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# **TOWARD HEIGHTENING IMPARTIALITY IN SOCIAL SECURITY AGENCY PROCEEDINGS INVOLVING ADMINISTRATIVE LAW JUDGES\***

**Victor G. Rosenblum\*\***

As an academic who has studied, observed and admired the selection and performance of Administrative Law Judges over the past thirty years, I've been puzzled and troubled by misguided endeavors of some Social Security Agency officials to constrict commitment to impartiality by circumscribing the decisional independence of ALJs.

A prototype of myopic perception of ALJs' duties was presented in SSA General Counsel Arthur Fried's memorandum of January 1997 on "Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges."<sup>1</sup> Preoccupied with viewing ALJs as agency personnel subordinate to policy making officials in the hierarchy of power, the General Counsel's memorandum was devoid of implementation of Administrative Procedure Act or Supreme Court provisions that focused on the integrity of ALJ decision making. The memorandum's emphasis on a hierarchical analysis of agency-ALJ relationships also failed to probe the roles and impact of U.S. Courts of Appeals' decisions construing the contours and boundaries of Agency authority and their bearing on ALJ duties.

This article endeavors a) to examine the dysfunctionality of the General Counsel's narrow conception of impartiality in his memorandum b) to recognize problems posed for Agency and ALJ impartiality by dissonance between Agency policies and appellate court rulings and c) to suggest feasible steps toward and potential benefits from adoption of a collegial, rather than hierarchical, approach to agency-ALJ ties.

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\*This is an expanded version of a presentation given in August, 1997, following the preceding presentations.

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<sup>1</sup>Hereinafter referred to as Fried Memorandum. Bearing the date January 18, 1997, the memorandum commenced with the declaration that "the highest quality and most efficient service of the ALJ corps is undermined by the differing and often contradictory understanding in various parts of the Agency of such 'decisional independence.'" at 1.

a) **Dysfunctionality of the General Counsel's Conception of Impartiality**

I chose the word "dysfunctionality" rather than "disingenuousness" in examining the General Counsel's conception of impartiality to accord the memorandum benefit of the doubt. It seemed clear from text and tone, nonetheless, that the memorandum's primacy of focus was not on expanding impartiality but on contracting it as an accompaniment to eliminating alleged "confusion" over the meaning of ALJ "decisional independence" and its bearing on the power of the Agency "to manage the performance of the ALJ corps."<sup>2</sup>

Then-Commissioner of Social Security Chater emphasized that the mission of the General Counsel's memorandum was "to provide me with a clear articulation of this relationship" between "the Agency's management authority over its ALJs" and "the protections afforded to claimants under the Administrative Procedure Act."<sup>3</sup> Rather than probing how the mandate of impartiality can be enhanced through Agency and ALJ interactions, the memorandum sought to justify expansion of Agency power to direct and control ALJ actions. The Agency was proclaimed possessor of the power to establish and enforce "administrative practices and programmatic policies that ALJs must follow." Only at the point that Agency actions "abridge" impartiality can the Agency's authority to prescribe, define, and enforce such directives for ALJs as "training," "performance goals" and "quality assurance programs" be questioned.<sup>4</sup>

I believe that the members of Congress who voted unanimously to adopt the Administrative Procedure Act did not intend the requirement of impartiality to become an isolated or limited component of the statute in operation. Impartiality was an obligation, a mandate that pervaded the statute's aspirations and directives as well as what Justice Jackson described as its "formula" and Justice Frankfurter its "mood."

Senator McCarran, Chairman of the Judiciary Committee at the time of passage, aptly summarized Congressional intent in his Foreword to the Legislative History of the Administrative Procedure Act. He labeled it "a solemn undertaking of official fairness" that

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<sup>2</sup>Fried Memorandum, at 1.

<sup>3</sup>Commissioner's introductory note to Fried Memorandum.

<sup>4</sup>Fried Memorandum, at 18.

"brings into relief the ever essential declaration that this is a government of law rather than of men."<sup>5</sup> This view of the 1946 statute was echoed in 1950 in the Supreme Court's ruling in *Wong Yang Sung v. McGrath*.<sup>6</sup> Justice Jackson stressed in his opinion that the APA was fueled by the "conviction" that the expanding power of federal administrative agencies "was not sufficiently safeguarded and sometimes was put to arbitrary and biased use."<sup>7</sup> Recognition of the need for reform by Congress of the administrative process reflected "concern over administrative impartiality and response to growing discontent."<sup>8</sup> The APA represented "a long period of study and strife" and enacted a "formula upon which opposing social and political forces have come to rest."<sup>9</sup> Fundamental to that "formula" were "the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge"<sup>10</sup> and the effort to "escape from these subversive influences" that have produced the atmosphere "that threatens the impartial performance of that judicial work"<sup>11</sup> by the agencies. Justice Jackson cited as a theme "reiterated throughout the legislative history of the Act" the view that impartial performance is threatened particularly when "the discretionary work of the administration is merged with that of the judge."<sup>12</sup> He maintained that an indispensable component of fair hearing was the role of examiners—now ALJs— "whose independence and tenure are so guarded by the Act as to give the assurance of neutrality which Congress thought would guarantee the impartiality of the administrative process."<sup>13</sup>

Justice Frankfurter made a historic determination about correlations between impartiality and the roles of Administrative Law Judges in the Donnelly Garment case in 1947<sup>14</sup> and in the Universal Camera case in 1951.<sup>15</sup> Alleged bias of examiners was a central theme of the Donnelly litigation. After a remand to the National Labor

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<sup>5</sup>Legislative History of the Administrative Procedure Act of 1946, S. Doc. No. 248, 79th Congress, at iii.

<sup>6</sup>*Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

<sup>7</sup>*Id.* at 37

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*, at 41.

<sup>10</sup>*Id.*, at 41.

<sup>11</sup>*Id.*, at 42.

<sup>12</sup>*Id.*

<sup>13</sup>*Wong Yang Sung v. McGrath*, 339 U.S. at 52.

<sup>14</sup>*NLRB v. Donnelly Garment*, 330 U.S. 219 (1947).

<sup>15</sup>*Universal Camera v. NLRB*, 340 U.S. 474 (1951).

Relations Board was ordered by the Court of Appeals for a fair hearing on an unfair labor practice charge, the company objected that the examiner should be disqualified as biased because he had in the previous hearing rejected as valueless the very evidence he was now ordered by the Court of Appeals to receive. After the examiner found again that Donnelly had committed unfair labor practices, the Court of Appeals held that the NLRB should have assigned a different examiner to the second hearing because the continuing impartiality of the original examiner was called into question by his rulings and findings at the first hearing.

A unanimous Supreme Court reversed. Justice Frankfurter maintained that the examiner's prior rulings did not evidence bias. Analogizing hearing examiners to judges, Justice Frankfurter first found that "Certainly it is not the rule of judicial administration, that, statutory requirements apart, a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings."<sup>16</sup> He then stressed that "We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing."<sup>17</sup> The message of Donnelly was clear: ALJs perform judicial decisional roles and are subject to the same standards as other judges regarding disqualification. Ruling strongly against a party on the record of a prior proceeding does not establish actual bias or lack of impartiality by a judge or ALJ.

In *Universal Camera v. NLRB*, Justice Frankfurter focused for the first time on whether courts must weigh hearing examiners' findings in relation to those of higher agency officials in meeting the APA's standard of substantial evidence. He reversed and remanded the unanimous ruling of the Court of Appeals that, pursuant to the Administrative Procedure Act and the National Labor Relations Act, the court had to accept the agency's decision and not weigh the examiner's findings as long as the agency's decision was within the bounds of rational entertainment.

The key to Justice Frankfurter's conclusion that the examiner's findings must be weighed by the reviewing court even though rejected by the agency was the reference in the APA to consideration "upon the whole record." While he was critical of Congress for incorporating the APA into the statute books "with unquestioning--we might even say

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<sup>16</sup>Donnelly, 330 U.S. at 236. (citation omitted).

<sup>17</sup>*Id.*, at 236-7.

uncritical--unanimity,"<sup>18</sup> he was impressed by the fact that the sponsors of the legislation called for higher judicial standards in the exercise of independent judgment by the reviewing courts on consideration of "the whole record." The substantial evidence test cannot be met by considering only whether the evidence supporting an agency's decision was substantial by itself. The whole record has to be studied, and the examiner's findings and report are integral parts of the whole record.

Likening Congress' action in passing the APA to having "expressed a mood,"<sup>19</sup> Justice Frankfurter insisted that, "As legislation, that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules...."<sup>20</sup>

Included in the legislation's "mood" that "must be respected" were the APA's provisions "designed to maintain high standards of independence and competence in examiners."<sup>21</sup> Both the APA and the NLRA "evinced a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administration counsel that we attribute to the Labor Board's examiners both due regard for the responsibility which Congress imposes on them and the competence to discharge it."<sup>22</sup>

Regrettably and dysfunctionally, the memorandum of the Social Security Agency's General Counsel drove backward from the APA's breadth and depth of concern with the principle of impartiality and from the implementations of it by the Supreme Court. Instead of commending and enhancing the impartiality of ALJs, the memorandum endeavored to confine their decisional independence and to warn of disciplinary consequences if the ordered confinements were not heeded.

That the Supreme Court's seminal early decisions construing decisional roles of ALJs in *Donnelly*, *Wong Yang Sung* and *Universal Camera* bearing on impartiality of the administrative process received short shrift in the General Counsel's selective invocations of Supreme Court text might have been understandable if more recent cases dealing with foundational obligations and immunities of ALJs had been probed.

The General Counsel's memorandum, for example, drew on the Supreme Court's *Ramspeck*<sup>23</sup> ruling in 1953 which had denied

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<sup>18</sup>*Universal Camera v. NLRB* 340 U.S. 474, 482 (1951).

<sup>19</sup>*Id.*, at 487.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*, at 495.

<sup>22</sup>*Id.*

<sup>23</sup>*Ramspeck v. Federal Trial Examiners' Conference*, 345 U.S. 128 (1953).

examiners total independence from agency controls. Nonetheless the memorandum did not develop the point that the justices in *Ramspeck* agreed that a key objective of the APA was prevention of agency abuses of examiners' integrity and impartiality. The thrust of the APA regarding ALJs was held to be that hearing officers "were not to be paid, promoted or discharged at the whim or caprice of the agency or for political reasons."

*Butz v. Economou*<sup>24</sup> made a salient contribution to the judicial literature of ALJs' decisional independence in 1978, but the General Counsel's memorandum bypassed Justice White's detailed analysis of ALJ roles there as well.

In the course of probing the issue of immunity from suit, Justice White maintained in his *Butz* opinion that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages."<sup>25</sup> He didn't stop there but proceeded to expatiate in considerable detail:

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. 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 . . . and because they were often subordinate to executive officials within the agency. . . . [T]he Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. . . . When conducting a hearing under [section] 5 of the APA . . . a hearing examiner is not responsible to, or subject to the supervision or direction

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<sup>24</sup>*Butz v. Economou*, 438 U.S. 478 (1978).

<sup>25</sup>*Id.*, at 512-13.

of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. . . . Nor may a hearing examiner 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. . . . Hearing examiners must be assigned to cases in rotation so far as is practicable. . . . They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. . . . Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.<sup>26</sup>

Were these “safeguards” enumerated by Justice White to be compromised and the “independent judgment” of ALJs supplanted with Agency edicts promiscuously labeled “policy” by representatives of management, the Supreme Court could well feel called upon to reassess its role in judicial review of agency actions and to replicate hostile, adversarial relationships of yesteryear.

**b) Problems posed for impartiality by conflicts with appellate court rulings.**

In an insightful article in *Judicature* in 1997,<sup>27</sup> Professors Susan Haire and Stefanie Lindquist found that the Social Security Administration “is subjected to widely varying degrees of support among the circuits. And the infrequency with which the Supreme Court reviews disability cases has meant that little has been done to cohere the standards or approaches of the circuits.”<sup>28</sup> The tensions that exist between the Agency and reviewing courts account for serious

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<sup>26</sup>*Id.*, at 513-14.

<sup>27</sup>Haire and Lindquist, “*An Agency and Twelve Courts: Social Security Disability Cases in the United States Courts of Appeal*,” 80 *JUDICATURE* 230 (1997).

<sup>28</sup>*Id.*, at 236.



dissonance and disarray in the application of Social Security law and received no consideration or analysis in the General Counsel's memorandum beyond the insistence that an ALJ is bound to follow Agency policy even if, in the ALJ's opinion, the policy is contrary to law."<sup>29</sup>

Unconcerned with the impact of conflict between circuit courts and the Agency, through which "balkanization has become an institutional reality,"<sup>30</sup> the General Counsel appeared to order ALJs to stonewall in adherence to Agency policies in the face of overt court rulings to the contrary. Given rulings such as the Fourth Circuit's that federal agencies "are required to abide by the law of this court in matters arising within the jurisdiction of this circuit until and unless it is changed by this court or reversed by the Supreme Court of the United States,"<sup>31</sup> it is difficult to construe the General Counsel's instruction to ALJs as anything but a requirement to engage in contempt of court.

My own random, unsystematic survey of recent courts of appeals rulings on social security issues evinces frequent intrusions into Agency practices and reversals or remands geared to judicial micro-scrutiny and management of decisional impartiality, such as application of the substantial evidence requirement.

Typical recent rejections of Agency rulings or policies have been:

- *Flanery v. Chater*<sup>32</sup> in which a 2-1 panel of the Eighth Circuit reversed the Agency and instructed the district court to remand to the Commissioner for an award of benefits, after finding that the ALJ placed "inordinate

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<sup>29</sup>Fried memorandum at 5-6. This absence of any consideration of these tensions from the General Counsel's memorandum on the duty of impartiality suggests his reluctance to discern any nexus between perceptions by courts of appeals regarding the scope of ALJs' impartiality and the appellate judges' readiness to challenge or refute Agency decisions. Some of Mr. Fried's earlier examinations of and commentaries about appellate court relationships with the Agency contained constructive and creative insights into those relationships which could and still should be enlarged upon in collegial dialogue with ALJs. See, e.g. Fried, A Disability Appeal Primer, 9 Soc. Sec. Rep. Ser. 971 (1985) and Fried, the Sequential Evaluation of Disability 145 PLI/Crim 7 (1987).

<sup>30</sup>Haire and Lindquist at 236.

<sup>31</sup>*Industrial Turn Around Corporation v. NLRB* 115 F. 3d 248, 254, (4th Cir. 1997). See also *Iowa Utilities Board v. FCC* 135 F. 3d 535, 540 (8th Cir. 1998), in which the unanimous panel issued a writ of mandamus against the agency and declared that "a policy argument bottomed on an agency's views of expediency can never justify an agency's disregard of the existing mandate of a federal court in which the agency was a party litigant."

<sup>32</sup>*Flanery v. Chater* 112 F. 3d 346 (8th Cir. 1997)

emphasis on an isolated statement by a physician” regarding the claimant’s seizures and that the evidence shows--contrary to the rulings of the ALJ and the Appeals council--”that there would be no jobs in the national economy that Flanery could perform.”<sup>33</sup>

- *Likes v. Callahan*,<sup>34</sup> in which a per curiam panel of the Fifth Circuit reversed and remanded because the ALJ erred in failing to consider the retrospective medical diagnoses and the corroborating lay evidence relating back to the claimed period of disability covering post-traumatic stress disorder stemming from duty in the Vietnam War.
- *Porch v. Chater*,<sup>35</sup> in which a unanimous Eighth Circuit panel reversed the Agency’s denial of benefits because “the record does not contain substantial evidence to support the finding of the ALJ” rejecting Porch’s claim of disability from debilitating pain due to disorders of the spine. The court concluded that “the Commissioner did not meet her burden of showing that there are other jobs in the economy that Porch can perform” and that the ALJ did not adequately credit either the claimant’s testimony regarding the side effects of her medications or regarding her complaints of pain. The court even rejected the ALJ’s framing of a hypothetical question to the vocational expert, maintaining that “the ALJ’s hypothetical question must include those impairments that are substantially supported by the record as a whole.”<sup>36</sup>
- *Quinones v Chater*,<sup>37</sup> in which a unanimous Second Circuit panel remanded to the ALJ to address evidence in a minor’s petition for supplemental security income based on the 13 year old’s claim of disability for dietary problems, and impairment of uncontrolled diabetes personal/behavioral function. The court disagreed

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<sup>33</sup>Id., at 350.

<sup>34</sup>*Likes v. Callahan* 112 F. 3d 189 (5th Cir. 1997).

<sup>35</sup>*Porch v. Chater* 115 F. 3d 567 (8th Cir. 1997).

<sup>36</sup>Id., at 57.

<sup>37</sup>*Quinones v. Chatter* 117 F. 3d 29 (2nd Cir. 1997).

sharply with the Agency over the weight to be accorded testimony by psychologists who had found the minor able to sustain her attention and work carefully on tasks she enjoyed. Finding the reports “at best inconclusive,” the court ruled that they “do not by themselves amount to substantial evidence” when compared with reports of the minor’s teachers “who dealt with her on a daily basis.”<sup>38</sup> Remand was deemed necessary, despite the unanimity on disposition of the case among the ALJ, Commission and district court, because “the record in this case simply does not contain substantial evidence to support the finding that Jennifer’s impairment in the domain of concentration, persistence and pace is less than moderate.”<sup>39</sup>

- *Schaal v. Apfel*<sup>40</sup> in which a unanimous Second Circuit panel upheld the ALJ’s credibility finding regarding claimant’s testimony and affirmed the district court’s ruling that the ALJ had sufficiently developed the record regarding claimant’s mental condition during the relevant period but nonetheless remanded the case to the Agency to reweigh the evidence because “we are unable to determine with certainty what legal standard the ALJ applied in verifying the medical opinion of plaintiff’s treating physician” and because “the ALJ failed to supply ‘good reason’ for discounting that opinion required by SSA regulations.”<sup>41</sup>

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<sup>38</sup>Id., at 35.

<sup>39</sup>Id.

<sup>40</sup>134 F. 3d 496 (2nd Cir. 1998).

<sup>41</sup>Id., at 506. That these illustrations were not aberrations is supported by other court of appeals reversals of SSA cases from 1996 to 1998, particularly though not exclusively, by Eighth Cir. panels. See, e.g., *Hutchison v. Chater*, 99 F. 3d 286 (8th Cir. 1996) insisting that “Regardless of whether the Commissioner formally announces her acquiescence . . . , she is still bound by the law of this Cir. and does not have the discretion to decide whether to adhere to it.” Id at 287; *Pratts v. Chater*, 94 F. 3d 34 (2nd Cir. 1996) ruling that the ALJ’s finding that the grids set forth in Agency regulations required the conclusion that claimant was not disabled was “legal error” where the ALJ neither identified the claimant’s nonexertional limitations nor considered whether a vocational expert was necessary; *Stieberger v. Apfel*, 134 F. 3d 37 (2nd Cir. 1997), a “protracted” case dating back more than a dozen years, concluding that a district court has jurisdiction to review the Agency’s determination that an unrepresented claimant was not so impaired as to lack adequate comprehension and that such review is subject to the traditional substantial evidence test; *Lucy v. Chater*, 113 F. 3d 905 (8th Cir. 1997) ruling that

These recent examples of divergence between courts of appeals and the Agency were especially noteworthy because the ALJs and the Agency were in agreement in every instance. SSA's genuine problem is with its relationship with reviewing courts, not with compliance by its ALJs with its policies. Instead of preoccupation with ALJs' conformity to Agency policy, SSA would do well to implement a collegial relationship with its ALJs and to enlist them as the professional, impartial colleagues they are in heightening courts of appeals' understanding of, coordination with and deference to the records and findings of the ALJs and the Agency. Bound to exacerbate conflict between the Agency and the reviewing courts would be further memoranda confining ALJ decisional independence and elevating adherence to Agency policy over acquiescence with court rulings. Certainty that ALJs and Agency are in agreement because independent professional judgments coalesce--and not because the ALJs are obliged to genuflect to Agency political power--could produce effective incentives for appellate judges to eschew micro-management and second-guessing of the Agency and instead, to broaden Chevron-type deference in SSA cases.<sup>42</sup>

### **c) Implementing a collegial approach toward SSA-ALJ ties**

A collegial approach to SSA-ALJ ties could commence ideally with tabling the Fried memorandum and with instituting colloquia among Agency officials and ALJs on key administrative procedure issues that highlight and compare federal agencies' experiences with court reversals and remands. Monitoring and assessing courts' actions and rationales--especially those that delay and impede putting closure on impartially administered and adjudged SSA cases, warrant systematic

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the ALJ should not have determined that the claimant could engage in the full range of sedentary work without consulting a vocational expert and that the ALJ's findings regarding claimant's residual functional capacity were not supported by substantial evidence; *Trossauer v. Chater* 121 F. 3d 341 (8th Cir. 1997) ruling that the ALJ improperly discredited testimony of the claimant's treating physician in deciding that claimant was not disabled before the date she was last insured for disability benefits; *Taylor v. Chater*, 118 F. 3d 1274 (8th Cir. 1997) reversing the denial of a claim for disability and supplemental security income benefits because the ALJ improperly rejected claimant's testimony as not credible; and *Kelly v. Callahan*, 133 F. 3d 583 (8th Cir. 1998) reversing and remanding denial of a claim because the ALJ disregarded the opinions of Kelly's treating physicians and instead credited the opinions of consultative physicians who had not examined the claimant.

<sup>42</sup>*Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

analyses and consideration of alternative responses through interactions of the experienced, skilled minds of the ALJ corps and those of management officials. Some judges no doubt prefer micro-management to deference by their temperament, but I surmise that other judges may yet be unconvinced that ALJs invariably exercise dispassionate, impartial and independent judgment in their decisions, free from pressures and politics. Heightening commitment to reaffirming, rather than confining, ALJ decisional independence would be a constructive step toward collegiality within the Agency and toward more successful experiences with the appellate court system. Deference to their construction of their governing statutes is a wise and effective policy for courts to follow vis á vis administrative agencies. But deference has typically been earned as a product of trust and respect. The Chevron doctrine has its roots in the feasibility of trust between courts and administrative agencies. A major producer of trust is a pervasive record of adherence to highest standards of impartiality.

Although annual conventions of Social Security ALJs have consistently probed problems and issues of evidence--especially substantiality of evidence--the colloquia I propose among ALJs and Agency officials could profitably focus on the meaning for ALJs and the Agency conveyed by recent Administrative Law decisions of the Supreme Court, especially reversals of other federal agencies' actions by Justices on grounds of agency failure to meet the requirement of substantial evidence. The 1998 decision in *Allentown Mack Sales and Service v. National Labor Relations Board*<sup>43</sup> would be excellent for starting.

The sharply split Justices ruled by a 5-4 vote that the NLRB ALJ's factual findings that Allentown lacked a good faith reasonable doubt about the union local's majority status was not supported by substantial evidence on the record as a whole. By an equally split 5-4 majority, the Supreme Court rejected Allentown's contention that the NLRB also violated the Administrative Procedure Act prohibition against arbitrary and capricious administrative action.

Analogizing the requirement that agency factual findings be supported by substantial evidence to the obligations of "a reasonable jury," Justice Scalia concluded that a reasonable jury could not have

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<sup>43</sup>*Allentown Mack Sales and Service v. National Labor Relations Board*, 118 L. Ed., 2d 797 (1998).

found that Allentown lacked a good faith reasonable doubt about whether the union local enjoyed continued employee support. "The Board's finding to the contrary rests on a refusal to credit probative circumstantial evidence and on evidentiary demands that go beyond the substantive standard the Board purports to apply."<sup>44</sup>

Together with Justices Rehnquist, O'Connor, Kennedy and Thomas, Justice Scalia rejected the agency's argument that the record contained substantial evidence for the factual findings, with regard to which the NLRB and its ALJ were in full agreement. The Justices examined details of employees' testimony before the ALJ and were incisively critical of the findings and inferences the ALJ and the Board drew from employee statements. The Board cannot, consistent with the substantial evidence standard "covertly transform its presumption of continuing majority support into a working assumption that all of a successor's employees support the unions until proved otherwise."<sup>45</sup>

Notwithstanding his ruling that the NLRB did not violate the arbitrary and capricious standard, Justice Scalia concluded, "We think it quite impossible for a rational fact finder to avoid the conclusion that Allentown had reasonable good faith grounds to doubt . . . the union's retention of majority support."<sup>46</sup> It is worth reiterating that the ALJ, the Agency, and a majority of the Court of Appeals supported the findings; but the five person majority of the Supreme Court rejected them--not exactly an illustration of deference.

In an acerbic dissent, Justice Breyer charged the majority with rewriting a Board rule without adequate justification. Quoting from Justice Frankfurter's *Universal Camera* decision in 1951, the four Justices in the minority maintained that whether there is substantial evidence in the record as a whole to support agency findings "is a question which Congress has placed in the keeping of the Courts of Appeals."<sup>47</sup> The Board's factual findings, Justice Breyer insisted, were supported by "both reason and experience."<sup>48</sup> He concluded ominously that the majority's opinion "will, I fear, weaken the system for judicial review of administrative action that this Court's precedents have carefully constructed over several decades."<sup>49</sup>

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<sup>44</sup>*Id.*, at 824.

<sup>45</sup>*Id.*, at 825.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*, at 833.

<sup>48</sup>*Id.*, at 836.

<sup>49</sup>*Id.*, at 836.

A colloquium on the content, contexts and implications for substantial evidence review of the Allentown case could provide a heartening launch for a new era of collegiality in SSA-ALJ ties.

