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## Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act

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# Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act

By Daniel F. Solomon\*

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The authority of United States administrative law judges (ALJs), formerly known as “hearing examiners,”<sup>1</sup> comes from the 1946 Administrative Procedure Act (APA)<sup>2</sup> designed to promote public confidence in government and reduce the appearance of bias.<sup>3</sup> Before adoption, administrative adjudication was haphazard and had a bad reputation for being arbitrary, as the perception was that agency “hacks” could be forced to rubberstamp agency determinations. Agencies have a natural tendency to promote from within and are jealous of their jurisdictional prerogatives, so the centerpiece of reform was to safeguard that future adjudicators would be selected through merit selection of impartial trial lawyers and that they would be provided decisional independence.<sup>4</sup> In addition, two other major purposes of the APA are:

- (1) To require agencies to keep the public informed of their organization, procedures and rules; and

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Thanks to Jeffrey S. Lubbers, Professor of Practice in Administrative Law, Washington College of Law, American University, for his comments.

<sup>1</sup> 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 6362, 7562 (2006). Scholars date the first use of administrative law judges to the year 1789, when officers were appointed to determine the disability of Revolutionary War soldiers and officers who adjudicated custom duties. 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.11 at 313 (2d ed., 1978).

<sup>2</sup> Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500 *et. seq.*).

<sup>3</sup> See Ralph F. Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950).

<sup>4</sup> The Federal judiciary has institutional independence, due the separation of powers. Under the APA, administrative law judges have “special status” and a “qualified right” of decisional independence. *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989).

- (2) To establish uniform standards for the conduct of formal rulemaking and adjudication.<sup>5</sup>

## I. OVERVIEW

Today agency adjudication far exceeds the volume of the Federal courts, and although many APA hearings are just like Federal bench trials,<sup>6</sup> and all agencies could be required to standardize, due process is not applied uniformly at more than twenty-nine separate fiefdoms.<sup>7</sup> However, it should not be that way. In *Dickinson v. Zurko*, the Supreme Court determined that the APA must be applied uniformly except where Congress has expressly stated otherwise.<sup>8</sup> Unfortunately, this rule has been overlooked.

In recent years, the quantum of administrative adjudication has statistically exploded. In 1946, there were less than 200 hearing officers in the government. By last count, more than 1500 administrative law judges work for twenty-eight agencies and hold hearings involving hundreds of statutes.<sup>9</sup> By 1961, President John F.

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<sup>5</sup> See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, UNITED STATES DEP'T OF JUSTICE (1947). Other primary purposes are:

1. To provide for public participation in the rulemaking process;
2. To define the scope of judicial review.

<sup>6</sup> See *Butz v. Economou*, 438 U.S. 478 (1978); *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002) (finding that Department of Labor ALJs are functionally equivalent to Federal District Court judges). Whereas a trial judge's principal responsibility is to conduct trials before juries that determine the facts of a dispute, we must determine both fact and law and reduce our factual rulings to writing.

<sup>7</sup> This article discusses only "formal" adjudications involving trial-like hearings with witness testimony, a written record, and a final decision. Under "informal" adjudication, some agency decisions are made using "inspections, conferences and negotiations" rather than a "hearing on the record." The legislative intent of the APA comes in part from the FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong. (1<sup>st</sup> Sess. 1941), available at <http://www.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf> (last visited Mar. 26, 2013) [hereinafter "FINAL REPORT"].

<sup>8</sup> 527 U.S. 150 (1999).

<sup>9</sup> See Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 476 (2011). Although

Kennedy acknowledged that APA cases “permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth.”<sup>10</sup> Although not all adjudication is governed by the APA, the Social Security Administration, standing alone, administers the largest system of adjudication in the world.<sup>11</sup>

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Professor Lubbers advises that the growth of APA adjudication has increased primarily at SSA and is in decline elsewhere, as stated later, I find that the published studies have been quite deficient.

This view does not account for the exploding volume of Medicare appeals now heard by a separate agency, the Centers for Medicare and Medicaid.

This view also does not account for the dozens of new areas of adjudication added by the past several Congresses. For example, at my agency, the Department of Labor, cases that may take days or weeks to hear, and more time to write, such as under whistleblower Federal Rail Safety Act (FRSA) claims, now dominate our dockets. Others include whistleblower claims under National Transit Systems Security Act of 2007; the Consumer Product Safety Improvement Act of 2008; Food, Drug, and Cosmetic Act, Section 1012, as amended by the FDA Food Safety and Modernization Act (FSMA); the Patient Protection and Affordable Care Act; and the Seamen’s Protection Act. Moreover our “traditional” cases, such as H-1B Visa cases, are on the rise.

<sup>10</sup> President John F. Kennedy, H.R. DOC. NO. 135, 57th Cong., at 1–2 (1st Sess. 1961), quoted in Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B. J. 351, 353 (1967) and in Victor Palmer and Elmer S. Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENGL. L. REV. 673, 674 (1983–1984).

<sup>11</sup> *Information About Social Security’s Office of Disability Adjudication and Review*, SOCIAL SECURITY ONLINE, [http://www.ssa.gov/appeals/about\\_odar.html](http://www.ssa.gov/appeals/about_odar.html) (last visited Mar. 26, 2013). “[T]he Chief Administrative Law Judge directs a nationwide field organization consisting of 10 regional offices, 169 hearing offices (including 7 satellite offices), 5 national hearing centers, and 1 national case assistance center.” *Id.* In fiscal year 2011, SSA hearings offices issued over

793,000 adjudications, of which approximately 740,000 were issued by [administrative law judges] and over 53,000 were issued by Attorney Adjudicators. An Attorney Adjudicator can issue an allowance decision that does not require a hearing. See 20 C.F.R. §§ 404.942, 416.1442. Of the 740,000 dispositions issued by administrative law judges, approximately 629,000 dispositions resulted in an allowance or denial decision, and the remaining 111,000 dispositions were dismissals of the hearing request. A hearing request can be dismissed for a variety of reasons, including failure of the claimant to appear at the hearing,

As administrative adjudication began to increase, especially when the Franklin Roosevelt administration introduced more regulation, legal experts contemplated how to best extend due process rights.<sup>12</sup> The APA idea may first have been suggested in May 1933, by an American Bar Association Special Committee on Administrative Law.<sup>13</sup> To avoid the appearance of bias, the ABA determined that the “‘judicial function’ [of each agency] . . . should be transferred to an independent tribunal or, alternatively, that officials’ decisions should be completely reviewable on the facts as well as on the law by a tribunal marked by judicial independence.”<sup>14</sup> To administrative law judges, as well as many litigants, and those concerned with judicial economy, this goal became a quest.

## II. THE CORPS CONCEPT

In 1936, legislation was offered to consolidate Article I courts with hearing examiners.<sup>15</sup> However, lawyers that appeared before certain agencies such as Customs, Tax, and the Patent Office opposed

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the claimant choosing to withdraw the hearing request, or death of the claimant. See 20 C.F.R. §§ 404.957, 416.1457.

SSA OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT A-07-12-21234: THE SOCIAL SECURITY ADMINISTRATION’S REVIEW OF ADMINISTRATIVE LAW JUDGES’ DECISIONS 1 n.2 (2012). See also CONGRESSIONAL RESPONSE REPORT A-12-11-01138: OVERSIGHT OF ADMINISTRATIVE LAW JUDGE WORKLOAD TRENDS (2012); JERRY L. MASHAW, ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 1 (1978) and RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.1 (5th ed. 2010).

<sup>12</sup> The Classification Act of 1923 placed hearing examiners as “mere tools of the Agency” and thus did not have decisional independence. See *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128 (1953).

<sup>13</sup> Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

<sup>14</sup> *Id.* In 1934 the ABA proposed legislation to create “a federal administrative court with branches and an appellate division, or, failing that, ‘an appropriate number of independent tribunals’ unencumbered by ‘legislative and executive functions.’” *Id.*

<sup>15</sup> S. 5154, 70th Cong. (2d Sess. 1939). See Testimony of Abraham Alan Dash, Esquire, Professor of Law, University of Maryland, Cong. Rec., S. 1275, 89th Cong. at 97 (June 23, 1983) [hereinafter “Testimony of Dash”]. See also Gellhorn, *supra* note 13, at 219.

the Bill, and the legislation failed. Subsequently, Congressional committees considered the issue and agreed that uniformity should be applied but could not reach a consensus on the details. In 1939, President Roosevelt asked the Attorney General to study administrative law. The Attorney General's Committee on Administrative Procedure studied the methods, rules and regulations and the general effects on the public. "Forty agencies and distinct entities within departments were studied; twenty-seven descriptive and evaluative monographs" were published.<sup>16</sup> The research was circulated and after public notice and individual invitations to 100,000 interested individuals, public hearings were held to receive oral or written opinions about administrative procedure.<sup>17</sup>

In anticipation of the Attorney General's Committee report, a "Walter-Logan Bill" version of the APA was passed, containing the ABA recommendations. However, since it was passed before the Committee report was completed, it was vetoed by President Roosevelt.<sup>18</sup>

Within the Attorney General's Committee, a majority supported:

- (1) Creation of an Office of Federal Administrative Procedure, with continuing responsibility and power to seek just and efficient discharge of official duties, and also to appoint and remove hearing commissioners;
- (2) Publication of rules, policies, and interpretations; formulation and effective date of rules; requests for promulgation or amendment of a rule;

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<sup>16</sup> See Gellhorn, *supra* note 13, at 226. See also S. DOC. NO. 10-77 (1941); S. DOC. NO. 186-76, (1940).

<sup>17</sup> FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8-77, at 1 (1941).

<sup>18</sup> See 86 Cong. Rec. 13,942-43 (1940) (President's veto message), *reprinted in* 27 A.B.A.J. 52 (1941). "The President attached to his veto message an extended analysis of the bill by Attorney General Robert H. Jackson, "pointing out some of the perhaps unintended consequences of the bill's excessively generalized provisions." See Gellhorn, *supra* note 13, at 226 n.22. See also 86 Cong. Rec. 13,943-45 (1940).

- (3) Utilization of hearing commissioners in formal adjudicatory proceedings, a statement of commissioners' powers and duties, and of the effect and reviewability of their decisions;
- (4) Empowerment of agencies to issue a judicially reviewable declaratory ruling in order to terminate a controversy or remove an uncertainty.

The minority members of the Committee also requested:

- (1) The separation of prosecuting and judicial functions,
- (2) The scope and practice of judicial review, and
- (3) A "Code of Standards of Fair Procedure."

According to Gellhorn, a member of the Committee, now known as the "father" of the APA, haggling among the Attorneys General, including Robert Jackson and eventually Tom Clark, who would later become Supreme Court justices, and the Congress, homogenized the issues so that it "seemed somewhat anticlimactic" by the time that the APA passed on May 24, 1946.<sup>19</sup> At passage, there was "no indication of dissent."<sup>20</sup> In any event, the APA did not address whether hearing officers should be employed by a single agency, constitute an Article I court, or remain with their agencies.

The APA does not require an agency to provide a hearing, but when it does so, it must be heard by an administrative law judge or the head of the agency. Section 11 of the APA was intended as a Federal Bill of Rights for adjudicators, providing that:

- Examiners shall perform no duties inconsistent with their duties and responsibilities as hearing examiners;
- Examiners are removable only for "good cause" established by the Civil Service Commission; only after an opportunity for an oral hearing and upon the record thereof; and

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<sup>19</sup> Gellhorn, *supra* note 13, at 232–33.

<sup>20</sup> *Id.* at 232.



- Examiners shall receive compensation prescribed by the commission independently of agency recommendations or rating<sup>21</sup>

In 1972, the title “hearing examiner” was changed to “Administrative Law Judge.”<sup>22</sup> These Section 11 protections were later incorporated into descriptions of the administrative law judge positions adopted by the Civil Service Commission and later the Office of Personnel management. The Administrative Law Judge position is the only merit-selected judicial position in the Federal system.<sup>23</sup>

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<sup>21</sup> Ch. 324, § 11, 60 Stat. 237, 244 (1944) (codified as amended at 5 U.S.C. § 7521(a)).

<sup>22</sup> See Bernard G. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424, 1425 (1976).

<sup>23</sup> Applicants must be licensed attorneys “authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court,” who have a minimum of seven years of “experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level.” *Qualification Standard for Administrative Law Judge Positions*, U.S. OFFICE OF PERSONNEL MANAGEMENT, <http://www.opm.gov/qualifications/alj/alj.asp> (last visited Mar. 26, 2013).

According to a 1992 ACUS study, the APA

contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

Paul Verkuil, *The Federal Administrative Judiciary*, ACUS Recommendation 92-7, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, <http://www.acus.gov/recommendation/federal-administrative-judiciary> (last visited Mar. 26, 2013) (adopted on Dec. 10, 1992).

When I applied for a position in the 1980s, minimum requirements included production of evidence for fifteen civil jury trials I had been involved with; twenty professional references; seven years litigation experience; a written test; and an

After enactment of the APA, the Hoover Commission,<sup>24</sup> the 1971 Ash Commission,<sup>25</sup> the LaMacchia Committee Report of the 1974 Civil Service Commission,<sup>26</sup> and the 1977 Bork Commission<sup>27</sup> all recommended a unified corps.<sup>28</sup> In fact, the Bork Committee proposed an Article I trial division within the judiciary branch, which “could serve the function now served by administrative law judges.”<sup>29</sup>

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interview by a panel that included one judge, one member of the bar, and one agency person. Dozens of people, including several judges, reported that my background and trial experience was investigated.

<sup>24</sup> Actually, the *Commission on Organization of the Executive Branch of the Government* was appointed by President Harry S. Truman in 1947 to recommend administrative changes in the Federal Government of the United States. It took its nickname from former President Herbert Hoover, who was appointed by Truman to chair it. A second Hoover Commission was created by Congress in 1953, during the administration of President Dwight D. Eisenhower. Also headed by Hoover—who was then almost eighty years old—the second commission sent its final report to Congress in June 1955.

<sup>25</sup> Named for Roy Ash, former CEO of Litton Industries, appointed in 1968, by President Richard M. Nixon, to create and lead the President’s Advisory Council on Executive Organization, which later came to be known as the Ash Commission. The reports of the Commission also lead to the creation of the Environmental Protection Agency.

<sup>26</sup> See U.S. CIVIL SERV. COMM’N, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (1974). Chaired by the Civil Service Commission’s then Deputy Counsel, Phillip LaMacchia, it sought the views of administrative law judges and sampled the opinions of federal agency officials, private practitioners, and Bar Association representatives about the quality and quantity of administrative law judge work products, relationships between judges and their agencies, standards of review of administrative law judge decisions, and criteria for recruitment of administrative law judges. See *id.* Although the final report found that an independent corps appears to be organizationally feasible and may be an effective approach, it also found that more information and detailed planning and analysis was needed. “The matter warrants consideration of a recommendation to institute and fund a professional management analysis of the feasibility and public benefit consequence of this proposal.” *Id.* at 4–5.

<sup>27</sup> COMMISSION ON THE REVISION OF THE FEDERAL JUDICIAL SYSTEM, U.S. DEP’T OF JUSTICE, THE NEEDS OF THE FEDERAL COURTS 42381 NCJ (1977) (hereinafter “BORK COMMISSION REPORT”).

<sup>28</sup> Testimony of Dash, *supra* note 15.

<sup>29</sup> BORK COMMISSION REPORT, *supra* note 27, at 7–11.

Critics charged that administrative law judges constituted an invisible judiciary that held secret proceedings and that litigants before some agencies were trapped in a complex world of bureaucracy and red tape.<sup>30</sup>

Although the Civil Service Commission initially had procedural jurisdiction over administrative law judges, in 1979 the Office of Personnel Management (OPM) succeeded the Commission and was mandated to administer an Administrative Law Judge program and to maintain a register of qualified applicants and test and evaluate prospective applicants.<sup>31</sup> “The classification of ‘administrative law judge’ is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies.”<sup>32</sup>

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<sup>30</sup> Remarks of Representative Austin Murphy, in introducing the Corps Bill, March 1, 1989 [hereinafter “Murphy Remarks”]. The notion that administrative law judges were invisible was furthered after Jeffrey S. Lubbers used the term in his paper, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 123 (1981). Professor Lubbers advised me in an email, “that article certainly was not critical of ALJs nor did it imply that they held secret proceedings or that the litigants were ‘trapped’ . . . . My title was simply intended to indicate that the administrative judiciary was not well known and that ALJs were doing their important jobs in an unseen way.”

<sup>31</sup> The United States Office of Personnel Management (OPM) is an independent agency of the United States government that manages the civil service of the federal government. The commission was abolished and replaced by OPM on January 1, 1979 following the passage of the Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, 92 Stat. 3783.

<sup>32</sup> AMERICAN BAR ASSOCIATION, *infra* note 49, at 2 n.2.

The title “administrative law judge” is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes. 5 C.F.R. § 930.203b. 5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an administrative law judge position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. § 3105. ALJs can only be appointed after certification by OPM: “[a]n agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM.” 5 C.F.R. § 930.203a; *see also* 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

The APA contemplated that the Civil Service Commission would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program, but OPM has essentially abandoned that role. Section 1305 provides that, for the purpose of sections 3105 (appointment), 3344 (loans), and 5372 (pay), OPM may investigate, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees.<sup>33</sup>

By the late 1970s, several suggestions coalesced into a unified concept after ABA President Bernard Segal requested creation of a Corps of Administrative Law Judges.<sup>34</sup> Congress considered enactment. According to sponsors of the legislation, a corps would “serve to dismiss one of the oldest problems facing the Federal administrative judiciary, the question of judicial impartiality.”<sup>35</sup> To some of the public, despite the intent of the APA, administrative law judges still looked like agency hacks, who would defer, if not submit, to agency authority. Besides an appearance of bias, it was also alleged that as agency employees, administrative law judges were vulnerable to a variety of subtle—and not so subtle—pressures from their employing agency.<sup>36</sup>

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*Id.* at 2.

<sup>33</sup> AMERICAN BAR ASSOCIATION, *infra* note 49, at 4 (quotation marks omitted). See also 5 U.S.C. § 1305 (2012).

<sup>34</sup> Bernard Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424 (1976).

<sup>35</sup> *Id.* at 1424 n.30 (“A direct result of the present structure of the administrative hearing system is a public concern that ALJ’s, because they are agency employees, are not impartial. The comments of one pro se litigant defending himself against U.S. Department of Labor’s charges of violating the Davis-Bacon Act aptly summed up public suspicion of the Federal administrative judiciary. The defendant complained, ‘How can I expect to win this case when the Department of Labor is my accuser, prosecutor and judge?’”)

<sup>36</sup> *Id.* (“An agency’s control over promotional opportunities, office space and support staff is a source of very real power and control over administrative law

Some of these complaints were substantiated, especially those directed at the U.S. Social Security Administration (SSA). Most of the allegations of improper agency interference and demands for a corps came from administrative law judges at SSA—by far the largest employer of administrative law judges—and by representatives of claimants. After the agency refused to bargain with them, judges sued to enforce Section 11 of the APA. In 1979, while a case to enforce the APA protections was pending,<sup>37</sup> Congressional hearings revealed that the agency was at war with itself.<sup>38</sup> The agency and the judges entered a consent order. SSA agreed:

1. Not to set quotas, and /or goals in numbers of cases to be scheduled, heard or decided in given periods of time;
2. To assign cases in strict rotation;
3. On remand, to re-assign cases only with the consent of the judge who was originally assigned the case; and
4. To abandon a criticized quality review system that would have permitted the agency to rate and evaluate the individual performance of administrative law judges.

SSA also decided not to impose a proposed hearing office manager position that would have removed control of the staff from the judges and have given it to a non-judge management official.<sup>39</sup>

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judges. Even though most agencies refrain from exerting pressure to influence their judge's decisions, the fact that such pressure may be applied compromises the integrity of the entire system.")

<sup>37</sup> Charles N. Bono et al. v. United States of America, United States District Court for the Western District of Missouri, Civil Action No. 77-0819-CV-4 (W.D. Mo. 1979).

<sup>38</sup> *Social Security Administrative Law Judges: Survey and Issue Paper, Subcommittee on Social Security of the Committee on Ways and Means*, 96th Cong. 96-2 (1979); see also FRANK B. BOROWIEC, UPHOLDING THE RULE OF LAW: IN THE SOCIAL SECURITY ADMINISTRATION, AN AGENCY AT WAR WITH ITSELF (iUniverse.com, 2011). At one time, Judge Borowiec was Regional Chief Judge, Atlanta Region, and was also an officer of AALJ.

<sup>39</sup> Charles N. Bono, *The Evolution and Role of the Administrative Law Judge at the Office of Hearings and Appeals in the Social Security Administration*, 15 J. NAT'L ASS'N ADMIN. L. JUDICIARY 235 (1995). According to Judge Bono, shortly after the case was filed, Associate Commissioner Louis B. Hayes issued a

In 1981, after the agency had removed hundreds of thousands of disability recipients from the rolls without a hearing, a Bellmon Review Program, “a series of measures reportedly designed to improve decisional quality and accuracy,”<sup>40</sup> was accelerated, which led to “own motion” review of thousands of cases that had not been appealed.<sup>41</sup> Judges’ decisions, usually awards of benefits to disability claimants, were administratively overturned and remanded for new hearings, and individual judges who had a high number of

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memorandum to the judges announcing a “Bellmon Review” of judges who had allowed more than 66 2/3% of their cases, as it was determined that judges who allowed more were aberrational and needed to be studied to determine how to counsel them. Certain judges had been selected and notified to appear for “counseling.” The judges who were about to be “counseled” called upon the Association for help, and their cause was included in the litigation. The court issued a protective order, and the judges never had to appear for their behavior modification training; but the issue of Bellmon Review remained. So not only was it obvious to the judges that they had a numerical quota to meet, but a new twist had been added to caution them that if they allowed too many cases, as compared to the national average, they would be identified, and counseled. It was later in the trial of the case learned that in the performance plan of the Associate Commissioner Louis B. Hayes, one of his charges was to reduce the allowance rate overall in the hearings and appeals system.

The case was tried for two weeks, taken under advisement by the court, and pending the decision the agency announced by memorandum to the judges that it was discontinuing Bellmon Review. The case was dismissed in 1985 by the court, on the basis that the issue was moot, that the Association had reformed the agency, and that attorneys’ fees were paid by the agency. *See generally id.*

<sup>40</sup> *Ass’n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1134 (D.D.C. 1984). The “Bellmon Review Program” was named after the Bellmon Amendment, Pub. L. No. 96-265 (1980) (discussed at 42 U.S.C. § 421 (1982)). The Amendment referred to Section 304(g) of Pub. L. No. 96-265, the “Social Security Disability Amendments of 1980,” set forth that SSA institute a program of ongoing review of administrative law judge decisions.

<sup>41</sup> *Heckler*, 594 F. Supp. at 1133.

Initially, individual ALJs with allowance rates of 70% or higher were to have 100% of their allowance decisions reviewed for accuracy and hearing offices with allowance rates of 74% or higher would also be reviewed. 106 ALJs, or approximately 13% of all ALJs in SSA, were placed on Bellmon Review because of their high allowance rates. The selection of entire hearing offices for review was soon discontinued.

*Id.* at 1134.

awards were targeted as outliers. Legislation to encourage SSA to re-visit cases every three years under Continuing Disability Review (CDR) increased the dockets, and pressure was applied to obtain greater administrative law judge productivity, as lower producing judges were also targeted.

At the same time, under a policy of “non-acquiescence,” SSA took the position that only the decisions of the Supreme Court of the United States were binding on it. It made exceptions for those decisions that the agency chose to adopt by changing the regulations and to those decisions it decided to acquiesce. This infuriated many Circuit Court and other Federal judges, and in several cases the agency was held in contempt for missing judicially imposed deadlines<sup>42</sup> or failing to follow orders of United States Circuit Courts of Appeal.<sup>43</sup>

Administrative law judges at SSA were convinced that if the agency could not retaliate against the courts, it projected *totem animus* on them. In at least one case involving judges’ allegations of agency hostility to judicial independence, a United States District Court concluded that the agency’s “unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA . . . .”<sup>44</sup> The Senate Subcommittee on

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<sup>42</sup> In the 1980s, SSA was missing court ordered deadlines as often as 90% of the time, and contempt citations from district courts were common. Koch and David Koplow, *The Fourth Bite at the Apple*, 17 FLA. ST. U. L. REV. 199, n.320 (1990).

<sup>43</sup> See, e.g., *Hutchison v. Chater*, 99 F.3d 286, 287–88 (8th Cir. 1996); *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), *vacated sub nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986); *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), *rev’d on other grounds sub nom.*, *Heckler v. Lopez*, 463 U.S. 1328 (1983). In others, contempt was threatened. See, e.g., *Kuehner v. Schweiker*, 717 F.2d 813, 824 (3d Cir. 1983) (Becker, J., concurring); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring specially); *Valdez v. Schweiker*, 575 F. Supp. 1203, 1205 n.3 (D. Colo. 1983).

<sup>44</sup> *Ass’n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1143 (D.D.C. 1984). The Court stated further that

if no specific provision thereof, Defendants’ insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as “targeting,” “goals” and “behavior modification” could have

Oversight of Government Management determined that the CDR system and Bellmon review were mistakes,<sup>45</sup> and the Secretary of Health and Human Services did, in effect, admit a mistake was made and issued a moratorium of the cessations, putting thousands of people back on the disability roles.<sup>46</sup>

In 1981, Jeffrey S. Lubbers, then a senior staff attorney for the Administrative Conference of the United States (ACUS), suggested a test of the Corps concept.<sup>47</sup> Administrative law judges from seventeen selected “regulatory” agencies would comprise a separate corps for five years. Anticipated efficiencies would likely “mute any opposition . . . since adjudication is not as central to the missions of most of these agencies as it is to the others.”<sup>48</sup> He also suggested that

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tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide. However, defendants appear to have shifted their focus, obviating the need for any injunctive relief or restructuring of the agency at this time. While it is incumbent upon the agency to reexamine the role and function of the Appeals Council and its relationship to the ALJs in light of this litigation, it would be unsuitable for the Court to order any affirmative relief under the present circumstances. Plaintiff has achieved considerable success in its valid attempt to reveal and change agency practices.

*Id.*

<sup>45</sup> *Oversight of Social Security Disability Benefits Terminations: Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs*, 97th Cong. (1982).

<sup>46</sup> *See Social Security in Review, Public Statements by Secretary Schweiker and Commissioner Svahn*, 45 SOC. SEC. BULL. 1 (1982); *Social Security Disability Reviews: the Human Cost, Joint Hearing Before the Special Committee on Aging*, 98th Cong. (1984). Several states acted independently to end the review at the state agency level. New York State Social Services Commissioner Cesar Perales ordered that no disabled New Yorkers be removed from the disability rolls until the federal government promulgates “appropriate” medical standards for assessing whose benefits should be discontinued. Several others soon followed.

<sup>47</sup> Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 275 (1981).

<sup>48</sup> *Id.* at 276. Actually, some agencies rarely use rulemaking but rely almost exclusively on adjudication to create precedent. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications, which constitute binding precedents. *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 39–41 (1964); *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947). In those cases, the threshold issue is whether it would have been



the entire corps of ALJs could be centralized into separate panels of specialization. Although it was discussed, Congress did not adopt the proposal.

The ABA adopted policy continuing to support the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. ABA policy supports both a Corps and a Conference concept, effective in August 2005.<sup>49</sup> In August 1986, the President of the American Bar Association presented an award to the Social Security Administrative Law Judge “corps,” which was received by the Association of Administrative Law Judges on their behalf:

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>50</sup>

The award was given in recognition of the Association’s efforts in redressing the wrongs of the CDI program and opposing efforts of the agency to set numerical quotas and instituting measures to attempt to force certain judges to reduce allowance rates.<sup>51</sup>

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possible for a reasonable jury to reach the agency’s conclusion in a case heard on the record. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>49</sup> The resolution states:

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges, including their testing, selection, and appointment.

AMERICAN BAR ASSOCIATION, RECOMMENDATION 1 (2005), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/administrative\\_law\\_judiciary/resolution\\_106a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law_judiciary/resolution_106a.authcheckdam.pdf) (last visited Mar. 26, 2013) (adopted by the House of Delegates on August 8–9, 2005).

<sup>50</sup> See American Bar Association Award (Aug. 11, 1986), presented at the American Bar Association’s annual dinner in Lincoln Center, New York City.

<sup>51</sup> *Bono*, *supra* note 39, at 237–38.

In 1983, Senate Bill 1275 included language that would have provided that one circuit court would hear all administrative appeals.<sup>52</sup> However, due to practical issues, and to keep the proposals as bipartisan as possible, concepts such as a Social Security court or a single circuit to hear all administrative cases were removed. An effort was made to ensure that legislation would promote efficiency and would save the government enough to make it palatable to a majority.

Although Social Security tried to restrict judicial independence, most other agencies had no such problem, and academics noted that administrative law judges needed to be insulated from agency pressure.<sup>53</sup> Courts noted analogies to their own judicial independence. In *Butz*, the Supreme Court stated: “There can be little doubt that the role of the modern federal . . . [ALJ] . . . is ‘functionally comparable to that of a judge.’”<sup>54</sup> *Nash v. Califano* compared SSA administrative law judges to Article III judges.<sup>55</sup>

In scoring the 1989 version of the Corps Bill, estimates from the Congressional Budget Office (CBO) indicated that potential savings

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<sup>52</sup> See Paul N. Pfeiffer, *Hearing Cases Before Several Agencies—Odyssey of an Administrative Law Judge*, 27 ADMIN. L. REV. 217 (1975). Pfeiffer was a member of the Civil Service Commission study group on the effectiveness of administrative law judges. See *id.* at 217.

<sup>53</sup> E.G. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57, 499–500 (1986). The authors advocated the same independence for administrative law judges as that of Article III judges because: “without prophylactic protection of adjudicatory independence, the Constitution’s majestic guarantee of due process of law may in reality be no more than a deceptive facade.” *Id.* at 505.

<sup>54</sup> *Butz v. Economou*, 438 U.S. 478, 513 (1978). *Butz* involved a futures commission merchant who brought an action against the Department of Agriculture and others seeking damages on ground that defendants had wrongfully initiated administrative proceedings against merchant and his company. *Id.* at 480–81. Justice White held that administrative law judges are entitled to absolute immunity from damages liability for their judicial acts. *Id.* at 508–14.

<sup>55</sup> 613 F.2d 10, 15 (2d Cir. 1980). My position is that we are, indeed, like all other trial judges . . . and more. Whereas a trial judge’s responsibility is to conduct trials before juries that determine the facts of a dispute, ALJs must determine both fact and law. And moreover, we must articulate legitimate reasons for each fact that we decide. Lengthy decision writing is typically the job of appellate judges, not trial judges. See Daniel F. Solomon, *Crafting ‘Substantial’ ALJ Decisions*, 43 JUDGES J. 23 (2004).

could have been as high as \$20 million annually.<sup>56</sup> It was envisioned that in Washington, D.C. alone, consolidation of twenty-nine separate docketing offices would produce immense savings.<sup>57</sup> Pooling of administrative staff, receptionists, docketing clerks and libraries would allow reduction of the support staff and could yield an estimated additional \$10 to \$15 million annually.<sup>58</sup> Consolidation of physical facilities and resources would also result in a more efficient and economical operation of the administrative hearing process. Many law libraries and hearing rooms maintained for various agencies throughout the District of Columbia would no longer have been required. Many hearings require travel as much as several weeks each month to conduct proceedings at remote hearing locations, and it was anticipated that the costs of travel could have been reduced.<sup>59</sup> Finally, efficiency could also have been achieved by the unification or reconciliation of the nearly 280 different procedural and evidentiary rules currently used in departmental and agency adjudications.<sup>60</sup> Seven divisions within the Corps would be maintained:

1. Division of Communications, Public Utility and Transportation Regulations;
2. Division of Safety and Environmental Regulation;
3. Division of Labor;
4. Division of Labor Relations;
5. Division of Health and Benefits Programs;
6. Division of Securities, Commodities, and Trade Regulation; and
7. Division of General Programs and Grants.<sup>61</sup>

In 1992 hearings before the House Ways and Means Committee, Representatives of the ABA, the Federal Administrative Law Judges'

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<sup>56</sup> Murphy Remarks, *supra* note 30.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Murphy also noted that securing hearing rooms was often troublesome, and some hearings had to have been conducted in hotel rooms. *Id.*

<sup>61</sup> The 1993, 103d Congress versions referred to eight divisions, covering the same topics.

Conference, and the Association of Administrative Law Judges testified for the Corps Bill. Representatives from the Forum of the United States Administrative Law Judges (FORUM) and the Department of Justice testified in opposition.<sup>62</sup> In 1993, the House and Senate bills were introduced simultaneously.<sup>63</sup> SSA, the Department of Labor, and Department of Transportation filed official objections. SSA argued that the primary impact of the bill would have been on the Department of Health and Human Services, which then encompassed SSA, as it employed more than seventy percent of all administrative law judges:

A separate ALJ corps is inconsistent with the concept of administrative decisionmaking. The authority for ALJs to make decisions in hearing cases is delegated to ALJs because the Secretary cannot personally hear and decide the cases. Under the delegation, the ALJ acts on behalf of the Secretary, applying the Secretary's policies (as established through rules and regulations) to the individual fact situation in a particular case. The ALJ does not, however, establish or create new policy. The SSA ALJ's decision generally represents the final decision of the Secretary in a case (unless action is taken by the Appeals Council). If the claimant disagrees with that final decision, he may file a civil action, and the Department of Justice defends the Secretary's final decision. Thus, it would be inappropriate for an ALJ corps totally outside this Department to have the final

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<sup>62</sup> Administrative Law Judge Charles N. Bono testified for the ABA; Administrative Law Judge Melford O. Cleveland testified on behalf of the Association of Administrative Law Judges, Inc. (AALJ); Administrative Law Judge Victor Palmer testified on behalf of the Federal Administrative Law Judges Conference (FALJC). Administrative Law Judge Bruce Birchman testified in opposition for the Forum of the United States Administrative Law Judges (FORUM). FORUM had been organized by an indefinite number of administrative law judges, and probably represented less than five percent of all administrative law judges at the time. Judge Birchman would not divulge number of members or provide the membership roster. ACUS was conspicuously absent.

<sup>63</sup> H.R. 2586, 103d Cong. & S. 486, 103d Cong. (1993).

responsibility for making administrative decisions for the Secretary.<sup>64</sup>

Internally within SSA, continuing ongoing discussions centered on how to replace administrative law judges.<sup>65</sup>

Meanwhile, Congress was mulling over the Corps concept. On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ) and Judicial Division of the ABA wrote to OPM, pointing out that despite a mandate to do so, OPM had not taken a leadership role in the education of ALJs or the agencies as to the nature of their relationship, the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM had not conducted or sponsored orientation programs for ALJs or their administrators; had not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it carefully monitored appointments to prevent the appointment of too many); had not adopted or proposed uniform rules for conduct or procedure; had not determined how judges should handle continuing legal, let alone, judicial education; had not addressed how to handle support staff, office or hearing space; and had not investigated or made recommendations on any of these questions. It also had never addressed the long-standing strife between the Social Security Administration and its administrative law judges, among other judicial independence issues.

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<sup>64</sup> CONG. REC., S16566 (daily ed. November 19, 1993).

<sup>65</sup> Bono, *supra* note 39. In 1973, SSA acquired the state disability program, now known as the Supplemental Security Income (SSI) program. Judges who heard these cases were not considered to have been APA judges until 1976. *See* Pub. L. No. 95-216, tit. III, § 371, 91 Stat. 1559. *See also* SUBCOMM. ON SOC. SEC. OF THE HOUSE COMM. WAYS AND MEANS, 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER (Comm. Print 1979).

Actually, as described by Bono, SSA had discussed replacing ALJs openly. In "Meet the Candid Bureaucrat," *Federal Times*, July 16, 1976, James B. Cardwell, then Commissioner of Social Security, said that he would just as soon do away with administrative law judges in the hearings and appeals process. He complained that they were too unpredictable and had too many "judicial trappings," that the Bureau of Hearings and Appeals, now SSA's Office of Disability Adjudication and Review (ODAR), had strayed too far from the parental unit. He expressed a desire to replace them with pre-APA presiding officers who would be more in tune with "agency policy."

In Recommendation 92-7 of the 1992 Administrative Conference of the United States, the Federal Administrative Judiciary determined not to address proposals for an independent corps of ALJs.<sup>66</sup>

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<sup>66</sup> *Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure*, 57 Fed. Reg. 61,759; 61,760–65 (Dec. 29, 1992). “Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.” 57 Fed. Reg. 61,760.

Among recommendations: (1) ALJs be appointed from a broader list of qualified applicants so as to include more women and minorities; (2) provision be made for peer review of ALJ performance; (3) some administrative judges (AJs) be converted to administrative law judges. *See id.* The ACUS investigation was performed by Professors Paul Verkuil, Jeffrey S. Lubbers, Daniel Gifford, Charles Koch, and Richard Pierce.

As an aside, Lubbers later wrote that the ACUS recommendations

did not sit well with certain members of the ALJ community—especially those that were pushing the centralized corps proposal. With a change in OPM leadership and some vocal opponents among ALJs, the ACUS recommendations died on the vine. Afterwards, several outspoken opponents bitterly criticized ACUS in correspondence with Congress, while other ALJs strongly defended the agency. An objective observer who wrote a post-mortem on ACUS found that there was at least some evidence that this campaign on the part of some ALJs to discredit ACUS, aided by a hired lobbyist, had some impact on its ultimate defunding.

Jeffrey Lubbers, *Paul Verkuil’s Projects for the Administrative Conference of the U.S.: 1974–1992*, 32 CARDOZO L. REV. 2421, 2441 (2011) (citing Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 58–61 (1998)). Ms. Fine was apparently supplied the “objective” evidence during a symposium entitled, “Administrative Conference of the United States (‘ACUS’).” However, there is no mention of the “Contract for America,” written by Larry Hunter, who was aided by House members Newt Gingrich, Robert Walker, Richard Armey, Bill Paxon, Tom DeLay, John Boehner and Jim Nussle, and in part using text from the 1985 State of the Union Address, the Contract detailed the actions to take if they became the majority. Many of the Contract’s policy ideas originated at the Heritage Foundation, a conservative think tank. Among those was to retire “unneeded” agencies. ACUS became one of them. At the same time, the Clinton Administration was “reinventing government.” A similar organization, the Advisory Commission on Intergovernmental Relations, which gave recommendations and advice, was also defunded. In fact, during the debate on ACUS, former Congressman George Gekas, seen as the “godfather” to administrative law judges, who sponsored much

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of the legislation favorable to administrative law judges, also favored funding ACUS, contrary to the implications applied by Lubbers and Fine. The opposition to ACUS was expressed by Ernest Istook, R. Oklahoma:

Mr. Speaker, I rise in support of this motion. The motion simply asks the conferees to consistently uphold the position already taken by this House in defunding several small agencies that provide services which duplicate those that are or could be performed elsewhere within the Government.

For example, regarding the Administrative Conference, their oversight function is basically to help other agencies to coordinate. That function dealing with Federal regulations and administrative oversight can be performed within the Department of Justice. It can be performed within the Office of Management and Budget which has subdivisions for an Office of General Management and also an Office for Informational and Regulatory Affairs.

This is a case of duplication of services, Mr. Speaker, and if we are serious about trying to restrict the amount of Federal spending to bring down the Federal Government to size, if on the one hand we have responded favorably to the Government re-invention initiatives of the Clinton administration and Vice President Gore, then to be consistent we have to vote that way.

When we have Federal agencies that provide duplicative efforts, then we need to do away with those agencies and roll them up into the others that are doing the same job or can do the same job without extra personnel, without extra rent, without extra fringe benefits, without extra personnel policies, without extra budgets.

The dollar amount here is fairly small, Mr. Speaker, in the scope of the national budget. It is \$7 million, but it is important to inform the public whether or not we are serious about downsizing the Federal Government. If we are serious, we should vote the same way that we already voted previously in this House, in favor of this motion to instruct conferees. If we vote any other way, we are backing down. We are sending a message to the taxpayers around the country that we did not mean it when we said that we wanted to save their money and be more economical.

*Appointment of Conferees on H.R. 2403, Treasury, Postal Service, and General Government Appropriations Act, 1994*, 139 CONG. REC. 20563 (1993). I am advised by Professor Lubbers that the ACUS budget was actually \$2 million.

I personally believe that whereas ACUS considered that the application of “veterans’ preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary,” objections to

The Corps Bill passed through the Senate in 1993, but was not sent to conference. In the 104th Congress, co-sponsors of the Corps Bill included key Democratic sponsor, Howell Heflin, of Alabama, and Republican senators, such as Strom Thurmond, Richard S. Shelby, Hank Brown, William Cohen, and Arlen Specter.

Although the Corps concept was accepted by both houses of Congress, it was not accepted simultaneously. During a last ditch effort from 1993 to 1994, many of the provisions were diluted. The question of judicial impartiality no longer seemed as important to Congress as it had been initially, and attempts at compromise failed. With the passage of time, it became clear that dissention among administrative law judges defeated the Corps Bill. A small minority of administrative law judges objected, publicly contending that there would be a loss of expertise, alleged savings would be ephemeral, and that the proposed bill would shift political pressure to Congress.<sup>67</sup>

Historically there had been a distinction between judges who were paid at the GS-16 scale and those, mostly at SSA, at the GS-15 scale, in the General Schedule.<sup>68</sup> The inference was that “regulatory” administrative law judges heard more complicated cases and, as inference upon that, the judges were more worthy. Congress leveled the potential corps when the current pay system was established by the Federal Employee Pay Comparability Act of 1990 (FEPCA).<sup>69</sup> In private, the main reason for objection by GS-16 judges was that they resented that the former GS-15 judges had been “elevated,” and wanted a return to a hierarchy—they craved public notice that they were in superior status.

By 1993, several concessions to SSA had been added to the language of the Corps Bill. Some members of ACUS who did not accept that administrative law judges were “judges” who should have

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ACUS from veterans’ groups had more influence on Congress than all other groups involved.

<sup>67</sup> See John Holmes, *In Praise of the ALJ System*, 21 ADMIN. & REG. L. NEWS, No. 4 (1996).

<sup>68</sup> Until 1975, some SSI judges were paid at the GS-14 scale, but were granted full APA status in 1976.

<sup>69</sup> FEPCA was enacted as Section 529 of the Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 101-509, 104 Stat. 1389 (1990).



any decisional independence, as well as some administrators at SSA, argued for an “efficiency of the service” standard for administrative law judges in SSA, to amend Section 11 of the APA, as the basis for discipline or removal. After negotiations, as a matter of compromise, the latest version of the Corps Bill permitted authorization of performance and evaluation systems, as well as efficiency standards.<sup>70</sup> In response to the changes, some of the same judges who argued for passage in 1992, objected one year later.<sup>71</sup>

### III. THE CONFERENCE CONCEPT

For several years, representatives of several administrative law judge organizations, including FORUM had met to consider modifying or revising the corps bill. The result became “The Administrative Law Judge Conference of the United States Act,”<sup>72</sup> sponsored by former Representative George Gekas (R. Pa.), then Chair of the Subcommittee on Administrative Law, House Judiciary Committee. All of the objections rendered by FORUM were addressed in the legislative intent section:

(1) in order to promote efficiency, productivity, and the improvement of administrative functions, to enhance public service and public trust in the administrative resolution of disputes, and to enhance the enforcement of the administrative law provisions of title 5, United States Code, the Administrative Law Judge Conference of the United States should be established;

(2) the existing system of permanent agency assignments of administrative law judges appointed under section 3015 of title 5, United States Code, will be enhanced, by creating the Administrative Law

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<sup>70</sup> See S. 486, 104th Cong. (1st Sess. 1995).

<sup>71</sup> See Charles N. Bono, *The Evolution and Role of the Administrative Law Judge at the Office of Hearings and Appeals in the Social Security Administration*, 15 J. NAT’L ASS’N ADMIN. L. JUDGES 213, 238–39 (1995).

<sup>72</sup> Administrative Law Judge Conference of the United States Act, H.R. 3961, 105th Cong. (1998) (enacted).

Judge Conference of the United States and will serve the public with maximum economy and efficiency;

(3) the Administrative Law Judge Conference of the United States will enhance legal specialization of administrative law judges by establishing initial and continuing education programs, after consulting with the appropriate agency, to insure that each such judge has the necessary training in the specialized field of law to hear cases assigned by the agency;

(4) the Administrative Law Judge Conference of the United States will establish a system of administrative law judge professional accountability and implement a process to protect the public by establishing procedures to handle allegations of judicial misconduct; and

(5) the Administrative Law Judge Conference of the United States will effect no change in the rulemaking, interpretative, or policymaking authority of an agency which would retain full authority to review and change administrative law judge decisions.<sup>73</sup>

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. A second version of the Conference Bill was introduced in 2000, also sponsored by Representative Gekas.<sup>74</sup>

Meanwhile, there were attacks to OPM's management of the Register. Applicants for the administrative law judge position challenged the scoring formula OPM used in 1996 to evaluate candidates for the position of administrative law judge. They alleged that the policy violated OPM's regulations and the Veterans' Preference Act. While that case, generally known as *Azdell*,<sup>75</sup> was pending, OPM suspended the examination process for administrative law judges. Therefore, the ALJ register became dated with one

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<sup>73</sup> *Id.*

<sup>74</sup> See H.R. 5177, 106th Cong. (2d Sess. 2000).

<sup>75</sup> Ultimately, known as *Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368 (Fed. Cir. 2003).

exception: agencies could not hire judges from the ALJ register during this period.<sup>76</sup> In *Bush v. Office of Personnel Management*,<sup>77</sup> after an applicant was rejected in his request to be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice.<sup>78</sup> On February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

Since 2000, neither a Corps Bill nor a Conference Bill has been offered. As of the date of writing, all administrative law judge organizations continue to support the Conference concept, as well as the ABA and the Federal Bar Association. However, there have been no further discussions in Congress.

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<sup>76</sup> In 1997, the *Azdell/Meeker* lawsuit was filed, with disadvantaged plaintiffs asking that the 1996 rescoring process be overturned. After many appeals, the Federal Circuit Court of Appeals eventually upheld OPM's original rescoring process in 2003. Through most of the litigation, the ALJ register was suspended, and no hirings were allowed. However, in August 2002, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Challenges Facing the New Commissioner of Social Security: Hearing Before the Subcomm. on Social Security of the Committee on Ways and Means*, 107th Cong. (2002), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg83375/pdf/CHRG-107hhrg83375.pdf>.

<sup>77</sup> 315 F.3d 1358 (Fed. Cir. 2003)

<sup>78</sup> American Bar Association policy established that with respect to the recruitment and selection of ALJs employed by federal agencies, OPM and Congress, where necessary, were to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the *Azdell* litigation.

## IV. COMPARISON: CORPS VS. CONFERENCE

| <b>Corps Bill<sup>79</sup></b>   | <b>Conference Bill<sup>80</sup></b>   |
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| <i>All judges become employees of ALJ Corps in a new agency.</i>   | Judges are employees of agencies of hire.<br>New agency would replace the former OPM. Office of Administrative Law Judges. <sup>81</sup>  |
| <i>Chief Judge<br/>Appointed by the President with consent of the Senate.<br/>Nominated by 5 member nominating commission.<br/>Sends names of three candidates to President<br/>President can reject list and ask for another 5-year term.</i> | Chief Judge<br>Appointed by the President with consent of the Senate.<br>Must have served as an administrative law judge for at least 5 years immediately before the date of appointment.<br>5-year term.<br>Paid at the rate of 105 percent of basic pay for level IV of the Executive Schedule. |
| <i>7 divisions -- each headed by a division chief administrative law judge appointed by the President.<br/>5 year terms.</i>   | Judges remain with their agencies. <sup>82</sup><br>The chief administrative law judge of each agency shall be appointed by the agency head.  |

<sup>79</sup> References are to the Reorganization of the Federal Administrative Judiciary Act, S. 486, 104th Cong. (1995) (enacted).

<sup>80</sup> References are to the Administrative Law Judge Conference of the United States Act, H.R. 5177, 106th Cong. (2000) (enacted).

<sup>81</sup> "All functions of the Office of Personnel Management with respect to administrative law judges are transferred to the Conference." Administrative Law Judge Conference of the United States Act, H.R. 5177, 106th Cong. (2000).

<sup>82</sup> It is stated:

After selection for appointment to the position of administrative law judge by an agency, the administrative law judge shall be assigned by the chief judge to such agency for the adjudication of cases for the agency. Each administrative law judge appointed at the time of the date of enactment of this section shall be assigned to the agency the administrative law judge was assigned to at the time of the date of enactment of this section. Subsequent assignments of the administrative law judge shall be made with the consent of the administrative law judge and the appointing agency.

*Id.*

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|---|---|
| <i>OPM retains primary duties.</i>                              | OPM duties assumed by the Conference. <sup>83</sup> |
| <i>Administrative law judges are generalists.</i> <sup>84</sup> | Administrative law judges remain specialists.       |
| <i>Appeals process remains intact.</i> <sup>85</sup>            | Appeals process remains intact.                     |

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<sup>83</sup> The Conference Bill provided:

There shall be transferred to the Administrative Law Judge Conference of the United States established under section 598 of title 5, United States Code, the personnel, property, unexpended balances of appropriations, allocations, and other funds employed and held by the Office of Personnel Management and relating to the administrative law function administered by the Office of Personnel Management. Appropriations, authorizations, allocations, and other funds paid or transferred by agencies to the Office of Personnel Management for the administration of the administrative law judge function shall, after the date of the enactment of this Act, be paid or transferred to the Conference.

*Id.* at 8–9.

<sup>84</sup> The Corps Bill stated:

An administrative law judge who is a member of the Corps shall hear and render a decision upon—

(1) every case of adjudication subject to the provisions of section 553, 554, or 556; (2) every case in which hearings are required by law to be held in accordance with sections 553, 554, or section 556; (3) every other case referred to the Corps by an agency in which a determination is to be made on the record after an opportunity for a hearing; and (4) every case referred to the Corps by a court for an administrative law judge to act as a special master or to otherwise making findings of fact on behalf of the referring court, which shall continue to have exclusive and undiminished jurisdiction over the case.

S. 486, 104th Cong., at 14 (1995).

<sup>85</sup> The Corps Bill further provided:

The provisions of this subchapter shall effect no change in—

(1) an agency's rulemaking, interpretative, or policymaking authority in carrying out the statutory responsibilities vested in the agency or agency head;  
 (2) the adjudicatory authority of administrative law judges; or  
 (3) the authority of an agency to review decisions of administrative law judges under any applicable provision of law.

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| <i>However, studies of the entire appeals process is mandated.<sup>86</sup> A report after two years is required.</i> |   |
| <i>Corps budget assumes all expenses for individual judges.</i>   | Conference has a budget but each agency responsible for all budget, resources and support requirements on a per capita basis. <sup>87</sup> |
| <i>Collective bargaining agreements and other contracts remain in effect.</i>   | Collective bargaining agreements and other contracts remain in effect.  |
| <i>Judicial Council<br/>Power similar to agency authority.<sup>88</sup></i>   | MSPB system remains, <sup>90</sup> but a  |

*Id.* at 15–16.

<sup>86</sup> The studies were to conform with the following:

The chief administrative law judge of the Administrative Law Judge Corps of the United States shall conduct a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be conducted for each division of the Corps. The studies shall include monitoring and evaluating data and shall be conducted in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges.

*Id.* at 24–25.

<sup>87</sup> In the 2000 version of the Conference Bill, \$5,000,000 was to have been appropriated. H.R. 5177, 106th Cong., at 8 (2000).

<sup>88</sup> The Corps Bill stated:

- (1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 599c;
- (2) to appoint persons as administrative law judges under section 599c;
- (3) to file charges seeking adverse action against an administrative law judge under section 599e;
- (4) to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Reorganization of the Federal Administrative Judiciary Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the 2 years following such effective date without the approval of that agency, and any amendments or revisions

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| <i>Hears discipline cases – replaces MSPB</i><br><i>Removal, suspension, reprimand</i> | voluntary alternative dispute resolution process would be created that <i>shall</i> be conducted at the request |
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made to such rules shall not affect or be applied to any pending action;

(5) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

(6) subject to the civil service and classification laws and regulations–

(A) to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that the Council deems necessary to carry out the functions, powers, and duties of the Corps; and

(B) to prescribe the authority and duties of such employees;

(7) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

(8) to procure temporary and intermittent services under section 3109;

(9) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. § 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

(10) to delegate any of the chief judge’s functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or other employees of the Corps, and to authorize the redelegation of any of those functions or powers;

(11) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of that agency has the necessary training in the specialized field of law of that agency;

(12) to make suitable arrangements for continuing education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

(13) to determine all other matters of general policy of the Corps.

*Id.* at 9–12.

<sup>90</sup> “An administrative law judge may not be removed, suspended, reprimanded, or disciplined except as provided in section 7521.” H.R. 5177, at 7.

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| <p><i>on grounds:</i></p> <p><i>Incompetence</i></p> <p><i>Neglect of duties</i></p> <p><i>Misconduct</i></p> <p><i>Physical or mental disability</i></p> <p><i>Concurrent peer review system and a “Complaints Resolution Board” established comprised of judges and 16 attorneys.<sup>89</sup></i></p>         | <p>of the administrative law judge. Emphasis added.<sup>91</sup></p>  |
| <p><i>Rules of practice can be prescribed by Council after two years.</i></p> <p><i>During first two years agency rules in use</i></p>   | <p>No mention of rules of practice. However, Chief Judge can initiate rules and procedures to implement the functions of the Conference.</p>  |
| <p><i>Additional jurisdiction:</i></p> <p><i>Agency and court referral:</i></p> <p><i>With agency approval, courts are authorized to refer cases, “or portions thereof,”<sup>92</sup> to act as a special master to make findings of fact subject to de novo review by the referring court.<sup>93</sup></i></p> | <p>Additional jurisdiction:</p> <p>Court referral:</p> <p>With agency approval, courts are authorized to refer cases, “or portions thereof,” to act as a special master to make findings of fact subject to de novo review by the referring court.<sup>94</sup></p> |
| <p><i>Special Functions of Chief Judge:</i></p> <ul style="list-style-type: none"> <li>• <i>“[T]raining of judges in more than one subject area;</i></li> <li>• <i>[E]mployment information technology . . . [for] case</i></li> </ul>   |   |

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<sup>89</sup> The Corps Bill mentioned:

Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning conduct of a judge of the Corps. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, administrative law judges, and agencies.

S. 486, 104th Cong., at 17–18 (1995).

<sup>91</sup> The 1998 version of the Conference Bill established a peer review system.

<sup>92</sup> S. 486, at 15.

<sup>93</sup> The court shall provide for reimbursement to the agency involved for costs relating to the administrative law judge referral.

<sup>94</sup> The court shall provide for reimbursement to the agency involved for costs relating to the administrative law judge referral.



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| <p><i>docketing, and research;</i></p> <ul style="list-style-type: none"> <li>• <i>[C]onsolidating hearing facilities and law libraries; and</i></li> <li>• <i>[P]rograms and practices to foster overall efficient use of staff, personnel, equipment, and facilities.”<sup>95</sup></i></li> </ul> <p><i>Issues an annual written report to the President and the Congress.</i></p> |  |
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## V. ONGOING QUEST VIA OPM

As set forth above, the APA contemplated that the Civil Service Commission (now OPM)<sup>96</sup> would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program, but OPM has essentially abandoned that role. Section 1305 provides that, for the purpose of Sections 3105 (appointment), 3344 (loans), and 5372 (pay), OPM “may . . . investigate, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees.”<sup>97</sup> Although the OPM Program Handbook affirms those responsibilities, OPM has seldom exercised them, except for prescribing regulations, including sometimes less-than-benign changes in selection and Reduction in Force regulations.<sup>98</sup> Judges are selected through a special process, which provides for a register of qualified applicants overseen by OPM. Judges’ pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove a judge requires a formal hearing by the Merit Systems Protection Board. Judges are also exempt from the performance appraisal requirements applicable to almost all other Federal employees under the Civil Service Reform Act.

<sup>95</sup> S. 486, at 5–6.

<sup>96</sup> Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to the OPM and the Merit Systems Protection Board (MSPB).

<sup>97</sup> 5 U.S.C. § 1305 (2006).

<sup>98</sup> See Appointment, Pay, and Removal of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb. 23, 1998).

The APA attempted to bring uniformity to a field full of variation and diversity.<sup>99</sup> This variation is especially true since the APA permits some agencies to borrow administrative law judges to hold hearings.<sup>100</sup> Parties have a right to know what the rules will be, and in the current state, there is confusion. The 1992 ACUS proposal supported the use of practice rules.<sup>101</sup>

*A. Qualifications of Applicants to Administrative Law Judge Register*

Historically, OPM developed the criteria for judicial selection, accepted applications and rated them on the basis of experience as described in (1) a lengthy statement prepared by the applicant, (2) a personal reference inquiry, (3) a written demonstration of decision-writing ability, and (4) a panel interview. The scores from this process determined an applicant's rank on the Register. OPM rated and ranked candidates on a scale from 70 to 100. When an agency needed to fill a vacancy, OPM certified the top three ranked applicants on the register to that agency. Also historically, only applicants with scores from 85 to 100 were certified.<sup>102</sup>

OPM issued a final rule in March 2007 eliminating OPM Examination Announcement No. 318—the rule instructed applicants to apply during a fixed time period, and all applicants were screened by the administration of (1) a written examination, (2) an interviewing process, and (3) a scoring of qualifications. However, it has since opened the Register to a haphazard “race to the mailbox” method; otherwise qualified applicants are summarily rejected. OPM has arbitrarily rejected applicants for the ALJ Register on several occasions. For example, Vacancy Announcement No. 2008ALJ 134575, issued on July 30, 2008, limited applicants to the first six

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<sup>99</sup> 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2006).

<sup>100</sup> At my agency, judges hear approximately eighty different types of cases, with differing time lines and procedures.

<sup>101</sup> See 1 C.F.R. § 305.92-7 (1993). “To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.” *Id.*

<sup>102</sup> Application of the Veterans' Preference Act can provide an extra five points; disabled veterans can receive an extra ten points in their scores.

hundred. Although the applications were supposedly open until August 13, 2008, applications were closed within eighteen hours, on July 31st.

OPM develops an ALJ Register of qualified applicants to submit to the agencies who certify a need to hire administrative law judges. Historically, many applicants were former or sitting state judges, as well as former military judges and state administrative law judges.<sup>103</sup> Some have been Federal magistrates. However, some applicants who are in judicial status in their home states are deemed unqualified if they are not “active” lawyers. ABA policy supports using prior judicial experience as a factor.<sup>104</sup> It is important to ensure that the federal government can attract highly qualified candidates for the administrative law judge position, and the laws, regulations, and practices of the various state bars should be controlling in the classification of members of the judiciary, whether administrative or otherwise.

Although OPM is required to provide hiring agencies a list of the three best qualified applicants, ACUS recommended that a hiring agency should be permitted to select any applicant from the certificate who, in the agency’s opinion, possesses the qualifications for the particular position to be filled, and an agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.<sup>105</sup> The main reason that ACUS made the suggestion was because it determined that veterans are precluding agencies from hiring a more diverse cadre.<sup>106</sup>

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<sup>103</sup> Social Security Administration judges included Judge Joseph Simeone, a former justice of the Missouri Supreme Court, and Judge Tom Allen, a former justice of the Georgia Supreme Court, among other notables. Others included at least one former military general, an admiral and many former chief military trial and appellate judges.

<sup>104</sup> REPORT TO THE HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION (Feb. 2009), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/recommendations/112.authcheckdam.pdf> (last visited Mar. 26, 2013).

<sup>105</sup> 1 C.F.R. § 305.92-7.

<sup>106</sup> ACUS also stated that although there was no evidence of bias against certain classes of litigants, it recommended further investigation, especially at SSA. It referenced a report, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HRD-92-56, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION (1992), and the report, NINTH CIRCUIT GENDER BIAS

Congress intended that trial experience should be a primary qualification for the position. There has also been a longstanding debate regarding whether agencies should hire candidates using a “select criterion”—or those who have agency specific knowledge. The current law requires trial experience and or the equivalent, without regard to special agency knowledge. ABA policy rejects select criterion. Accusations have been made that the current register is filled by candidates with no trial experience, because OPM sees itself as an agent to “customer” agencies, especially SSA, and has stacked the register to suit agency demands.

There is absolutely no evidence that veterans are less qualified than the general population of applicants. To the contrary, evidence from the *Azdell* litigation shows that in the main, they are better qualified.

Some chief judges of the regulatory agencies have complained to OPM that there are no qualified candidates in the register because it is filled by former SSA decision writers, who have no trial experience. The ABA and other bar groups have opposed “selective certification” because some of the candidates appear to be less qualified to manage conflicts and marshal evidence, and also because of the appearance of agency bias.

In a recent development, SSA has convinced OPM to accept a “split” register so that, in essence, SSA will have its own register

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TASK FORCE, PRELIMINARY REPORT (Discussion Draft) (July 1992) at 93–103 (discussing gender bias issues relating to disability determinations); no evidence had been produced, and in fact, the GAO study did not establish any proof of discrimination, either in hiring or in decision making.

Professor Lubbers advised me that ACUS did show (through statistics) that veterans’ preference was hampering the selection of women, but ACUS also suggested allowing agencies to choose anyone from the top 50% of the register because it felt that agencies should be afforded more flexibility in choosing eligibles with the background they needed for their ALJs. Lubbers stated: “You don’t really address the main reason for ACUS’s proposed changes in ALJ selection—the fact that agencies were (and still are) circumventing the register by hiring laterally from SSA.”

However, as stated, at about the same time, GAO investigated complaints of bias and discrimination at then OHA. It never made a finding, and did not publish the study. From this, I assume that no bias or discrimination was proven.

I do not have the statistics, but anecdotally, I will testify that at my agency, and at many others, the veterans hired include a large percentage of women, most of whom were JAG officers and judicial officers.

comprised of candidates who have only agency decision writing experience, and the other agencies will have a register comprised of candidates with trial experience.

### *B. Active Bar Membership*

Historically, none of the regulations under the APA required active bar membership status for administrative law judges.<sup>107</sup> Effective April 19, 2007, 5 C.F.R. § 930.204 established a requirement that incumbent Administrative Law Judges maintain active bar status.<sup>108</sup>

Licensure in each state is distinct. Although some states have reciprocity for membership, some do not. Moreover, some judges live and work in states where all lawyers and judges are required to be members of the bar, while others are prohibited from being members of the bar because it is considered both inappropriate and unethical for judges to be subject to discipline by a body consisting

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<sup>107</sup> In fact, James R. Rucker, Jr., then SSA's Chief Administrative Law Judge, issued a Memorandum dated January 9, 1989, stating that OPM did not require active bar membership after appointment. On December 13, 2005, OPM published its initial Notice of Proposed Rule-Making (NPRM). Examining System and Programs For Specific Positions and Examinations (Miscellaneous), 70 Fed. Reg. 73646 (Dec. 13, 2005) (to be codified at 5 C.F.R. pt. 337 & 930). On December 21, 2005, OPM republished its NPRM "due to information that was inadvertently omitted" from the December 13, 2005 NPRM. See Examining System and Programs For Specific Positions and Examinations (Miscellaneous), 70 Fed. Reg. 75745 (Dec. 21, 2005) (to be codified at 5 C.F.R. pt. 337 & 930).

<sup>108</sup> See 5 C.F.R. § 930.204 (2009).

In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct, which has been applied to ALJs by the Merit Systems Protection Board (*In re Chocallo*, 1 MSPBR 612, 651 (1978)) and by some agency regulations. In some states, Federal ALJs, like other judges, cannot be members of the state bar—e.g. Alabama.

of and controlled by practicing attorneys. Moreover many judges are not members of the bar where they reside or where they may work.<sup>109</sup>

In many states, administrative law judges are entitled to judicial status. In many others, there may not be a judicial category, per se, but administrative law judges, as members of the judiciary, may be exempt from continuing legal education.<sup>110</sup> However, some states prohibit judges from the active practice of law. For example, Delaware Supreme Court Rule 69(e) provides that “Judicial members” of the Delaware Bar are “those judges, commissioners and masters who are disqualified from the practice of law and those retired judges who do not practice law.”<sup>111</sup> In addition, “judicial members are exempt from the process of annual registration with the Court.”<sup>112</sup>

AALJ filed suit in 2007. After the Court denied a Motion to Dismiss, OPM agreed to modify the regulation, which it did as to full time judges on October 7, 2010.<sup>113</sup> However, the *AALJ v. U.S. Office of Personnel Management* case has not been dismissed as of this writing, and the case remains open.<sup>114</sup>

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<sup>109</sup> For example, I live in Maryland and, although my office is in the District of Columbia, most of my cases are on the road; I have exposure to every state, territory and even foreign countries. I am a member of the Pennsylvania and Florida bars. In Pennsylvania I must register with the Prothonotary of the Supreme Court, through the state Disciplinary Board. I am exempt from mandatory CLE due to my judicial status. I could have waived into Maryland or the District of Columbia, but only through my Pennsylvania qualifications, as there is no reciprocity with Florida. Some non-resident judges are admitted in states like Indiana, and although they may not reside there, and do not hold hearings there, must meet a state CLE requirement.

<sup>110</sup> State requirements are tracked in David. L. Agatstein, *Active Bar Membership*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 496 (2007).

<sup>111</sup> See DELAWARE STATE COURTS, <http://courts.delaware.gov/Rules/#supreme> (last visited Mar. 26, 2013).

<sup>112</sup> *Id.*

<sup>113</sup> Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998 (Oct. 7, 2010) (to be codified 5 C.F.R. pt 930).

<sup>114</sup> 640 F. Supp. 2d 66 (D.D.C. 2009).

*C. Ethics*

OPM has refused to consider a code of conduct for administrative law judges.<sup>115</sup> All administrative law judge organizations promote high standards.<sup>116</sup> This is consistent with case law that judges should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct.<sup>117</sup> Although no standard judicial codes apply by law or regulation, the Merit Systems Protection Board has referenced the ABA Model Code of Judicial Conduct starting with *In re Chocallo*.<sup>118</sup> The 2001 Model Code, especially Canon 1, Rule 1.2, has been used extensively: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>119</sup> SSA has recently prosecuted administrative law judges using standards

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<sup>115</sup> Professor Lubbers had asked for authority for this statement:

I personally was involved during the 1992–1993 period when SSA tried to adopt a code. Judge Ronnie A. Yoder was the principal author of the 1989 NCALJ Code for Administrative Law Judges, and he, and several other members of NCALJ met with OPM, among other entities.

I was an officer in the ABA/NCALJ when we discussed use of the Codes as a substitute for performance evaluations during the Bush Administration. Office of Personnel Management Associate Director for Strategic Human Resources Policy, Ron Sanders, was the principal OPM negotiator. For the record, NCALJ was opposed to any “surrogate.” FORUM advocated for the surrogate.

<sup>116</sup> Administrative law judges should be governed by the 2009 Code of Conduct for United States Judges, administered by the Administrative Office of the United States Courts. Other Judicial groups have voluntarily sought and have received coverage: “Certain provisions of this Code apply to special masters and commissioners . . . . The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.” See <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (click on “Introduction”) (last visited Apr. 7, 2013).

<sup>117</sup> ABA DIV. FOR POLICY ADMIN., 2012–2013 ABA POLICY AND PROCEDURES HANDBOOK 193 (2012) [hereinafter “ABA POLICY AND PROCEDURES”].

<sup>118</sup> 1 MSPBR 612, 651 (1978)

<sup>119</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2 (2007).

that are not included in any judicial code, such as “conduct unbecoming an administrative law judge.”<sup>120</sup>

Although OPM did not actively participate, in October 1992 the SSA Division of Regulations and Rulings drafted and distributed a proposed “Code of Conduct” for administrative law judges. Although the code would probably been acceptable to all administrative law judge organizations, concerns were raised by the Department of Justice (DOJ) and by the Office of Government Ethics (OGE) about the proposed code at that time.<sup>121</sup> In March 1995, another draft was sent to be cleared for publication. It referenced the Unified Corps Bill S. 486 (1994) and included language concerning the efficiency of case management and extent of cooperation with administrative directives as criteria for misconduct.<sup>122</sup> However, it was not published.<sup>123</sup>

#### *D. Performance Reviews and “Discipline”*

Whereas the APA specifically forbids performance standards and reviews, in an attempt to reduce the implication of bias toward the employing agency, ACUS recommended a system of review. It recommended case processing guidelines, which would address

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<sup>120</sup> See, e.g., *Long v. Soc. Sec. Admin.*, 635 F.3d 526 (Fed. Cir. 2011) (upholding removal based on facts arising from off-duty conduct in a domestic relations dispute); *Soc. Sec. Admin. v. Steverson*, 2009 M.S.P.B. 143 (upholding the removal of an administrative law judge based upon four charges including, but not limited to, off-duty conduct unbecoming an administrative law judge, off-duty misuse of government equipment in storing sexually-oriented material on his government-issued computer and in maintaining a private business, and lack of candor), *aff’d*, 383 F. App’x 939 (Fed. Cir. 2010).

<sup>121</sup> In 1993, I attended a discussion at the William and Mary Marshall-Wythe School of Law with proponents and opponents of the proposed SSA and the NCALJ Code. Although there were no compelling substantive objections, the OGE general counsel objected, arguing that as administrative law judges are “mere” employees, any code would conflict with agency responsibilities, and OGE rules, as well as specific agency codes. At the time, SSA opposed this view. Another complicating factor is that OPM took the position that as all judges were members of a bar, the states’ codes would overlay the proposed codes. We reminded them that Article III judges and most Article I judges have no such problem.

<sup>122</sup> *Bono*, *supra* note 39, at 243–44.

<sup>123</sup> *Id.*



issues such as “productivity and step-by-step time goals, [and] would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews.”<sup>124</sup>

ACUS also recommended that judicial comportment and demeanor would be reviewed.

Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of non-adherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.<sup>125</sup>

Since 1992, although performance reviews have not been performed, SSA has been maintaining production guidelines. Although administrative law judges have been removed through the MSPB system, none have been removed for low production per se. Almost all recent removal cases involve SSA. Ironically, at least two of the judges removed were SSA manager-judges, Hearing Office Chief Administrative Law Judges (HOCALJ).<sup>126</sup> Many other management judges have been demoted, although these are not well documented.<sup>127</sup>

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<sup>124</sup> Recommendation 92-7, 1 C.F.R. § 305.92-7 (1993).

<sup>125</sup> *Id.*

<sup>126</sup> *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318 (Fed. Cir. 1999); *Soc. Sec. Admin. v. Harty*, 117 F. App'x 733 (2004). Carr was removed for (1) reckless disregard for personal safety, (2) persistent use of vulgar and profane language, (3) demeaning comments, sexual harassment and ridicule, and (4) interference with efficient and effective agency operations. Harty was removed for failure to perform his assigned duties and for engaging in unprofessional and injudicious conduct or making unprofessional or injudicious statements to agency employees.

<sup>127</sup> In *Butler v. Soc. Sec. Admin.*, 331 F.3d 1368 (Fed. Cir. 2003), a former HOCALJ alleged that he was demoted in retaliation for his support of grievances filed by other administrative law judges. The Federal Circuit Court of Appeals ruled that because he did not suffer a reduction in pay or grade upon losing his Hearing Office Chief duties, his demotion was not a “reassignment,” and therefore

The accusation that SSA is obsessed with production remains. In at least one office, thousands of disability awards were rendered “prematurely,” ostensibly rendered to impress management. After the HOCALJ was confronted, he allegedly committed suicide. After an Inspector General investigation, the office supervisor was threatened with a fine of \$3.5 million, another employee has been assessed a fine of \$215,000, and two other employees were notified that they may have been fined more than \$100,000 each.<sup>128</sup> Another judge awarded benefits to 2,285 applicants in 2007, at a cost to taxpayers of \$2.1 billion.<sup>129</sup>

### *E. Peer Review*

The 1992 ACUS report recommended that chief judges, either individually or through a peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. The Conference Bill would have provided for a voluntary alternative dispute resolution process.

At my agency, advisory committees were established in 1981 to conduct informal inquiries and to consider and recommend appropriate action regarding complaints of misconduct or disability.<sup>130</sup> Apparently no other agency has a similar process.

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he had no standing to protect his former position. *Id.* at 1373. There is no determination how many other similar actions have occurred.

<sup>128</sup> Stephen Barr, *A Fight Over Fines for Social Security Workers*, THE WASH. POST (Jan. 16, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011500975.html>.

<sup>129</sup> Mark Friesen, *Paying Out Billions, One Judge Attracts Criticism*, THE OREGONIAN (Dec. 29, 2008), [http://www.oregonlive.com/special/index.ssf/2008/12/paying\\_out\\_billions\\_one\\_judge.html](http://www.oregonlive.com/special/index.ssf/2008/12/paying_out_billions_one_judge.html).

<sup>130</sup> Procedures for Internal Handling of Complaints of Judicial Misconduct, 46 C.F.R. § 28050 (1981), as amended; Amended Procedures for Internal Handling of Complaints of Misconduct or Disability, 48 C.F.R. § 30843 (1983); Office of Administrative Law Judges, Amended Procedures for Internal Handling of Complaints of Misconduct or Disability, 52 C.F.R. § 32973 (1987). The function of the committee is advisory only. “Its inquiry and report in each instances shall be confined to the specific matter referred to it and shall contain no evaluation of the performance or qualifications of the affected judge contrary to the Administrative Procedure Act.”

AALJ has recommended something similar at SSA, but nothing has been initiated. SSA has several complaint procedures, primary due to complaints of bias,<sup>131</sup> and does administer a program of “counseling.” Judges have complained that the agency has fostered some of the complaints, to scapegoat certain judges.

#### *F. Professionalism*

Although OPM should promote continuing judicial education, it has done nothing in this area. ABA policy encourages continuing legal education.<sup>132</sup>

Although agencies used to provide continuing legal education for their judges, many current budgets do not permit it.

#### *G. Chief Judges*

At present, no agency chief judge is directly accountable to Congress. Both the Corps and Conference concepts would require Presidential appointment of a chief with Senate confirmation.

In a handful of cases, some chief judges have defended due process, and, unfortunately, have been restrained. At SSA, the Chief Judge position is so far down on the pecking order that, on many occasions, decisions on how to manage the program are made without any input from any judge.<sup>133</sup>

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<sup>131</sup> Claimants and their advocates or representatives may file a bias complaint against a judge. “Persons may make complaints in writing to our Office of the Chief Administrative Law Judge and to our regional and hearing offices. We also receive complaints through our Appeals Council,” also through a telephone and I.G. Hotlines, “and congressional offices on behalf of their constituents. We review, investigate, and respond to such complaints.” 75 Fed. Reg., 35, at 8171–76 (Feb. 23, 2010).

<sup>132</sup> ABA POLICY AND PROCEDURES, *supra* note 117, at 268.

<sup>133</sup> The chief judge reported to the deputy associate commissioner, who reported to the associate commissioner, who reported to the deputy commissioner for disability, who reported to the principal deputy commissioner, who reported to the commissioner. *See* JUDGE LONDON STEVERSON, CONFESSIONS OF A SOCIAL SECURITY JUDGE 372 (2010) (“SSA’s attempt during the summer of 1999 to discharge the Chief ALJ for reasons not related to good cause”). A proposed bill was circulated at the height of the acrimony over HPI that would have required presidential appointment and direct reporting authority. When members of the

Both the Corps and Conference would require a term and reporting authority directly to Congress.

## VI. MINI-CORPS

As stated above, to promote judicial and administrative efficiency and consistency, Professor Lubbers suggested an experiment, of uniting seventeen similar small regulatory agencies. Combined, these agencies might have approached the budget and manpower of a couple of large SSA hearings offices, and at the time, SSA had over a hundred hearing offices. None of the seventeen had been accused of violations of section 11 of the APA, whereas judges at SSA still maintain that SSA remains unconscionably obsessive about “production” and indolent about “quality.” Although SSA judges now produce far more decisions in faster time, the judges allege that agency hostility to the rank and file remains, and that judges continue to make convenient scapegoats for agency failures.

Although the Conference concept is still policy of the AALJ, the union at SSA, there has been an open discussion on the feasibility of renewing the Corps concept, or a Mini-Corps, if only for SSA. After a 1999 Federal Labor Relations Authority (FLRA) election, AALJ became the exclusive representative of all full-time and part-time non-supervisory administrative law judges. Today, SSA’s Office of Disability Adjudication and Review (ODAR) consists of the Office of the Chief Administrative Law Judge at the top of an organizational pyramid; four National Hearing Centers (sixty-two supervisory judges) and ten Regional Offices (ten supervisory ALJs). Hearing Offices, numbering 157, report to the regional chief judges, each with its own hearing office chief judges (157 “HOCALJ” judges) and one or more bargaining unit non-supervisory ALJs. In fiscal year 2012, AALJ represented 1,266 bargaining unit members. Under the FLRA, “supervisors” cannot be part of the bargaining units. However, under a program of “re-configuration,” SSA does not permit administrative law judges to direct or rate office employees, who are represented by other unions. One major impetus for unionization was the implementation of the Hearing Process Improvement Plan (“HPI”),

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House Subcommittee and staff inquired, the chief judge was barred from speaking to them. The issue was whether SSA would retain the due process hearing.

which was designed to minimize the role of the judge in the hearing process.<sup>134</sup>

SSA and CMS (the Centers for Medicare and Medicaid) are the only APA agencies that use a “non-adversarial” system.<sup>135</sup> Initially, both were housed within the Department of Health and Human Services (“HHS”), formerly known as the Department of Health, Education and Welfare (“HEW”). Subsequently, SSA was “separated” from HHS. Until 2003, SSA administrative law judges heard a large majority of the cases now heard by CMS.<sup>136</sup>

The major complaint about SSA disability programs is that it is slow and that there is a backlog of cases. In the *Joint Hearing on Eliminating the Social Security Disability Backlog*, the late Judge Ronald A. Bernoski testified: “It is critical to understand that currently, of the 765,000 total pending cases, over 455,000 of them, 60% of the total backlog, are waiting in the hearing offices to be worked up for a judge to review. This is the precise location of the blockage causing the backlog.”<sup>137</sup>

Factors Judge Bernoski also identified:

- The ratio of staff to judge,

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<sup>134</sup> According to the agency, the plan sought to reduce “1) the high number of hearing office staff involved in preparing a case for a hearing; 2) the ‘stove pipe’ nature of employees’ job duties; and 3) inadequate management information necessary to monitor and track each case through the process.” *Statement of Michael J. Astrue, Commissioner, Social Security Administration before the Committee on Ways and Means Subcommittee on Social Security*, 112th Cong. 11–13 (June 27, 2012). A few of the changes HPI made to hearing office organization, such as creating the position of hearing office director, are still in place, but Congress would not fund it. *See id.*

<sup>135</sup> Under Title IV of the Federal Coal Mine Health and Safety Act of 1969, Congress authorized the Social Security Administration to promulgate regulations regarding entitlement to benefits for miners totally disabled due to coal workers’ pneumoconiosis. These regulations are codified at 20 C.F.R. Part 410, subpart D. Part 410 applies to claims filed on or before December 31, 1973. 20 C.F.R. § 410.231. A few of these claims survive, and are “non-adversarial.”

<sup>136</sup> SSA administrative law judges heard Medicare Part A and Part B cases, while HHS administrative law judges heard Part C cases.

<sup>137</sup> *Joint Hearing on Eliminating the Social Security Disability Backlog: Before the H. Comm. on Ways and Means*, 111th Cong. 2 (Mar. 24, 2009) (statement of ALJ. Ronald G. Bernoski).

- Quality and composition of the staff,
- State Agency Disability Determination Service (“DDS”) allowance rates,
- Quality of case development, and
- Availability of worked-up cases for hearings.

Additional factors are: continued inadequate funding for Social Security; the failure of SSA to hire adequate support staff for judges; the failure of Social Security to manage and forecast the impact of the baby boomers; increased case receipts during the mid-1990’s; the failure of the agency to implement a plan to address the same; and the failure of many of SSA’s reform initiatives.<sup>138</sup>

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<sup>138</sup> In my experience the main factors for the backlog were:

1. Failure of certain state DDS agencies to award benefits in clear cases. Although the Centers for Disease Control (CDC) has identified certain states with a significantly higher incidence of disease than others, these statistics are not consistent with DDS payment rates in those states, or rates of payment at the hearings level. Some state DDS’s have been accused of sending on meritorious claims that should have never been sent to the hearings level. In some instances, certain DDS’s have been accused of creating alleged conflicts in the evidence, to avoid payment, when there is enough affirmative evidence to render a favorable decision. For example, see the CBS Television series, *Failing the Disabled*, 2008–2009. *Failing the Disabled*, CBSNEWS (Feb. 11, 2009), [http://www.cbsnews.com/2100-500690\\_162-3718129.html](http://www.cbsnews.com/2100-500690_162-3718129.html). “Nobody cares if a case is denied. If you approve it, it will be subjected to intense scrutiny,” one former DDS examiner stated. *Disabled and Waiting*, CBSNEWS, (Feb. 11, 2009) (statement of Trisha Cardillo). In many states, DDS’s refuse to thoroughly develop the medical and vocational evidence, refuse to process (or mark) documents, cull out duplicates or develop an exhibit list to avoid having the hearing office to reconstruct every file before evidence can be entered into the record. *Failing the Disabled*, CBSNEWS (Feb. 11, 2009), [http://www.cbsnews.com/2100-500690\\_162-3718129.html](http://www.cbsnews.com/2100-500690_162-3718129.html).
2. Failure of ODAR to include judges in the chain of command of the hearing office staff. Although the staff is supposed to support the hearings process, they are not supervised by judges who are singularly responsible for the work product.
3. Too much time and money are devoted to development of cases that do not involve needy claimants. For example, whereas claimants who are not in payment status desperately wait for payment, many of the cases at the hearing level involve disputes over onset dates for people already receiving reduced retirement benefits, but allege disability to try to obtain

Although SSA has been plagued with unwieldy backlogs at the hearings level, both AALJ and the SSA Inspector General have decried policies that encourage “paying down the backlog,” that is paying cases to get rid of them as quickly as possible.<sup>139</sup>

AALJ, the Social Security Advisory Board (SSAB),<sup>140</sup> and many other groups have recommended that the procedures at SSA should be more formal. At one time, managers at SSA might have agreed. In 1988, a draft proposal that would have provided rules of practice and limited some issues was disclosed in a *New York Times* article.<sup>141</sup> A hearing before the full House and Ways Committee was called.<sup>142</sup> The proposed rules would have “closed the record,” and would have limited the issues, at hearing and on appeal. Evidence would have to be produced seven days prior to hearing. Penalties for failing to supply evidence within the allotted time were also provided. It provided pre-hearing conferences before staff attorneys, to limit issues, to gather evidence. After the hearing, the proposed rules were never published.

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“full” benefits. The SSA trust fund exposure in these cases is usually quite limited. On some occasions, such cases have been prioritized. Others types of cases assigned to judges include SSI eligibility, overpayment, underpayment claims and other matters involving inconsequential amounts, all of which should have reduced priority.

<sup>139</sup> *Joint Hearing on Eliminating the Social Security Disability Backlog, Committee On Ways and Means*, 111th Cong. 5 (2009) (statement of the Hon. Patrick O’Carroll, Inspector General, SSA).

<sup>140</sup> In 1994, when Congress passed legislation establishing the Social Security Administration as an independent agency, it also created a 7-member bipartisan Advisory Board to advise the President, the Congress, and the Commissioner of Social Security on Social Security and Supplemental Security Income (“SSI”) policy. Social Security Independence Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat.

<sup>141</sup> Steven V. Roberts, *Sensitive Issues Put on the Shelf To Protect Bush*, NEW YORK TIMES (Nov. 16, 1988), <http://www.nytimes.com/1988/11/16/us/sensitive-issues-put-on-the-shelf-to-protect-bush.html> (“Today, it was learned that the Administration is preparing new rules that would restrict the rights of people to appeal Government decisions denying them Social Security or welfare benefits.”).

<sup>142</sup> Irvin Molotsky, *Plan to Curb Benefit Appeals Is Rejected*, NEW YORK TIMES (Dec. 4, 1988), <http://www.nytimes.com/1988/12/04/us/plan-to-curb-benefit-appeals-is-rejected.html> (“The Commissioner, Dorcas R. Hardy, said in a statement that the draft of the proposal had ‘generated inaccurate information and caused undue alarm to the American public.’”).

After a four-year investigation, and obtaining the advice of experts like Professors Verkuil, Lubbers, and Frank Bloch,<sup>143</sup> the Social Security Advisory Board found a serious gap between disability policy and the administrative capacity required to carry out that policy. “There has not been a full-scale review of disability policy and process in over 20 years. The result is a great deal of incoherence and at times demonstrable unfairness.”<sup>144</sup>

To remedy this, the SSAB asked Congress to make a number of changes, including initiating an adversarial system, closing the record at hearing, and establishing rules of practice. It also asked Congress to “rationalize” the role of the Appeals Council and to establish a “Social Security Court” to replace review at the United States District Courts. Professors Verkuil and Lubbers appeared before Congress and specifically recommended closing the record.<sup>145</sup>

Subsequently, on July 27, 2005, SSA published a Notice of Proposed Rulemaking (“NPRM”), which included an attempt to close the record. Also, SSA stated that with a high percentage of claimants represented by counsel at hearings, it recommended the use of an agency representative to balance the interests that would, in essence, modify the nature of the proceedings. These rules were published, but due to pressure principally from the NOSSCR, but also Administrative Law Section of the ABA, some were also

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<sup>143</sup> Paul Verkuil & Jeffrey Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Advisory Board*, STRATAGEM, INC. (Mar. 1, 2002), available at <http://www.ssab.gov/Publications/Disability/VerkuilLubbers.pdf>. See also Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007).

<sup>144</sup> *Hearing on Social Security Disability Program's Challenges and Opportunities*, H. Comm. On Ways and Means, (2001) (statement of Stanford G. Ross, Chairman, Social Security Advisory Board).

<sup>145</sup> *Second in a Series on Social Security Disability Programs' Challenges and Opportunities: Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means*, 107th Cong. (2002).



withdrawn.<sup>146</sup>

There have been repeated suggestions that Congress should establish an independent adjudication agency with exclusive jurisdiction over SSA and CMS cases.<sup>147</sup> Not only are the procedures unique, both agencies exclusively use rulemaking proceedings to set policy, rather than adjudication.

Two independent adjudication agencies provide adjudication of safety and health disputes between the Department of Labor and employers:

- The Occupational Safety and Health Review Commission (OSHRC),
- The Federal Mine Safety and Health Review Commission (FMSHRC).

OSHRC determines whether safety regulations promulgated by the Department of Labor have been violated. FMSHRC adjudicates

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<sup>146</sup> Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590 (proposed July 27, 2005). Under a Disability Service Improvement (DSI) process, a Quick Disability Determination (QDD) experimental process for certain types of claims was initiated where an initial finding of disability could be made within twenty days; the creation of a Medical and Vocational Expert System (MVES), designed to improve the quality and availability of medical and vocational expertise throughout the administrative process; the addition of a Federal Reviewing Official (FRO), who would review appealed initial decisions before such decisions are scheduled for an administrative hearing; and rules implementing the closing of the record were offered, but most were rejected. See Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006). In December 2009, SSA announced ending the DSI program. In May, 2011, SSA issued a final rule. Eliminating the Decision Review Board Reestablishing Uniform National Disability Adjudication Provisions, 76 Fed. Reg. 24,802 (May 3, 2011).

<sup>147</sup> For example, the late Judge Robin J. Arzt suggested a new agency in Robin J. Arzt's, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267 (2003). She also suggested creation of a "Social Security Court" to eliminate jurisdiction of the United States District Courts. This was not the first time it had been suggested. See Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, (2003) (proposing a Social Security Court); Robert E. Rains, *A Specialized Court for Social Security?*, 15 FLA. ST. L. REV. 1, 8 (1987).

violations of mining standards likewise promulgated by the Department of Labor.<sup>148</sup>

If SSA and CMS were to be placed in an adjudication agency, these agencies could act as models. Meanwhile, it is ironic that although SSA and CMS were separated in 2003, they occupy separate offices in cities such as Cleveland, Miami, and Irvine. It very well may be that if SSA and CMS hearings offices were consolidated, it might lead to substantial savings.

It is also apparent that some agencies, such as the NLRB and the FLRA, have procedures and laws that may not be congruent, but which constitute variations on the same theme. The same may be true of the ITC and FTC, and the DOT and the NTSB. Claims heard under the Shipping Act by the FMC are not much different than some of the claims heard by my agency. My agency hears whistleblower claims that may stem from alleged violations of laws and regulations of other agencies, such as the SEC, the EPA, DOT, and the NRC (Nuclear Regulatory Commission). Although these agencies, in theory, may participate in these proceedings, they rarely do. Therefore, perhaps Congress should consider several sets of mini-corps.

## VII.      UNIFORMITY OF AGENCY PROCEDURES

As stated above, some agencies believed that they were superior to the United States circuit courts, and established “acquiescence” policies. In general, the degree of deference accorded to the interpretations that appellate courts review depends on whether the interpretation is offered by a district court or by an agency.

The APA provides agency heads with broad discretion as to the scope of review of administrative law judge decisions. “On appeal from or review of the initial decision, the agency has all the powers

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<sup>148</sup> As Judge Arzt stated, two agencies formed as boards have primarily adjudicative duties:

- The Merit Systems Protection Board (MSPB), and
- The National Transportation Safety Board (NTSB)

However, these both 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.

which it would have in making the initial decision except as it may limit the issues on notice or by rule.”<sup>149</sup> In practice, however, this free hand has been somewhat circumscribed by reviewing courts.

Although the circuits are relatively clear in refusing to accord deference to the district courts upon review of their statutory interpretation decisions, the standard of review accorded agency decisions involving interpretation represents an area of debate, centered around the application of the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, to decisions of law by an agency.<sup>150</sup> According to the Chevron standard of review, circuit courts ask:

- (1) Has Congress directly spoken on the precise issue decided by the agency;
- (2) If not, is the statute silent or ambiguous on the question (was the agency’s decision reasonable)?<sup>151</sup>

In *Dickinson v. Zurko*, the Federal Circuit Court of Appeals used a “clearly erroneous” standard of review of patent office (“PTO”) cases, which generally governs appellate review of district court findings of fact, rather than the standards set forth in the APA, which permit a court to set aside agency findings of fact found to be arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.<sup>152</sup> Justice Breyer, writing for a majority that included Justices Stevens, O’Connor, Scalia, Souter, and Thomas, ruled that although the PTO relied on a statute that preceded the APA, a uniform approach is required unless a clear exception exists.<sup>153</sup>

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<sup>149</sup> 5 U.S.C. § 557 (2006).

<sup>150</sup> 467 U.S. 837 (1984).

<sup>151</sup> *Id.*

<sup>152</sup> *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999).

<sup>153</sup> *Id.* The Federal Circuit determined that under APA § 559, the APA does

not limit or repeal additional requirements . . . recognized by law. In the Circuit’s view: (1) at the time of the APA’s adoption, in 1946, the Court of Customs and Patent Appeals (CCPA), a Federal Circuit predecessor, applied a court/court “clearly

No one has performed a thorough study of agency adjudication. From the standpoint of tracking cases, although this stage is relatively coherent in each agency, cross-agency comparisons are difficult due to the variety of review structures. Moreover, even within an agency, because the review structure is normally quite separate from the hearings office, the logistics of following cases through both stages are problematic. In fact, even within an agency, the standard of review may differ. At my agency, cases may be appealed to two separate boards, the Administrative Review Board (ARB), and the Benefits Review Board (BRB). Historically, the agency took the position that decisions to the ARB were not final; and therefore, the ARB was free to reweigh evidence. The BRB was required to review cases using APA principles of review.<sup>154</sup> Within some agencies, there are apparent turf wars that make evaluation difficult.<sup>155</sup>

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erroneous” standard; (2) that standard was stricter than ordinary court/agency review standards; and (3) that special tradition of strict review consequently amounted to an “additional requirement” that under § 559 trumps the requirements imposed by § 706.

*Id.* at 154 (internal quotation marks omitted). This rationale was rejected. Professor Lubbers advises that he worked on the case, and

the clearly erroneous standard used by the CCPA was an “additional requirement” that survived the enactment of the APA—was rejected. It’s true that the CAFC’s decision based on § 559 of the APA was reversed (we lost), but not because the argument itself was rejected—the Supreme Court simply found (wrongly I think) that the clearly erroneous test had not been consistently enough applied by the CCPA in the past to be an established requirement.

Email from Jeffrey S. Lubbers to author (on file with author).

<sup>154</sup> This distinction has been blurred. As on August 31, 2010, many of the cases that formerly were recommended or proposed to the ARB became “final” decisions.

<sup>155</sup> When the Governmental Accounting Office (GAO) examined cases appealed under the Black Lung Benefits Act, and found a high incidence of remands from the BRB to OALJ, the DOL Office of Administrative Law Judges (OALJ).

Different docket personnel are often involved at each stage and the hearings offices usually lose track of cases after initial decisions are issued.<sup>156</sup> It may be that a review of each agency will disclose that there are rules that should be added to the APA, or that can be added in rulemaking if a Conference or Corps were created. The ABA Judicial Division, the National Judicial College, and the National Association of Administrative Law Judges attempted to initiate a study of adjudication, not only within the Federal government but also among the states. However, funding was never accomplished and a thorough study remains unfulfilled.

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Officials at DOL offered divergent opinions on why cases were remanded. Some administrative law judges said claims are sometimes remanded to OWCP because medical evidence submitted by DOL's approved doctors was incomplete and required clarification or further development. BRB judges said claims are commonly remanded to OALJ for reconsideration because of certain legal deficiencies, such as errors in weighing evidence. However, several administrative law judges said that they believed that BRB sometimes remands claims for further review by the administrative law judge to avoid the potential review of a BRB decision by a United States Circuit Court of Appeals, and others said that in their view, certain remands are the result of BRB reweighing evidence, which is beyond the narrow scope of BRB review. In 2007, an independent program reviewer examined the number of OALJ remands to OWCP and concluded that further study of the causes of remands could help DOL identify policies and procedures that reduce this source of delays. No study has been conducted to determine the causes of remands by any of DOL's adjudicators back to the prior review stage, whether from adjudicatory bodies back to OWCP or from BRB to OALJ, according to DOL officials.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 16 (2009) [hereinafter *GAO Report*].

<sup>156</sup> See The "Good Cause" Exemption from the APA Rulemaking Requirements (Recommendation No. 83-2) 1 C.F.R. § 305.83-2 (1992) [hereinafter *Agency Structures*]. Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1 (1986).

In 2002, Professor Verkuil published a study of SSA court appeals.<sup>157</sup> Whereas most appeals from the “regulatory” agencies are heard by the United States Circuit Courts, district court judges and magistrates hear SSA appeals. Using “outcomes analysis,” he “expected” to find that courts applying the deferential substantial evidence standard would uphold 75-85% of SSA decisions denying benefits.<sup>158</sup> He also expected the affirmation rate of decisions denying disability benefits to be higher than the affirmation rate of a class of agency decisions subject to *de novo* review.<sup>159</sup> To the contrary, he found that courts upheld less than 50% of decisions that deny social security disability benefits and that courts reverse a much higher proportion of disability decisions than of agency decisions that are subject to *de novo* judicial review.<sup>160</sup>

Other studies have rendered quite different “expectations.” In a 1999 study that included all stages of evaluation determined that the “first stage award rate” for new applications submitted to one of the 54 state-based DDS is only 45.9%, whereas the “ultimate award rate” increases to 72.5%, allowing for the option to appeal or re-apply.<sup>161</sup> In some states, that percentage is now much higher.<sup>162</sup>

Although the studies may be accurate, none relate to whether there are differences in rates on a geographic basis, or whether there

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<sup>157</sup> Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002).

<sup>158</sup> *Id.* at 690.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 719. See also *Testimony of Richard J. Pierce, Jr. Before the Social Security Subcommittee of the House Ways and Means Committee*, 112th Cong. (2012). Pierce relies greatly on the fact that Verkuil expressed doubt that “Congress wants [judicial] scope of review to be an irrelevant labeling exercise,” but his findings demonstrate that it is “an irrelevant labeling exercise” in the context of judicial review of social security disability decisions. District courts and circuit courts routinely pay lip service to the deferential substantial evidence standard while actually applying a standard more demanding even than *de novo* review. Verkuil, *supra* note 157.

<sup>161</sup> Hugo Benitez-Silva et al., *An Empirical Analysis of the Social Security Disability Application, Appeal, and Award Process*, 6 LABOUR ECONOMICS 147 (1999).

<sup>162</sup> See *Social Security Disability and Supplemental Security Income (SSI) Disability Claims Allowance Rates, Initial and Reconsideration Adjudicative Level, Fiscal Year 2011, By Nation, Region, and State*, 34 NOSSCR SOCIAL SECURITY FORUM 16 (July 2012) [hereinafter *Statistics (NOSSCR Forum)*].

are other factors to generate variances in rates at the appellate level. The Centers for Disease Control and Prevention (CDC) has evaluated populations by location and impairment, and these statistics are available, but they have not been considered by any of the studies. In reviewing DDS state agency rates at the first and second levels of evaluation of SSA cases,<sup>163</sup> there has not been any study that can reconcile that in some states a claimant has a 75% chance of receiving benefits at a stage below the hearings level, whereas in others a claimant has less than a 30% chance at that level.<sup>164</sup> The high proportion of “reversals” by District and Circuit court judges, suggests that SSA should review its litigation policy, rather than suggest that the initial determinations require other “expectations.”<sup>165</sup>

Unlike most other adjudication, the Social Security Act precludes settlement.<sup>166</sup> In almost any other venue, the vast majority of claims are settled before a decision and order is published and is subject to appellate review. Therefore, any analogy to pure adversarial appeals may not be valid.

Much of the increase in the rate of “reversals” is, to a reasonable degree of probability, due to the fact that SSA claimants are “lawyered up.” According to Social Security, by 1993, claimants requested a hearing in about 75% of all reconsideration denials. The claimant typically retained an attorney for assistance in the appeal

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<sup>163</sup> The initial and reconsideration steps.

<sup>164</sup> See *Statistics (NOSSCR Forum)*, *supra* note 162.

<sup>165</sup> Professor Lubbers advises me that the Verkuil study did compare SSA cases to “a class of cases subject to *de novo* review,” but I think it should be mentioned that those latter cases were FOIA decisions by agencies—where the government seems to get extra deference despite the statutory scope-of-review standard.

<sup>166</sup> Another exception was discussed in *Ramey v. Dir., Office of Workers’ Comp. Program*, 326 F.3d 474, 477 (4th Cir. 2003), where settlements in Black Lung cases were also barred. Although the miner and the coal operator wanted to settle, the Court relied on a DOL interpretation of its own statute to reject settlement. *Id.* at 476–78. A subsequent GAO report suggested that DOL study the costs and benefits of allowing compensation for partial disability and settlement of claims. See *GAO Report*, *supra* note 155. In most Black Lung cases, both the miner and coal operator are usually represented. Another factor may be that in many recent cases, the Black Lung Trust Fund has paid interim benefits to the miner.

process.<sup>167</sup> Apparently, since then, representation has increased. It is reasonable to expect that good representation should skew the expectations.<sup>168</sup>

There is also no mention in the studies that the case law among the circuits may vary. If that is important, as stated above, in 1983, primarily as a remedy for “non-acquiescence,” Senate Bill 1275 included language that would have provided for all administrative appeals to be heard by one Circuit Court.<sup>169</sup> It has yet to be studied whether or not this would result in cost savings.

It is also apparent that these studies have not considered the history of appeals in agencies other than SSA. When ACUS evaluated the SSA Appeals Council, it determined that it “added nothing of value” to the process.<sup>170</sup> Professor Lubbers and the late Judge Robin Arzt have made suggestions for replacement by a Review Board.<sup>171</sup> It may very well be that SSA has more to learn from other agencies’ experiences. Professor Lubbers and the late Judge Arzt suggested that all hearings should be reviewed by a single body, similar to the Social Security court. Such an idea could lead to cost savings through consolidation and elimination of duplication

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<sup>167</sup> Benitez-Silva et al., *supra* note 161, at 163–64.

<sup>168</sup> I had the opportunity to hear hundreds of these cases in several states. I would testify that the quality of representation varies, and if a claimant is able to find the right lawyer, as the claimant controls the presentation of evidence in a non-adversarial setting, chances of losing are low. I also would testify that at least two of my former colleagues denied almost every claim, but were reversed on appeal every time. Many of these cases were remanded, and I heard many of the remands.

<sup>169</sup> Administrative Law Judge Corps Act, S. 1275, 98th Cong. (1983).

<sup>170</sup> *Agency Structures*, *supra* note 156.

<sup>171</sup> Robin J. Arzt, Proposal for a United States Social Security Court 6 (2006) (unpublished manuscript), available at <http://www.abanet.org/adminlaw/annual2006/Tab8Bproposal.pdf>; Frank Bloch et al., *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications: A Report to the Social Security Advisory Board* (2002), available at <http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf>; Paul Verkuil & Jeffrey Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Advisory Board*, STRATAGEM, INC. (Mar. 1, 2002), available at <http://www.ssab.gov/Publications/Disability/VerkuilLubbers.pdf>.



among agencies and result in judicial economy, while promoting uniformity. At least one state has established such a court.<sup>172</sup>

It could also be that in the name of uniformity and fundamental fairness, Congress should include non-APA agencies. A 1992 study by former Administrative Law Judge John H. Frye III (based on 1989 data) identified about eighty-three case-types (involving about 343,000 cases annually) of non-APA adjudication. Frye identified 2,692 Presiding Officers in the federal service. Of the eighty-three case-types, fifteen accounted for 98% of the total.

By far, the greatest number of non-APA adjudications involves immigration deportation cases, where an Immigration Judge (IJ) “shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien “shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government.” The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions.<sup>173</sup> In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), the Supreme Court determined that the APA governed the enabling statute. However, Congress subsequently removed this requirement. There are dozens of Circuit Court decisions, which state that Board of Immigration Appeals (BIA) decisions should follow the APA formula.<sup>174</sup> The ABA issued a report in February 2010, *Reforming*

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<sup>172</sup> The Commonwealth Court is one of Pennsylvania’s two statewide intermediate appellate courts and is unlike any other state court in the nation. Article V, section 4 of the 1968 Pennsylvania Constitution created the Commonwealth Court. It was established in 1970.

<sup>173</sup> 8 U.S.C. § 1229a(1)(a)(1), (b)(1), (4)(B); 8 C.F.R. § 240.1(c).

<sup>174</sup> Noting the high reversal rates of the BIA in the Courts of Appeals, Judge Richard Posner wrote:

This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation’s immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. Whether this is due to resource constraints or to other circumstances beyond the Board’s and the Immigration Court’s control, we do not know, though we

*the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, approved as ABA policy. While it did not recommend that IJ hearings should be APA hearings, or that IJs be selected using the OPM register, it recommended that the BIA and IJs be removed from the Department of Justice and that a Title I Immigration Court be established.<sup>175</sup> At its June 2012 Plenary Session, ACUS approved a recommendation to streamline federal immigration courts but did not accept the ABA suggestions.<sup>176</sup>

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note that the problem is not of recent origin. All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals . . . . And anyway punishment was not the rationale of the Board's action, which appears to have been completely arbitrary. The order of removal is vacated . . . .

*Benslimane v. Gonzales*, 430 F.3d 828, 830, 833 (7th Cir. 2005) (internal citations omitted). Many other Circuit Court opinions express similar views.

<sup>175</sup> REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION 114B, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary\\_of\\_recommendations/114B.authcheckdam.doc](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary_of_recommendations/114B.authcheckdam.doc). See also Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGRATION BULLETIN 1, 14 n.71 (2008); Arnold & Porter, LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness Efficiency, and Professionalism in the Adjudication of Removal Cases*, ABA COMMISSION ON IMMIGRATION (2010).

<sup>176</sup> ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, IMMIGRATION REMOVAL ADJUDICATION: PROPOSED RECOMMENDATION (June 14-15, 2012), available at <http://www.acus.gov/sites/default/files/documents/Proposed-Immigration-Rem.-Adj.-Recommendation-for-Plenary-5-22-12.pdf>. See also Lenni B. Benson & Russell R. Wheeler, *Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Jan. 12, 2012), available at [http://www.acus.gov/sites/default/files/documents/ACUS-Immigration-Removal-Adjudication-Draft-Report-1\\_12\\_12.pdf](http://www.acus.gov/sites/default/files/documents/ACUS-Immigration-Removal-Adjudication-Draft-Report-1_12_12.pdf). Professor Lubbers states that from the beginning, ACUS excluded these "major structural issues" from its scope.

Moreover, the Justice Department hired IJs on a political basis,<sup>177</sup> and after litigation, suspended all hiring of BIA members and IJs in January 2007.<sup>178</sup> DOJ has settled with rejected applicants who were apparently better qualified than some of those hired who apparently remain IJs. It has a new selection method, but the public and the American bar have no input.<sup>179</sup> Although it was suggested<sup>180</sup> that the Justice Department use the OPM register or hire from the existing register, or create an internal register based on merit selection, to try to avoid the appearance of political favoritism and agency bias, neither the ABA Commission nor ACUS recommended it.

The Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ) currently has one ALJ, who adjudicates

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<sup>177</sup> *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, Evidence and Analysis: Immigration Judge and Board of Immigration Appeals Member Hiring Decisions*, U.S. DEPT. OF JUSTICE OFFICE (June 28, 2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf> [hereinafter "IG Report"]; see also Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based On GOP Ties*, THE WASH. POST (June 11, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html>.

<sup>178</sup> IG Report, *supra* note 177. The Justice Department official was reprimanded by the Virginia bar for politicizing the Justice Department's hiring and promotion process. Ryan J. Reilly, *Monica Goodling Reprimanded By Virginia State Bar*, TPMUCKRACKER (May 6, 2011), [http://tpmmuckraker.talkingpointsmemo.com/2011/05/monica\\_goodling.php](http://tpmmuckraker.talkingpointsmemo.com/2011/05/monica_goodling.php).

<sup>179</sup> Under the new process, EOIR's Office of the Chief Immigration Judge (OCIJ) reviews applications and rates each candidate. Three-member EOIR panels of two Deputy Chief Immigration Judges or Assistant Chief Immigration Judges and a senior EOIR manager also perform a review. Selectees are reviewed by the EOIR Director (or his designee) and the Chief Immigration Judge, who together select at least three candidates for a vacancy to recommend for final consideration. A second three-member panel, comprised of the EOIR Director (or his designee), a career SES employee designated by the Deputy Attorney General, and a non-career member of the SES designated by the Deputy Attorney General, then conduct interviews. This panel recommends one candidate for the Deputy Attorney General to recommend to the Attorney General for final approval. Both the Deputy Attorney General and the Attorney General can request additional candidates if they do not approve the candidates forwarded to them. IG Report, *supra* note 177.

<sup>180</sup> Mainly by FALJC and NCALJ.

(1) employer sanctions cases,<sup>181</sup> (2) unfair immigration-related employment practices,<sup>182</sup> and (3) document fraud.<sup>183</sup> At times, she has been asked to sit on the BIA and sometimes has been loaned to other agencies. Wherever and whenever she sits, the APA applies to the proceeding.

At DOL, administrative law judges comprise the Board of Alien Labor Certification Appeals (BALCA) under the Immigration & Nationality Act (INA), which hears claims for permanent certification and most of the decisions are *en banc*. Individual judges hear H-1B visa cases and other temporary INA visa cases. The Department of State issues the visas.

The Contract Disputes Act provides that a board of contract appeals shall “provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing.”<sup>184</sup> A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended.<sup>185</sup> At

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<sup>181</sup> Employer sanctions cases are brought by the Department of Homeland Security, Immigration and Customs Enforcement (ICE) when the agency issues a Notice of Intent to Fine to the employer, and the employer requests a hearing. If liability is found, the ALJ can impose monetary sanctions, issue a cease and desist order, and award attorney’s fees. See 41 U.S.C. § 605(a) (2012); Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 476 (2011); *Executive Office for Immigration Review Releases FY 2010 Statistical Year Book, Book Includes Pending Caseload Numbers for the Immigration Courts*, U.S. Dep’t of Justice (Feb. 1, 2011), <http://www.justice.gov/eoir/press/2011/2010SYB02012011.htm> (last visited May 18, 2013).

<sup>182</sup> These cases are usually initiated when an individual files a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), within the Civil Rights Division. The OSC investigates the charge, and then determines whether or not to file a complaint with OCAHO on behalf of the charging party. If the OSC does not file a complaint, the charging party may file an individual complaint with OCAHO. If liability is found, the ALJ can award back pay, order hiring or reinstatement, and civil penalties where OSC is the complainant. See citations accompanying note 181.

<sup>183</sup> This provision establishes civil penalties for document fraud that relates to satisfying an immigration law requirement or obtaining and immigration-related benefits. Document fraud cases are brought and adjudicated much like employer sanctions cases. See citations accompanying note 181.

<sup>184</sup> 41 U.S.C. § 605(a) (2012).

<sup>185</sup> 41 U.S.C. §§ 607(e), 610 (2012).

one time, three of my colleagues, administrative law judges, also constituted the DOL Board of Contract Appeals (BCA). Although these may not be APA hearings, once an administrative law judge is assigned to hear them, they become so.

The same is true at the MSPB. None of the assigned judges are administrative law judges. However, when an administrative law judge is borrowed by the agency, the proceedings are APA hearings.

Although the Veterans' Administration (VA) holds hearings, the APA does not govern them.<sup>186</sup> Boards of Veterans Appeal (BVA) hearings are informal and non-adversarial.<sup>187</sup> Members of the Board review benefit claims determinations made by local VA offices and issue decisions on appeals. These "law judges," attorneys experienced in veterans' law and in reviewing benefit claims, are the only ones who can issue Board decisions.<sup>188</sup> Staff attorneys, also trained in veterans' law, review the facts of each appeal and assist the Board members.<sup>189</sup> Persons claiming VA benefits are not generally represented by lawyers, and the government is not represented at all. There have been some suggestions that the process should use aspects of the APA, especially the substantial evidence test.<sup>190</sup> In 2003, the ABA recommended that the Secretary of Veterans Affairs select members of the BVA through procedures supposedly modeled on those used for the selection of administrative law judges and board of contract appeals judges.<sup>191</sup>

The ABA also urges that non-APA employment discrimination hearings conducted by the Equal Employment Opportunity

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<sup>186</sup> 38 U.S.C. §§ 7104(a), 7107(b) (2012).

<sup>187</sup> See 38 C.F.R. §20.700(c) (2011).

<sup>188</sup> The judges are not ALJs.

<sup>189</sup> 38 U.S.C. §§ 7103, 7104 (2012).

<sup>190</sup> See Ronald L. Smith, *VA Implementation of the Informal and Non-Adversarial Claims Adjudication System May Not Be Serving Veterans Well*, (Nov. 1, 2001) (presented at the Fall Meeting of the Section of Administrative Law and Regulatory Practice, Washington, D.C.). I served in a panel discussion with Mr. Smith as moderator to discuss the ramifications of applying the APA to VA hearings. The bar and some appellate judges present universally favored adoption of the APA. *Id.* The opposition came mostly from BVA judges who advised that if the substantial evidence test supplanted the clear and convincing test now in force, they would have to write lengthy time-consuming decisions. *Id.*

<sup>191</sup> AMERICAN BAR ASSOCIATION, *Report and Recommendation Number 102* (Aug. 11–12, 2003).

Commission (EEOC) become subject to the APA.<sup>192</sup> EEOC hearings determine the rights of federal employees, applicants for employment, and former employees under the various non-discrimination statutes which EEOC also enforces in the private sector, including Title VII of the 1964 Civil Rights Act, as amended, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq.; and the Americans with Disabilities Amendment Act, 42 U.S.C. 12101 et seq. Since adoption of the ABA policy, the EEOC has been negotiating to voluntarily adopt the APA.

Although the interests of the agencies have been the paramount factor in determining whether the hearings should follow the APA, the main factors should be whether the hearings are fair and whether this is communicated to the public.

Considering the potential of added agencies that may be included as noted above, it very well may be that if procedures were consolidated, it might lead to greater judicial economy and also to substantial potential savings far beyond the \$20 million contemplated by Congress when the Corps Bill was under consideration.

#### VIII. INDIVIDUAL DUE PROCESS V. “OUTCOMES ANALYSIS”

Under our Constitution, litigants are supposed to have a right to present their claims, to confront and cross-examine witnesses, and have a fair opportunity to be heard by an impartial adjudicator. “No person shall be deprived of life, liberty or property, without due process of law.”<sup>193</sup> When a party becomes the target of an individualized governmental decision, that party should have a right

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<sup>192</sup> AMERICAN BAR ASSOCIATION, *Report and Recommendation Number 124* (Aug. 8–9, 2011). Although this resolution passed virtually unanimously at the House of Delegates, there was some opposition from the Administrative Law Section.

<sup>193</sup> U.S. CONST. amend. V. The Fourteenth Amendment, ratified in 1868, uses the same words, called the “Due Process Clause,” to describe a legal obligation of all states. Although the Sixth Amendment right to confrontation applies only in criminal cases, case law and the APA extend it. U.S. CONST. amend. XIV.

to an individualized determination.<sup>194</sup> Most agency hearings are modeled after the common law system contemplated in the right to a fair trial under the Fifth Amendment. The hearings are similar to bench trials before United States District Courts.<sup>195</sup>

The exceptions are at SSA and CMS, where the form of hearing is “non-adversarial,” as the claimant seeking benefits may be represented, but the agency is not. Critics to this process assume certain facts, sometimes using outcomes analysis, to determine that the result should be determinative of the process. Relying on an oft cited SSA case, *Richardson v. Perales*, 402 U.S. 389 (1971), critics of individual due process rely on a majority statement that SSA hearings do not require the same level of due process protections under the Fourteenth Amendment as in other administrative law cases.<sup>196</sup> In another Social Security case, *Mathews v. Eldridge*,<sup>197</sup> parties protected by the due process clause are entitled to “some form of hearing.”<sup>198</sup> The *Mathews* Court determined that a hearing is not required prior to the termination of Social Security disability payments, and the administrative procedures prescribed under the Act fully comport with due process. Critics argue that the elements of that hearing are not defined, and depend on the circumstances of the particular program at issue. There was no mention of the APA in *Mathews*; and in *Perales*, the court specifically stated that it did not consider the APA. However, after *Perales* and *Mathews*, Congress ended any confusion regarding the applicability of the APA to the Social Security Act by enacting “[a]n Act to amend the Social Security Act to expedite the holding of hearings under titles II, XVI

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<sup>194</sup> *Londoner v. Denver*, 210 U.S. 373 (1908).

<sup>195</sup> *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Rhode Island Dep’t of Env’tl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002).

<sup>196</sup> Specifically, *Goldberg v. Kelly*, 397 U.S. 254 (1970), when the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires an evidentiary hearing before a recipient of certain government benefits (such as welfare) can be deprived of such benefits. *Id.* at 261. The individual losing benefits is not entitled to a trial, but is entitled to an oral hearing before an impartial decision-maker, the right to confront and cross-examine witnesses, and the right to a written opinion setting out the evidence relied upon and the legal basis for the decision. *Id.* at 268–70.

<sup>197</sup> 424 U.S. 319 (1976).

<sup>198</sup> *Id.* at 333.

and XVIII by establishing uniform review procedures, and for other purposes.”<sup>199</sup> Under this and later statutes, SSA hearings are APA hearings.<sup>200</sup>

In a more recent case, *Tennessee Valley Authority (TVA) v. Whitman*,<sup>201</sup> although the Environmental Protection Agency (EPA) provided a “hearing” before its Environmental Appeals Board (EAB), comprised of non-ALJs, the 11th Circuit found it did not meet APA hearing requirements.<sup>202</sup>

Moreover, the APA dictates differences in evaluation among agency adjudicators. For example, a Social Security ALJ’s factual determination is entitled to deference, while a factual determination by the Social Security Appeals Council is not.<sup>203</sup>

After noting the unique process, and after determining that the outcomes are unfair, the following suggestions have been offered for SSA hearings:

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<sup>199</sup> Pub L. No. 94-202, 89 Stat. 1135–37 (1976). The House Reports of the bill states:

To avoid any possible misinterpretation, the bill specifically provides that the temporary hearing officers authorized to conduct hearings under the bill would be subject to all the provisions of the Administrative Procedure Act that assure independence from agency control . . . . However, the specific application of these provisions of the APA, together with the provisions of the bill applying the same procedural safeguards to review proceedings under title XVI as apply under title II, should eliminate the possibility of the courts determining that SSI review procedures do not comply with the Administrative Procedure Act or due process.

*Id.* Similar language is in the Senate Report.

<sup>200</sup> *Id.* See also Conversion of Temporary Administrative Law Judges, H.R. Rep. No. 617, 95th Cong. (1st Sess. 1977); UNITED STATES CONGRESS HOUSE COMMITTEE ON WAYS AND MEANS, CONVERSION OF TEMPORARY ADMINISTRATIVE LAW JUDGES: REPORT TO ACCOMPANY H.R. 5723 (U.S. Gov’t Printing Office, 1977).

<sup>201</sup> 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 2096 (2004).

<sup>202</sup> Professor Lubbers argues that there’s no indication that EPA could have satisfied the court if it had used ALJs instead. Email from Jeffrey S. Lubbers to author (on file with author).

<sup>203</sup> *Mullen v. Bowen*, 800 F.2d 535 (6th Cir. 1986).



1. Use of rulemaking by SSA to reduce the number of issues that must be heard at hearing.<sup>204</sup>

Professor Lubbers argues that there might be other general factual issues that could be resolved as fairly and more efficiently through rulemaking as through case-by-case adjudication.<sup>205</sup>

2. Modifying the role of the Appeals Council.

Professor Lubbers suggests replacement of the SSA Appeals Council with a Decision Review Board for the Appeals Council, with power to review both allowances and denials.<sup>206</sup>

3. Consider establishment of a Social Security Court.

Professor Lubbers cites to increases in the numbers of appeals and a lack of uniformity among the district court decisions.<sup>207</sup> He cites to a study that showed “a wide range of outright allowances (not including the numerous remands) among the 48 district courts that had over 100 appeals, with a high of about 28% and a low of zero.”<sup>208</sup>

4. Introduce government attorneys/adversarial hearings.

Professor Lubbers notes that the non-adversarial system makes a judge’s job more difficult, and asks that “counselors,” not prosecutors, should be used, as “[he is] not convinced that the benefits of transforming the program from an inquisitorial to an

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<sup>204</sup> See *Testimony of Jeffrey S. Lubbers: Before the Social Security Subcommittee of the House Ways and Means Committee*, 112th Cong. (June 27, 2012), available at [http://waysandmeans.house.gov/uploadedfiles/lubbers\\_testimony.pdf](http://waysandmeans.house.gov/uploadedfiles/lubbers_testimony.pdf) [hereinafter *Testimony of Lubbers*].

<sup>205</sup> *Id.*

<sup>206</sup> This process was tried on an experimental basis in one geographic region but was abandoned.

<sup>207</sup> *Testimony of Lubbers*, *supra* note 204, at 9–10.

<sup>208</sup> *Id.* at 15.

adversary program would outweigh the considerable costs of doing so.”<sup>209</sup>

On July 22, 2010 the CBO issued “Social Security Disability Insurance: Participation Trends and Their Fiscal Implications,”<sup>210</sup> and on July 16, 2012 issued “Policy Options for the Social Security Disability Insurance Program.”<sup>211</sup> CBO evaluated how SSA hires and trains “employees” who conduct disability application hearings. It discussed SSA representation at hearings, “which in the short term would add certain costs for hiring and training but might over the long run result in lower spending for the program because fewer people would be admitted.”<sup>212</sup>

If the government were represented, ABA policy would require the agency to provide free representation to pro se claimants under the ABA Model Access Act.<sup>213</sup>

5. Eliminate the right to a hearing before an administrative law judge.

Professor Richard J. Pierce, Jr., argues<sup>214</sup> that the decisions of the state agencies at SSA are more accurate than those of the judges.<sup>215</sup>

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<sup>209</sup> *Id.* at 16.

<sup>210</sup> CONG. BUDGET OFFICE, SOCIAL SECURITY DISABILITY INSURANCE: PARTICIPATION TRENDS AND THEIR FISCAL IMPLICATIONS, ECONOMIC AND BUDGET ISSUE BRIEF (July 22, 2010), *available at* [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/116xx/doc11673/07-22-ssdisabilityins\\_brief.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/116xx/doc11673/07-22-ssdisabilityins_brief.pdf).

<sup>211</sup> CONG. BUDGET OFFICE, POLICY OPTIONS FOR THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (July 16, 2012), *available at* [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance\\_print.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance_print.pdf).

<sup>212</sup> CONG. BUDGET OFFICE, POLICY OPTIONS FOR THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 15 (July 16, 2012), *available at* [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance\\_print.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance_print.pdf).

<sup>213</sup> ABA REPORT TO THE HOUSE OF DELEGATES (Aug. 2010), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_104\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf).

<sup>214</sup> Richard J. Pierce, *What Should We Do About Administrative Law Judge Disability Decisionmaking?* CATO: REGULATION (2011), *available at* <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-3.pdf>.

He relies in large part on the assumption that the decisions rendered by judges are inaccurate.<sup>216</sup> Pierce also references Justice Antonin Scalia, “The ALJ Fiasco—A Reprise,”<sup>217</sup> who argued that judges impose the “highest” salaries and occupy a high proportion (24% to 73%) of the Senior Executive Service in each agency.<sup>218</sup>

In some agencies, because of “performance awards” and the right to overtime pay, some administrative law judges make less than the staff.<sup>219</sup> Also, administrative law judges are not part of the Senior Executive Service. Professor Pierce argues that billions of dollars could be saved in that manner.<sup>220</sup>

Over time, a number of suggestions would have included other agencies. Agencies continue to have an irresistible impulse to appoint their own judges without regard to claims of favoritism and bias. There were attempts to appoint non-APA judges to hear cases currently heard by APA judges at the International Trade Commission. There have been attempts to curtail APA procedures at the Small Business Administration, the Federal Communications Commission (FCC), the Energy Department (FERC), and the

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<sup>215</sup> He also accuses USDC judges of failing to follow the law:

District judges should be instructed to review SSA decisions as final decisions based solely on the record created at the agency. At present, district judges are required to permit applicants who appeal a decision denying benefits to obtain a remand to SSA to allow the applicant to introduce new evidence. That is not the way other agency review proceedings are conducted. The norm in other contexts is judicial review based solely on the record before the agency.

*Id.* at 40. In many contexts, this is certainly not the case.

<sup>216</sup> *Id.* at 36.

<sup>217</sup> Justice Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

<sup>218</sup> *Id.*

<sup>219</sup> This is especially true at agencies such as the SEC where the staff is entitled to enrichment pay, while administrative law judges receive pay under the AL schedule. In an anomaly, some law clerks may be able to make more than their employing judges.

<sup>220</sup> See Pierce, *supra* note 214, at 36.

Department of Education; and, at present, there is a bill in Congress to abolish the EPA and, with it, its hearing program.<sup>221</sup>

6. Demote or remove administrative law judges.<sup>222</sup>

Professor Pierce argues that Social Security judges are “unconstitutional,” referencing *Free Enterprise Fund v. Public Company Accounting Board* (PCAOB), 130 U.S. 3138 (2010). Article II, Section 2 of the Constitution’s Appointments Clause, requires that the president, and no one else, pick the principal Federal officers (with Senate approval), while permitting “heads of departments” to pick “inferior officers,”<sup>223</sup> who are supervised and directed by “principal officers.” PCAOB members are not picked by the president, but by the SEC commissioners as a group. By striking the restrictions on removing PCAOB members, and thus making them subject to termination at will by the SEC, the Court was able to render PCAOB members inferior officers who could be validly picked by someone other than the president under the Appointments Clause.

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<sup>221</sup> Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65 (1996). He argued then and maintains now that agencies are “vot[ing] with their feet” because of the problems with the ALJ program. *Id.* at 72. If that was true then, it was because of politics. I find that when the economies of scale and the danger of public anger due to perceived injustices are factored, due process under the APA is a bargain.

<sup>222</sup> He would require employers to share the cost of disability decisions; require SSA review of past decisions to grant benefits; implement SSA quality controls on judges; and eliminate nonexertional restrictions as a potential disability.

<sup>223</sup>

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

U.S. CONST. art. II, § 2, cl. 2.

Thus, Professor Pierce, by analogy, states that in order to be “inferior,” one must be subservient, and finds that SSA judges are actually “principal,” rather than “inferior” officers, since they are unaccountable to the agency for their decisions.<sup>224</sup>

Further, he cites to *Landry v. FDIC*<sup>225</sup> to argue that as the SSA decisions are “final,” they are “officers of the United States” rather than employees, who would render only recommended decisions as the FDIC administrative law judge was required to do.<sup>226</sup> He argues that SSA’s rules allow an appeal of an SSA judge’s decision to a higher authority in the agency “only at the behest of an applicant whose application for benefits has been denied by an ALJ.”<sup>227</sup> ALJ decisions that grant benefits are final.<sup>228</sup> They are not reviewable by any institution of government.<sup>229</sup> Thus, it is clear that SSA ALJs are “officers” as that term is used in the constitution.

However, SSA has had “own motion” review of selected decisions for many years.<sup>230</sup> Therefore, the predicate to the

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<sup>224</sup> Professor Lubbers states that the discussion of the constitutionality of for-cause protection for ALJs appointed by agency officials who also have for-cause protection after the PCAOB case should also discuss *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). It finds, among other things, that the “for cause” removal provision protecting the Board judges is unconstitutional because it contributes to making them principal officers that would (if the provision were not severed) make the judges’ appointment violative of the Appointments Clause. *Id.*

However, those judges were not APA judges with section 11 protections. I also note that the agency, the Library of Congress, capitulated to pressure and acquiesced. Under the APA, OPM would, I argue, have an affirmative, statutory duty to intercede on behalf of the judges.

<sup>225</sup> 204 F.3d 1125 (D.C. Cir. 2000).

<sup>226</sup> Pierce, *supra* note 214, at 40.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Section 304(g) of Public Law 96-265, enacted June 9, 1980, states that: “The Secretary . . . shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act . . . .” For Example, see SSR 82-13: “OHA [now ODAR] will conduct a comprehensive, ongoing program under which a prescribed percentage of administrative law judge decisions involving the issue of disability, particularly those allowing previously denied claims for disability

argument, that “[award decisions] are not reviewable by any institution of government,” is not accurate.<sup>231</sup> If *Landry* is supposed to apply to every other agency besides the FDIC, it did not contemplate that an agency may delegate any powers it may have to an “inferior” officer, or recognize that Article II, Section 2 of the Constitution does not expressly limit delegation of agency authority.

Moreover, although decisions may be “final,” they may be reviewable. For example, almost all of the decisions I render at the Department of Labor involve several parties. Whereas at one time, in some categories of cases we rendered only recommended decisions, and some of those were automatically reviewed, by August 31, 2010, our rules were changed to convert most of the former recommended decisions to “final” decisions. The parties, including my agency, are free to appeal.

7. Recently, Samuel Johnson, the Chair of the Subcommittee on Social Security, House Ways and Means Committee, inquired whether it would be possible to replace the SSA judges.

This has been considered intermittently since state disability was acquired by Social Security in 1973. Former chairmen of the Subcommittee, such as James Bunning, advocated permitting the state agency DDS determination to be the “final” determination. Professor Lubbers wrote about it in “APA-Adjudication: Is the Quest for Uniformity Faltering?,”<sup>232</sup> regarding use of non-APA judges.

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benefits, will be evaluated prior to their effectuation, even though there is no request for review.”

<sup>231</sup> Jon C. Dubin & Robert E. Rains, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, AMERICAN CONSTITUTION SOCIETY (Mar. 8, 2012), available at <http://www.acslaw.org/publications/issue-briefs/scapegoating-social-security-disability-claimants-and-the-judges-who-evalu>. They find that Professor Pierce misinterprets the problem with the system and find that his proposed solutions are misguided.

Whereas Pierce asserts that the “increase in the proportion of the population that has been determined to be permanently disabled is attributable to ALJ decisions,” they note that administrative law judge decisions amount to a relatively small portion of disability awards, as the DDS perform 75% of total annual awards. *Id.* But they also do not address that there is no uniformity to the DDS determinations.

<sup>232</sup> Lubbers, *supra* note 221.

When the SSI program was created, although the judges who heard SSI cases were employees of SSA, they were not APA judges, although their colleagues who heard SSA disability insurance benefits cases were.<sup>233</sup>

In 2005, the ABA suggested the opposite, that Congress should extend due process rights beyond traditional APA cases.<sup>234</sup> It categorized the APA cases as “Type A” adjudication.<sup>235</sup> In the report to the ABA House of Delegates, the Administrative Law Section noted that numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA’s adjudication provisions.<sup>236</sup> These were termed, “Type B” adjudications.<sup>237</sup> Although the following are not contained in the actual recommendation, they include:

1. Extend certain APA procedural protections to Type B adjudication.
2. Require adoption of ethical standards for ALJs and POs (presiding officers in non-APA hearings) and protect full-time POs against removal or discipline without cause.
3. Clarify the definitions of rule and adjudication under the APA.
4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication.
5. Clarify the APA provisions relating to evidence.
6. Clarify the ability of all adjudicating agencies to issue declaratory orders.
7. Clarify the right to obtain transcripts at agency’s cost of duplication.

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<sup>233</sup> See Lubbers, *supra* note 221, regarding use of non-APA judges.

<sup>234</sup> AMERICAN BAR ASSOCIATION, *Report and Recommendation Number 114* (2005).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.<sup>238</sup>

In 2000, the ABA determined that Congress should prefer APA adjudication over other forms, and recommended that it create a default provision.<sup>239</sup> If Congress failed to include language concerning application of the APA to a statute, it would be presumed that the APA should control.<sup>240</sup> Although Congress has not enacted these provisions, they remain ABA policy and remain broader ideas about uniformity than any of the suggestions set forth above.

As of this writing, neither the Commissioner of Social Security or OPM has responded to Chairman Johnson. However, it is clear that the APA must be applied uniformly except where Congress has expressly stated otherwise.<sup>241</sup> So far, neither Professor Pierce nor anyone else has directed the Chairman to an express, or even an implied, statement in the Social Security Act that would preclude application of the Act.

#### IX. FINDINGS OF FACT

Upon review, I find that Congress, nor anyone else, has performed an extensive review of APA adjudication. Therefore, most of the “outcomes” assumptions about APA adjudication are mere folklore. Although it is probably true that adversarial hearing decisions are more valid than inquisitional hearings, no data has been produced to verify this fact.

I also find that the “cost” of having an unbiased adjudicator cannot be measured in purely economic terms.<sup>242</sup> If decisions are continually considered to be unfair, the reputation of every agency and the entire government may be jeopardized. Therefore, the public interest must be factored into any consideration. Moreover,

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<sup>238</sup> *Id.*

<sup>239</sup> See AMERICAN BAR ASSOCIATION, *supra* note 234.

<sup>240</sup> *Id.*

<sup>241</sup> *Dickinson v. Zurko*, 527 U.S. 150 (1999).

<sup>242</sup> “Due process is perhaps the most majestic concept in our whole constitutional system.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).



uniformity may bring judicial and economic economies, which might make due process a bargain.<sup>243</sup>

Although the functions of administrative law judges are clearly judicial, not “executive,” OPM and the employing agencies consider ALJs as “mere” employees. In fact, when representatives of the administrative law judge organizations met with the current OPM Director for the first time, he stated that administrative law judges were “judicial” and that judicial rules should apply. In the ensuing three years since the Director made that statement, however, OPM has not changed its position.<sup>244</sup> Section 11 of the APA and *Nash v. Califano* provide otherwise.

It is not clear whether the investigators of the studies about SSA are aware that decision making has been “dumbed down,” first by use of the “sequential evaluation,” which requires a judge to make certain findings,<sup>245</sup> and also by the listings of impairments,<sup>246</sup> which if met,

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<sup>243</sup> In 1989, the CBO determined that conservatively, a Corps Bill could save \$20 million per year. In 2012, that amount would yield approximately \$140 million.

<sup>244</sup> See *Mahoney v. Donovan*, 824 F. Supp. 2d 49 (D.D.C. 2011). The court dismissed the suit, holding that: (1) ALJ failed to exhaust his administrative remedies with respect to retaliation claim under Rehabilitation Act; (2) ALJ did not suffer materially adverse employment action; (3) ALJ was not subjected to hostile work environment; and (4) ALJ lacked standing to bring APA claims. *Id.* Mahoney, the Chief ALJ at HUD, alleges that, among other things, that HUD officials selectively assigned cases based on political considerations and failed to provide adequate resources for legal research. Although he asked OPM to review his allegations, they failed to protect his judicial independence, stating that as a mere employee, he had a duty to follow orders, even if they were unreasonable and violated the APA. *Id.*

<sup>245</sup> 20 C.F.R. § 404.1520 and § 416.920:

The five-step sequential evaluation process. The sequential evaluation process is a series of five “steps” that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section). We use this residual functional capacity assessment at both step four and step five when we evaluate your claim at these steps. These are the five steps we follow:

provide an automatic award without further development by the administrative law judge. A judge is not free to award benefits without addressing the sequential evaluation. I assume most of the appellate decisions that reversed the SSA denial decisions are rendered because “substantial evidence” does not address certain shifting of the burdens of proof from the claimant to the government;<sup>247</sup> and, as the government was not represented at the

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(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled.

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled.

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled.

(iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled.

(v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

<sup>246</sup> The Listing of Impairments describes, for each major body system, impairments considered severe enough to prevent an individual from doing any gainful activity (or in the case of children under age 18 applying for SSI, severe enough to cause marked and severe functional limitations). Most of the listed impairments are permanent or expected to result in death, or the listing includes a specific statement of duration is made. For all other listings, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months. The criteria in the Listing of Impairments are applicable to evaluation of claims for disability benefits under the Social Security disability insurance program or payments under both the SSI program. 20 C.F.R. pt. 404, subpt. P, app. 1.

<sup>247</sup> For example, in adult disability hearings, once it is determined that a claimant who has a medically determinable impairment cannot return to former work, the burden shifts to SSA to prove that there are jobs that exist in the national economy that the claimant can perform. *See* step (v), *supra* note 245.

hearing and the claimants were, the burden has not been met.<sup>248</sup> Moreover, at SSA, the judge has the duty to develop the record to benefit the claimant.<sup>249</sup> This is no mean trick.<sup>250</sup>

Moreover, the professors rely in large part on Professor Verkuil's "outcomes analysis" methodology of investigating the data attributed to court review. If the data is accurate, why not apply regression analysis (and, if so, what type of regression), analysis of variance, structural equation modeling, survival analysis, or some other technique? There also is no mention of the fact that the Social Security Act, unlike most other statutes, is a "humanitarian" statute that is claimant friendly, and is interpreted accordingly.<sup>251</sup>

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<sup>248</sup> In writing this paper, I asked SSA statisticians whether they could determine at which step of the sequential evaluation an award or denial is made. Apparently, they cannot. It would be interesting to determine what percentage of claims are denied because a claimant has engaged in substantial gainful activities at step one, or what percentage of claims are denied because no medically determinable impairment was proven at step two, etc. Although SSA judges hear claims "*de novo*," it would be interesting to enquire whether appeals can be limited only to jurisdiction and/or standing before a presentation of further evidence can be proffered.

<sup>249</sup> *Reed v. Massanari*, 270 F.3d 838 (9th Cir. 2001); *Haley v. Massanari*, 258 F.3d 742 (8th Cir. 2001); *Smith v. Apfel*, 231 F.3d 433 (7th Cir. 2000).

<sup>250</sup> Although *Perales* is often cited for the proposition that ALJs wear three hats, the Court decision actually states:

[We are not persuaded] by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The Hearing Examiner [ALJ] . . . does not act as counsel. He acts as an examiner charged with developing the facts.

*Richardson v. Perales*, 402 U.S. 389, 410 (1971). The decision was six to three; Justice Blackmun wrote the majority opinion. *Id.*

<sup>251</sup> *E.g.*, the Social Security Act is a remedial statute which must be liberally construed in favor of disability if a disability is proven. *See Combs v. Gardner*, 382 F.2d 949, 956 (6th Cir. 1967); *Polly v. Gardner*, 364 F.2d 969 (6th Cir. 1966). "[S]ince the Act is remedial in nature, it should be given a liberal construction in order to effectuate its purpose." *SSR 71-30: Sections 413(a), 413(b), and 422(d), Federal Coal Mine Health and Safety Act of 1969; Sections 223(a), 223(b), and 224(a), Social Security Act — Disability Insurance Benefits — Black Lung Benefits — Monthly Payment Period*, SOCIAL SECURITY AND ACQUIESCENCE RULINGS, available at [http://www.socialsecurity.gov/OP\\_Home/rulings/di/09/SSR71-](http://www.socialsecurity.gov/OP_Home/rulings/di/09/SSR71-)

Professor Lubbers cited to *Heckler v. Campbell*, in which the Court upheld the agency's use of its "medical-vocational guidelines," which determined "the types and numbers of jobs that exist in the national economy," so that the issue did not have to be re-determined in every individual adjudication and suggested more regulations to eliminate the need for fact finding.

If SSA wants to manage outcomes of its decisions, it could determine:

1. Whether claimants, rather than administrative law judges, should bear responsibility for developing the record. Whereas claimants were once universally pro se, they now are almost universally represented, most by competent counsel;
2. Whether the decisions at all levels should be made public and that legal opinions regarding disability should be published;<sup>252</sup>
3. Whether principles of vocational rehabilitation should be applied,<sup>253</sup> and

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30-di-09.html (last visited May 18, 2013); and many other case decisions. Likewise, in DOL workers' compensation type cases, "[a]ll doubts are to be construed in favor of the employee in accordance with the remedial purposes of the Act." *Odom Constr. Co. v. United States Dep't of Labor*, 622 F.2d 110, 115 (5th Cir. 1980). See also Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9 (2000). Professor Mullins is also author of the *Manual for Administrative Law Judges*. Morell E. Mullins, Sr., *Manual for Administrative Law Judges*, <http://ualr.edu/malj/malj.pdf> (last visited Apr. 7, 2013).

<sup>252</sup> In a recent request to the SSA Inspector General, senators complained that at least 100 of the 1,500 judges at Social Security are approving 90% or more of the cases they review. "These numbers defy conventional logic and demand further scrutiny." Letter to Patrick J. Carroll from United States Senate's Committee on Finance (May 20, 2011) (on file with author).

The agency is overly concerned with the Privacy Act of 1974, and could "sanitize" its decisions, so that Congress and the public could read judges' decisions. Sunlight may be a better disinfectant. Professor Lubbers asks whether I would open the determinations at all levels. I would. At common law, all government determinations should be open. That does not mean that the patient records should be open.

<sup>253</sup> In evaluating disability claims, SSA does not recognize that under the Americans with Disabilities Act of 1990 (ADA), including changes made by the ADA Amendments Act of 2008 (Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008)),

4. Whether the medical vocational guidelines are still relevant as the world of work has changed. The last update of the Department of

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require that certain accommodations to the workplace must be considered. At my agency, in cases involving the Longshore and Harborworkers' Act and extensions, once a claimant has a disability, the burden shifts to the employer to prove that there may be "suitable alternate employment." At SSA, the burden is on the government to show:

If an individual cannot perform any past relevant work because of a severe impairment(s), but the remaining physical and mental capacities are consistent with meeting the physical and mental demands of a significant number of jobs (in one or more occupations) in the national economy, and the individual has the vocational capabilities (considering age, education, and past work experience) to make an adjustment to work different from that performed in the past, it shall be determined that the individual is not disabled. However, if an individual's physical and mental capacities in conjunction with his or her vocational capabilities (considering age, education and past work experience) do not permit the individual to adjust to work different from that performed in the past, it shall be determined that the individual is disabled.

*SSR 86-8: SSR 86-8: Titles II and XVI: The Sequential Evaluation Process*, SOCIAL SECURITY AND ACQUIESCENCE RULINGS, available at [http://www.socialsecurity.gov/OP\\_Home/rulings/di/01/SSR86-08-di-01.html](http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR86-08-di-01.html) (last visited May 18, 2013). Therefore, if a person had no or limited skills acquired from past relevant work, "disability" is directed as a matter of law. *Id.*

Although this is the subject of another paper, I find that they cannot distinguish between SSA DIB claims, where the claimant is, in effect, seeking early retirement, because (s)he is fully and currently insured, having paid into the trust fund through FICA taxes, and "pure" SSI claimants, who generally have NO work history and have no insured status. If SSI claimants have no work history, theoretically, they are automatically "disabled" under the "grids" at age forty-five if they have any medically determinable restriction.

In fiscal year 2011, 66.1% of claimants who applied at the initial stage were approved in Puerto Rico. Of those rejected, 37.4% were awarded at the reconsideration level. There is no indication in the statistics how many of those appealed. *See Statistics (NOSSCR Forum)*, *supra* note 161. At the hearings level, at least one SSA ALJ in Puerto Rico had a 100% approval rate. *See also* Damien Paletta, *Puerto Rico Disability Claims Probed*, THE WALL STREET JOURNAL (Sept. 11, 2011), <http://online.wsj.com/article/SB10001424053111903532804576564543481258206.html>. However, all of these claims involve claimants who have an earnings record as there is no SSI in Puerto Rico.

Labor's *Dictionary of Occupational Titles* was done in 1991. It is reasonable to expect that the world of work has radically changed over the past 20 years.

In addition, although obsessed with the administrative law judge reversals, the Social Security Subcommittee of Ways and Means has never investigated why state agencies have had such disparate results. It also does not consider that although Social Security is a national program, there may be demographic and geographic disparities.<sup>254</sup>

Agencies pay OPM a "tax" based on the numbers of their judges to pay for the expense of administering the ALJ program.<sup>255</sup> OPM has never accounted for the millions of dollars in receipts received during the time that the *Azdell* litigation was pending. It certainly did not expend them on the administrative law judge program. Currently, OPM has been conducting a study to replace the examination currently used for candidates for the register. It is clear that this is a costly effort that is most probably unnecessary, as the major factors for consideration should be trial experience, prior judicial experience, and judicial temperament.<sup>256</sup> However, OPM has catered to agency demands to hire from within by watering the requirements. It has not been certifying older applicants. It has not been performing background checks, and although bar records can be easily obtained to initiate an investigation, candidates with phony credentials have been certified for hire.

OPM also has not met its obligations to enforce application of the APA; has not promoted uniform rules of practice; has not established a standard ethics code, which would have eliminated duplication and costs for state CLE requirements now passed on to agencies; has not promoted professionalism; has not been interested in continuing

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<sup>254</sup> For example, a claimant with transferrable skills to manufacturing bench work may be "not disabled" in a region of the country where there may be a "significant" number of manufacturing bench work jobs, but be found "disabled" in a region where no such jobs exist.

<sup>255</sup> \$1633 per judge per annum. OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, INTERAGENCY AGREEMENTS WITH THE OFFICE OF PERSONNEL MANAGEMENT FOR ADMINISTRATIVE LAW JUDGE SERVICES, A-05-12-22144, Table 1 (Feb. 2013), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-22144.pdf>.

<sup>256</sup> The Minnesota Multiphasic Inventory Test (MMPI) is probably a better indication of temperament than any of the instruments under consideration.

judicial education or peer review; and has been, in essence, a toady for SSA in maintaining the ALJ Register.

X. CASE STUDY IN THE NEED FOR UNIFORMITY—SUBPOENA  
POWER<sup>257</sup>

The First Amendment provides that “Congress shall make no law [restricting the right] to petition the Government for a redress of grievances.”<sup>258</sup> Although the First Amendment does not express how, in furtherance of being able to seek redress, the APA Section 556(d) provides: “A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>259</sup>

Parties should be able to prosecute or defend a case in any manner deemed fit. It may be that the crucial witness cannot be brought to testify. Although the APA authorizes subpoenas, some agencies refuse to honor that provision.<sup>260</sup> Although there have been some suggestions from the ABA and even from ACUS to support uniformity, Congress has not acted. For example, in 1974, ACUS recommended that the APA should be amended: (1) To make agency subpoenas available in all agency proceedings, both rulemaking and

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<sup>257</sup> This material has been submitted to ACUS and was used at a FALJC seminar in 2009. It was compiled in conjunction with Todd Smythe, Esquire, Staff Attorney, Office of Administrative Law Judges, United States Department of Labor. Participants from several other agencies indicated that they have similar difficulties.

<sup>258</sup> U.S. CONST. amend. I.

<sup>259</sup> 5 U.S.C. § 556(d) (2012).

<sup>260</sup> At certain non-APA agencies, due process is not observed. Some restrict or eliminate the right to cross-examine. For example, under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask “follow-up questions” of the witnesses. 38 C.F.R. § 20.700(c) (2012) (“Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses, but cross-examination will not be permitted.”). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. 26 C.F.R. § 301.6330-1(d)(1) A-D6 (2012) (“The taxpayer or the taxpayer’s representative does not have the right to subpoena and examine witnesses at a CDP hearing.”). The issues in a CDP hearing would not ordinarily involve credibility conflicts, so cross-examination should not be necessary. At the Nuclear Regulatory Commission (NRC), panels have the authority to restrict cross-examination.

adjudication, which are subject to sections 556 and 557 of Title 5, United States Code, and (2) to make clear that the power to issue subpoenas in such proceedings shall be delegated to presiding officers.<sup>261</sup> We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of Title 5, United States Code to read as follows:

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpoenas. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words “subpoena authority”; in the heading after the words “powers and duties”; to delete the words “authorized by law” in subparagraph (c)(2), to redesignate subsections (d) and (e) as (e) and (f) respectively, and to add the following subsection (d):

(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpoena any person to appear and testify or to appear

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<sup>261</sup> 39 Fed. Reg. 23041 (June 26, 1974); Recommendation 74-1, Subpoena Power in Formal Rulemaking and Formal Adjudication, 1 C.F.R. § 305.74-1 (1993).



and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpoenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of any person to obey a subpoena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpoenas and for the judicial enforcement thereof.<sup>262</sup>

The APA provides that “[a]gency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.”<sup>263</sup> The APA further provides in the section describing the powers and duties of administrative law judges that “[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may . . . issue subpoenas authorized by law.”<sup>264</sup> In 1983, the Secretary of Labor published Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.<sup>265</sup> Section 18.24 provides the general rule for issuance of subpoenas by the Chief Administrative Law Judge or the presiding administrative law judge.<sup>266</sup> The provision states that the judge “may issue subpoenas as authorized by statute or law upon written application of a party

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<sup>262</sup> *Id.*

<sup>263</sup> Administrative Procedure Act, 5 U.S.C. § 555(d) (2012).

<sup>264</sup> *Id.* § 556(c)(2).

<sup>265</sup> Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18 (2012).

<sup>266</sup> 29 C.F.R. § 18.24 (2012).

requiring attendance of witnesses and production of relevant papers, books, documents, or tangible things in their possession and under their control.”<sup>267</sup>

At the DOL, issuance of subpoenas by administrative law judges is expressly authorized by the governing statute in many, if not most, ALJ hearings. For example, Section 927(a) of the Longshore and Harbor Workers Compensation Act specifically provides for issuance of subpoenas in respect to claims for compensation under the Act.<sup>268</sup>

Beginning in the early 1980s and continuing through 2010, Congress enacted a series of employee protection (‘whistleblower’) laws relating to various safety and corporate financial matters.<sup>269</sup> Seventeen of those laws include the right to request a hearing before a Department of Labor (DOL) administrative law judge if a party contests the findings of the investigatory agency.<sup>270</sup> None of those laws address whether or not an ALJ has the authority to issue subpoenas, and for a number of years judges were divided on the issue. In *Childers v. Carolina Power & Light. Co.*, the

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<sup>267</sup> *Id.*

<sup>268</sup> Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 927(a) (2012). See generally *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129, 132 (1986) (en banc); *Sanchez v. Pittston Stevedoring Corp.*, 5 BRBS 458, 462 (1977).

<sup>269</sup> See, e.g., Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 320–21 (1993); 77 Fed. Reg. 71687, 72143 (Dec. 4, 2012).

<sup>270</sup> See Clean Air Act, 42 U.S.C. § 7622 (2012); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (2012); Consumer Product Safety of 2008, 15 U.S.C. § 2087; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5567 (2012); Energy Reorganization Act, 42 U.S.C. § 5851 (2012); Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by P.L. No. 110-053, § 1521; Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2012); FDA Food Safety Modernization Act, Section 402, 21 U.S.C. 399d (2012); National Transit Systems Security Act of 2007, 6 U.S.C.A. § 1142 (2012); Patient Protection and Affordable Care Act, 30 U.S.C. §§ 921(c)(4) and 932(l) (2012); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (2012); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2012); Seaman’s Protection Act, 46 U.S.C. § 2114 (2012); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2012); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2012); Toxic Substances Control Act, 15 U.S.C. § 2622 (2012); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2012).

Administrative Review Board (ARB), which is delegated with the authority to act for the Secretary of Labor in review or on appeal of DOL whistleblower decisions, ruled that judges have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding.<sup>271</sup> The ARB reviewed statutory and decisional authority and found that:

- “[a]dministrative subpoenas are essential tools widely used by agencies responsible for assuring compliance with health and safety legislation.”<sup>272</sup>
- although some authority had assumed that administrative subpoena power is delegable only by express statutory terms, closer review of the “express authorization” rule reveals that it is not relevant to the question of whether agencies are authorized to issue administrative subpoenas.<sup>273</sup>
- statutory mandates for agencies to provide formal trial-type hearings, for example, the ERA whistleblower provision, necessarily encompass subpoena authority (citing authority to effect that it would be incongruous to grant an agency authority to adjudicate and make findings of fact, without also providing the authority to assure the soundness of the fact finding).<sup>274</sup>
- an agency given the power to adjudicate is entitled to use subpoenas “simply by virtue of the agency’s discretion to choose procedural mechanisms.”<sup>275</sup>

The ARB noted in *Immanuel v. United States Department of Labor*<sup>276</sup> that the Fourth Circuit ruled that an administrative law

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<sup>271</sup> Childers v. Carolina Power & Light Co., ARB No. 98-077, 2000 WL 1920346, at \*7 (DOL Adm. Rev. Bd. Dec. 29, 2000).

<sup>272</sup> *Id.* at \*3.

<sup>273</sup> *Id.* at \*4, \*6.

<sup>274</sup> Atl. Richfield Co. v. U.S. Dep’t of Energy, 769 F.2d 771, 795 (D.C. Cir. 1984).

<sup>275</sup> Childers, 2000 WL 1920346, at \*6–\*7

<sup>276</sup> No. 97-1987, 1998 WL 129932, at \*5 (4th Cir. Mar. 24, 1998).

judge “lack[s] subpoena authority under the whistleblower provision of the Federal Water Pollution Control Act.”<sup>277</sup> “The *Immanuel* court reasoned that administrative subpoenas must be authorized by express terms in the enabling legislation because §§ 555(d) and 556(c)(2) of the APA state that agencies may issue subpoenas in adjudications when ‘authorized by law.’”<sup>278</sup> The ARB found that the *Immanuel* court assumed that the term “authorized by law” means “authorized by express statutory terms.”<sup>279</sup> The ARB, however, held that “[a]uthorized by law” is clearly not the same as “authorized by explicit statutory text.”<sup>280</sup>

On July 27, 2001, the Acting Solicitor of Labor issued a Memorandum to the Department’s Associate Solicitors, Regional Solicitors and Associate Regional Solicitors, stating that the *Childers* decision was wrongly decided, and directing that the Department’s attorneys “should not rely on the Board’s dictum in requesting subpoenas or responding to subpoenas in litigation before the Department’s adjudicative agencies .”<sup>281</sup> The United States District Court for the District of Columbia has found that an ALJ does not have the authority to issue subpoenas under the whistleblower provision of six environmental statutes.<sup>282</sup>

The Solicitor’s memo and the *Bobreski* decision, however, have not prompted the ARB to revisit its ruling that judges have the authority to issue subpoenas in whistleblower cases. In fact, in a case arising under the H-1B nonimmigrant alien labor certification regulations, the ARB expressly declined the Wage and Hour Division

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<sup>277</sup> *Childers*, 2000 WL 1920346, at \*9.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at \*10.

<sup>281</sup> Memorandum from the Acting Solicitor of Labor to U.S. Dep’t of Labor Associate Solicitors, Regional Solicitors and Associate Regional Solicitors (July 27, 2001) (on file with author). See also PAUL GREENBERG, WHISTLEBLOWER PROTECTION AND THE SARBANES-OXLEY ACT: A ROAD UNDER CONSTRUCTION 8 (2003), available at <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/greenberg.pdf>

<sup>282</sup> *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 75–76 (D.D.C. 2003).

Administrator's request that the ARB reexamine and reject its decision in *Childers*.<sup>283</sup>

Because DOL judges are bound by the *Childers* precedent, they will issue subpoenas upon request in whistleblower cases unless the case arises in the District of Columbia.<sup>284</sup> However, the question of ALJ authority to issue subpoenas in the absence of express statutory authorization continues to be raised in whistleblower litigation before the DOL.<sup>285</sup>

The subpoena issue is an example of Congressional inaction (or inattention) to effectuate its intent. The DOL is not the only agency affected. It is a due process issue. It may be that, had they been reasonable, the agencies involved could have issued regulations to provide parties the right to subpoena witnesses or could create policies affirming the inherent right under the APA to issue subpoenas to effectuate the interests of justice. If the Corps or Conference were in force, that body could issue rules. Meanwhile, although OPM has a duty to see whether the APA is being fairly applied, it is apparently not interested.

## XI. RECOMMENDATIONS

After fully reviewing the relevant information, I make the following suggestions. In a perfect world, the public and practitioners engaged in agency adjudication would be able to access a single, user friendly, reliable resource to find out what the law and regulations are, what the procedures might be, and what the nature of the proceeding may entail. This resource would be accurately

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<sup>283</sup> Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Integrated Informatics, Inc., ARB No. 08-127, 2011 WL 327977 (Dep't of Labor Jan. 31, 2011).

<sup>284</sup> Meanwhile, there is a "rule of necessity" that requires judges to ensure that statutory aims are carried out, and have inherent judicial power to make sure that the interests of justice are protected. Included are rights of due process and the right to confront one's accuser. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (defining rules of procedure as the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them).

<sup>285</sup> See, e.g., PAUL GREENBERG, WHISTLEBLOWER PROTECTION AND THE SARBANES-OXLEY ACT: A ROAD UNDER CONSTRUCTION 8 (2003), available at <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/greenberg.pdf> (last visited Mar. 26, 2013).

annotated. ACUS would perform that service. However, it has chosen not to do so.

Rather than analyze the differences in agency procedures, many of which are irrational, logic dictates that it is more efficient to provide that all hearings fit a norm, in the name of APA simplicity and uniformity, rather than continue to perpetuate confusion.

1. In order to promote that

(1) agencies keep the public informed of their organization, procedures and rules; and

(2) uniform standards be established for the conduct of formal rulemaking and adjudication,<sup>286</sup>

Congress should “score” to determine the relative costs of uniformity:

(1) The Conference proposal of 2000, and

(2) The proposed Corps Bill of 1992, and

(3) A separate scoring should include the “Type B” judiciary in each category.

2. In order to ensure that adjudication under the APA is impartial and there are no taints of outside bias (or inside bias from the nature of employment within an agency that has a stake in the outcome of a case), Congress should immediately apply the Code of Conduct for United States Judges<sup>287</sup> to administrative law judges.

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<sup>286</sup> See *Attorney General’s Manual on the Administrative Procedure Act* (1947).

<sup>287</sup> See *Code of Conduct for United States Judges*, UNITED STATES COURTS, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (last revised June 2, 2011).