

10-15-2002

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Recommended Citation

Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. Nat'l Ass'n Admin. L. Judges. (2002)
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Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act

Robin J. Arzt*

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I. INTRODUCTION AND SUMMARY

The Administrative Procedure Act¹ (“APA”) was enacted in 1946 to, among other things, achieve reasonable uniformity and fairness of the administrative process in the federal government for members of the American public with claims pending before federal agencies. This includes uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of hearing examiners who now are administrative law judges (“ALJs”).²

The APA sets forth a due process administrative procedure for the hearing and decision by ALJs of cases brought before the federal agencies to which the APA applies.³ The APA also provides for judicial review of final administrative decisions by the federal agencies.⁴ Provisions in the APA for the decisional independence of ALJs, through safeguards against undue agency influence, include a merit selection process administered by the Office of Personnel Management (“OPM”) rather than the hiring agencies, career permanent civil service appointments without a probationary period, pay levels set by statute, prohibitions of performance evaluations and bonus pay, and the requirement of a due process hearing before the Merit Systems Protection Board before an adverse personnel action may be taken against an ALJ.⁵

Senior Social Security Administration (“SSA”) management personnel, including a former General Counsel, have stated publicly during the last few years that SSA is not required to hold Social Security Act (“Act”) hearings pursuant to the APA, notwithstanding that SSA’s hearing process uses APA judges who, by law, can conduct only APA hearings. Such personnel readily do acknowledge that the SSA hearing process in fact uses APA judges and complies

1. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (2000).

2. U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 9 (1947) [hereinafter Manual].

3. 5 U.S.C. §§ 551-59.

4. Administrative Procedure Act, 5 U.S.C. §§ 701-06 (2000).

5. 5 U.S.C. §§ 1305, 3105, 3344, 4301(2)(D), 5335(a)(B), 5372, and 7521 (2000).

with the APA.⁶ Two SSA Commissioners made statements on this issue in 1988 and 2001 that are consistent with SSA being required to hold Social Security Act hearings pursuant to the APA.⁷

At the time that the APA was enacted, the Title II Old Age and Survivors Insurance Benefits Program was the only entitlement program available to claimants pursuant to the Act. Since Title II of the Act predates the APA, it contains no express reference to it, which is the style that was continued in the statutes for the additional programs that later were added to the Act. The Title II Disability Insurance Benefits Program, Title XVIII Medicare Program, and Title XVI Supplemental Security Income Program (“SSI”) that now are part of the Act did not yet exist.

The due process rights of claimants for Social Security benefits are put in jeopardy by SSA assertions that the APA applies only at the sufferance of the SSA, which is the agency that determines their claims. Therefore, this article begins with a review of the authority that shows that, at the time that Congress enacted the APA, Congress intended to include (a) the SSA as an “agency” within the APA definition, and (b) the Title II Old Age and Survivors Insurance Benefits Program adjudications pursuant to the Act as “adjudications” within the APA definition. This article also demonstrates that Congress later intended to include Title II Disability Insurance Benefits Program adjudications, Title XVI Supplemental Security Income Program adjudications, and Title XVIII Medicare Program adjudications as “adjudications” within the APA definition. Therefore, adjudications pursuant to the Act are also adjudications pursuant to the APA, because (a) the SSA is an “agency” within the definition in section 2(a) of the APA,⁸ and (b) a Social Security Act hearing is a proceeding that is an “adjudication” within the definition in section 2(a) of the APA.⁹

6. Comment by Arthur Fried, SSA General Council, at the Association of Administrative Law Judges Sixth National Educational Conference, Chicago (July 1997).

7. See *infra* notes 37, 142-44 and accompanying text.

8. Administrative Procedure Act, 5 U.S.C. § 551(1) (2000); see discussion *infra* Part I.

9. Administrative Procedure Act, 5 U.S.C. § 551(7) (2000); see discussion *infra* Part II.

This article shows that because hearings held pursuant to the Act are also APA adjudications, ALJs appointed pursuant to section 11 of the APA must preside over the hearings.¹⁰ None of the narrow exceptions to the use of APA ALJs provided for in the APA apply to Social Security Act adjudications.¹¹ These principles are established by the unambiguous and repeatedly stated legislative intent of Congress¹² and are confirmed by the federal courts.¹³ Finally, this article establishes that the longstanding administrative practice of the SSA and OPM is consistent with Social Security Act hearings also being APA adjudications that are presided over by ALJs appointed pursuant to the APA.¹⁴

As Congress stated when it enacted a statute¹⁵ that deemed the non-APA hearing examiners, who were appointed temporarily in the 1970s to hear and decide SSI benefit claims, to be permanent ALJs appointed pursuant to 5 U.S.C. § 3105,¹⁶ the APA is:

[T]he general scheme under which rule making and adjudicatory procedures are carried out by agencies in the executive branch. Section 556 of title 5 requires that (unless the agency itself presides) administrative law judges (ALJ's) shall preside over all rule making or adjudicatory proceedings to which the APA applies.¹⁷

10. 5 U.S.C. § 3105 (2000).

11. See discussion *infra* Part III.

12. See discussion *infra* Parts I, II, III.

13. See discussion *infra* Part III.

14. *Id.*

15. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977).

16. 5 U.S.C. § 3105 (2000).

17. H.R. Rep. No. 95-617, pt. 2, at 2 (1977).

II. THE SOCIAL SECURITY ADMINISTRATION IS AN AGENCY TO WHICH THE ADMINISTRATIVE PROCEDURE ACT APPLIES

“Agency” is defined for the purposes of the administrative procedure subchapter of the APA¹⁸ in pertinent part as follows:

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States,

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia .

...¹⁹

The OPM regulations state that “[a]gency has the same meaning as given in 5 U.S.C. § 551” for the subpart of its regulations that address the appointment, pay and removal of ALJs.²⁰

To prepare the 1941 Final Report of the Attorney General’s Committee on *Administrative Procedure in Government Agencies*,²¹ the Committee studied and had monographs prepared regarding the administrative procedures followed by many agencies, and many bureaus and offices within the executive branch departments (i.e., Office of Indian Affairs and Bureau of Fisheries within the Department of the Interior).²² This included the Federal Security Agency that then included the Social Security Board itself, and a variety of other boards and commissions.²³ The Congressional hearings also included statements from many of these entities,

18. Administrative Procedure Act, 5 U.S.C. § 551(1) (2000).

19. 5 U.S.C. § 551(1) (formerly section 2(a) of the original APA).

20. 5 C.F.R. § 930.202(a) (2002).

21. S. Doc. No. 77-8, at 2 (1941).

22. S. Doc. No. 77-10, pts. 1-14 (1941).

23. H.R. Rep. No. 79-1980, at 11-12 (1946); P. Verkuil et al., Report for Recommendation 92-7: The Federal Administrative Judiciary 1992 ACUS 802 [hereinafter ACUS Report] (citing S. Doc. No. 77-10, pt. 3 (1941)).

including the Federal Security Agency and the Social Security Board.²⁴

The legislative history of the APA shows that Congress intended to define “agency” expansively:

The [Senate Judiciary] Committee stated that the term “agency” is defined substantially as in the Federal Reports Act of 1942 and the Federal Register Act.

Section 7(a) of the Federal Reports Act defines “Federal agency” as “any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government”

Section 4 of the Federal Register Act defines “agency” as “any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government”²⁵

The language, but not substantive content of the definition of “agency” in the current text of 44 U.S.C. § 3502 of the Federal Reports Act, has been modified to mean “any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency”²⁶ The definition of “Federal agency” or “agency” in the current text of 44 U.S.C. § 1501 of the Federal Register Act is virtually identical to the text at the time the

24. H.R. Rep. No. 79-1980, at 13.

25. *In re Fidelity Mortgage Investors*, 690 F.2d 35, 38 (2d Cir. 1982) (citations omitted); see also *Washington Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994).

26. 44 U.S.C. § 3502 (1994 & Supp. 1998).

APA was enacted.²⁷

The legislative history of the APA, 5 U.S.C. § 551(1) illustrates clearly the broad scope of the term “agency.”

In the Senate Comparative Print of June 1945, the term agency was explained as follows: “It is necessary to define agency as “authority” rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or “division” to have final authority. ‘Authority’ means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus, ‘divisions’ of the Interstate Commerce Commission and the judicial officers of the Department of Agriculture would be ‘agencies’ within this definition.”²⁸

That “agency”, which includes all federal authorities within an executive branch agency that have the power to make a final decision that binds the agency, was repeated in the final Senate Committee on the Judiciary Report on the APA (“Senate Report”):

The word “authority” is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization. In conferring administrative powers, statutes customarily do not refer to formal agencies (such as the Department of Agriculture) but to specified persons (such as the Secretary of Agriculture). Boards or commissions usually possess authority which does not extend to individual

27. 44 U.S.C. § 1501 (1994); Administrative Procedure Act, 5 U.S.C. § 551(1) (2000).

28. Manual, *supra* note 2, at 16, n.1.

members or to their subordinates.²⁹

The House Judiciary Committee Report on the APA (“House Report”) again repeated that “agency” includes all federal authorities within an executive branch agency that have the power to make a final decision that binds the agency:

Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere “housekeeping” functions or the exclusion of those who have the real power to act.³⁰

The U.S. Department of Justice’s *Attorney General’s Manual on the Administrative Procedure Act* (“Manual”) states:

“This [broad] definition [of agency] was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned.”

....

The Administrative Procedure Act applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions [and] Territories, and the District of Columbia.³¹

The Attorney General then stated in the Manual that the SSA and

29. S. Rep. No. 79-752, at 10 (1945).

30. H.R. Rep. No. 79-1980, at 19 (1946).

31. Manual, *supra* note 2, at 9-10 (citations omitted) (quoting section 2(a) of the original APA codified at 5 U.S.C. § 551(1)).

its then parent agency, the Federal Security Agency, both are agencies under the APA:

[T]he Federal Security Agency is composed of many authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. *By virtue of the definition contained in section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency.*³²

The Manual, which is “a contemporaneous interpretation” of the APA,³³ “has been ‘given some deference by [the Supreme] Court because of the role played by the Department of Justice in drafting the legislation,’ and Justice [Tom C.] Clark was Attorney General both when the APA was passed and when the Manual was published.”³⁴ “In prior cases, [the Supreme Court has] given some weight to the Attorney General’s Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act’s enactment in 1946.”³⁵ Justice Scalia has described the Manual as “the Government’s own most authoritative interpretation of the APA That document . . . was originally issued ‘as a guide to the agencies in adjusting their procedures to the requirements of the Act.’”³⁶

32. Manual, *supra* note 2, at 9-10 (emphasis added) (section 2(a) of the original APA codified at 5 U.S.C. § 551(1)).

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

34. Steadman v. SEC, 450 U.S. 91, 102, n.22 (1981) (quoting Vermont, 435 U.S. at 546).

35. Chrysler Corp. v. Brown, 441 U.S. 281, 302, n.31 (1979) (citing Vermont, 435 U.S. at 546).

36. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (quoting Manual, *supra* note 2, at 6).

Therefore, the ability of a federal executive branch authority, whether it is an agency or within an agency, to make a final decision is the key to being an “agency” within the definition of the APA. The legislative history of Congress makes it clear that the SSA, which formerly was known as the Social Security Board, expressly was intended to be an “agency” covered by the APA.

Finally, an SSA Commissioner published a description of the mission of the SSA Office of Hearings and Appeals (“OHA”), which administers the nationwide ALJ hearings process, that states the applicability of the APA to the SSA hearings and appeals process. The Commissioner said in a Statement of Organization, Functions and Delegations of Authority regarding a reorganization of OHA that was published in the Federal Register in 1988 that:

OHA provides the basic mechanisms through which individuals and organizations dissatisfied with determinations affecting their rights to and amounts of benefits or their participation in programs under the Social Security Act may administratively appeal these determinations in an impartial and unbiased forum *in accordance with the requirements of the Administrative Procedure and Social Security Acts*.³⁷

A. *Social Security Act Title II Old Age and Survivors Insurance Benefits Program Adjudications Are APA Adjudications*

The Social Security Act, which provided for old age and survivor’s insurance benefits, was enacted in 1935.³⁸ A claimant’s right to a hearing in the event of a denial of his claim for old age and survivor’s insurance benefits first was created by the 1939 amendments to the Act.³⁹ The Act was administered by a three-person Social Security Board that was within the Federal Security Agency. An initial decision was made by “adjudicators” and reviewed for correctness by

37. Statement of Organization, Functions and Delegations of Authority, 53 Fed. Reg. 29, 778 (Aug. 8, 1988) (signed by SSA Commissioner Dorcas Hardy on July 19, 1988, and published on August 8, 1988) (emphasis added).

38. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

39. Amendments to Title I of the Social Security Act, Pub. L. No. 76-379, 53 Stat. 1360 (1939).

“reviewers” employed in the Board’s Bureau of Old Age and Survivors Insurance. A denied claim was reconsidered by personnel not involved in the initial decision. A denied reconsideration entitled a claimant to a hearing. However, by 1941, when the Attorney General’s Committee on Administrative Procedure in Government Agencies prepared its monograph regarding the Board’s administrative procedures in preparation for its draft legislation that ultimately became the APA, no such hearings had been held even though the Board had appointed “referees” to conduct the hearings. Referee decisions could be appealed to a three-person Appeals Council.⁴⁰

“Adjudication” is defined for the purposes of the administrative procedure subchapter of the APA⁴¹ as the “agency process for the formulation of an order”.⁴² An “order” is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”⁴³ In the Manual, the Attorney General clearly explained the distinction between rulemaking and adjudication and then expressly and unequivocally stated that the determinations of claims under Title II of the Social Security Act are adjudications covered by the APA:

[T]he entire [APA] is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily

40. ACUS Report, *supra* note 23, at 808, n.109 (citing S. Doc. No. 77-10, pt. 3 (1941)).

41. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (2000).

42. Administrative Procedure Act, 5 U.S.C. § 551(7) (2000) (formerly section 2(d) of the original APA).

43. Administrative Procedure Act, 5 U.S.C. § 551(6) (2000) (formerly section 2(d) of the original APA).

concerned with policy considerations
Conversely, adjudication is concerned with the determination of past and present rights and liabilities [I]t may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits

. . . . [The entire APA is shaped around the] distinction between rule making and adjudication The intermediate [rule making] decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners [now ALJs]; rather it is formulated by the agency heads relying heavily upon the expert staffs In sharp contrast, is the procedure required in cases of adjudication subject to section 5(c) [now 5 U.S.C. § 554(c)]. There the hearing officer who presides at the hearing and observes the witnesses must personally prepare the initial or recommended decision required by section 8 [now 5 U.S.C. § 557]. Also, in such adjudicatory cases, the agency officers who performed investigative and prosecuting functions in that [case] or a factually related case may not participate in the making of decisions. These requirements reflect the characteristics of adjudication discussed above.

The foregoing discussion indicates that *the residual definition of "adjudication" in section 2(d) was intended to include such proceedings as the following:*

. . . .

2) *The determination of . . . claims under Title II (Old Age and Survivor's Insurance) of the Social Security Act.*⁴⁴

The Supreme Court has stated that the APA "is modeled upon the

44. Manual, *supra* note 2, at 14-15 (emphasis added) (citations omitted).

Social Security Act.”⁴⁵ In the 1970s, there was confusion regarding the applicability of the APA to adjudications of claims arising from the programs added to the Act after the APA was enacted. In 1971, the Supreme Court stated in *Richardson v. Perales*, that it need not rule whether the APA applies to the Title II disability program adjudication procedure because the APA and Act procedures were identical and met the constitutional requirements of due process.⁴⁶ Some incorrectly interpreted the *Perales* decision as holding that the APA did not apply to Title II disability program adjudications. After the SSI program was enacted in 1972, the Civil Service Commission, which was OPM’s predecessor agency, publicly took the position that the APA did not apply to SSI program adjudications.⁴⁷

In 1976, Congress ended the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law No. 94-202, which is entitled *An Act To Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes*.⁴⁸ Among other things, the provisions of Public Law Number 94-202 “clearly placed all social security cases (OASDI, SSI, and Medicare) under the APA.”⁴⁹ Thus, Congress reiterated its intention that the APA applies to Old Age and Survivors Insurance Benefits program adjudications.

Therefore, the APA unequivocally applies to adjudications of claims under the Title II Old Age and Survivors Insurance Benefits program.

45. *Richardson v. Perales*, 402 U.S. 389, 409 (1971).

46. *Id.* at 408-10.

47. S. Rep. No. 94-550, at 4-5 (1975); H.R. Rep. No. 95-617, pt. 2, at 3-4 (1977); ACUS Report, *supra* note 23, at 809-11.

48. Social Security Amendments of 1976, Pub. L. No. 94-202, 89 Stat. 1135, 1137 (1976).

49. H.R. Rep. No. 95-617, pt. 2, at 5 (1977) (emphasis added). Public Law No. 94-202 and its legislative history are discussed in more detail in Part II(D), which describes the SSI statute.

*B. Social Security Act Title II Disability Insurance Benefits Program
Adjudications Are APA Adjudications*

At the times that the APA was enacted and the Manual was issued, Title II of the Act regarding the Disability Insurance Benefits Program, Title XVI of the Act regarding the Supplemental Security Income Program, and Title XVIII of the Act regarding the Medicare program did not yet exist. However, the APA provides that a “[s]ubsequent statute may not be held to supercede or modify [the APA], except to the extent that it does so expressly.”⁵⁰ The Supreme Court repeatedly has held that “[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act [now codified at 5 U.S.C. § 559] that modifications must be express”⁵¹ An exemption from the APA will not be found unless the subsequent statute expressly supercedes the provisions of the APA and/or the congressional intent to override the APA or any of its provisions is sufficiently clear to overcome the presumption that the APA applies.⁵² The legislative intent of Congress is clear: “Subsequent legislation is not to modify the bill except as it may do so expressly.”⁵³

In the Social Security Amendments of 1956, Congress added the Disability Insurance Benefits Program to Title II of the Act by enacting Public Law Number 84-880. Congress required APA hearings held by APA ALJs for the disability program, even though a significantly heavier caseload was anticipated in the legislative history than was experienced with the Old Age and Survivor’s Insurance Program.⁵⁴ Public Law Number 84-880 provided, in pertinent part, as follows:

50. Administrative Procedure Act, 5 U.S.C. § 559 (2000).

51. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (The APA “is to be given a ‘hospitable’ interpretation.”); *Ardestani v. INS*, 502 U.S. 129, 134 (1991); *Brownell v. Shung*, 352 U.S. 180, 185 (1956).

52. *Marcello*, 349 U.S. at 310; *Shaughnessy*, 349 U.S. at 51; *Ardestani*, 502 U.S. at 134; *Brownell*, 352 U.S. at 185.

53. S. Rep. No. 79-752, at 29 (1945) (emphasis omitted); H.R. Rep. No. 79-1980, at 47 (1946) (emphasis omitted).

54. Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807, 815 (1956) (codified as amended at 42 U.S.C. §§ 401-34 (1994 & Supp. 1999)); S. Rep. No. 84-2133, at 131-33 (1956); ACUS Report, *supra* note 23, at 808.

Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, surviving divorced mother, surviving divorced father husband [sic], divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, *the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.*⁵⁵

As Congress later stated with reference to the words ““reasonable notice and opportunity for a hearing [sic]”” in reference to its later enactment of the SSI program, “[t]hese words were meant to trigger the application of the APA to SSI adjudications [The statute was] meant to apply the APA to SSI cases”⁵⁶ Congress used the same words in the disability program statute. Congress enacted Public Law Number 94-202 in connection with the SSI program to reiterate that it intends the APA to apply to all adjudications of Social Security Act claims that have been denied by the SSA, including Title II Disability Insurance Benefits Program adjudications.⁵⁷

In 1958, the backlog of disability cases prompted Congress to enact temporary emergency legislation to permit SSA's then parent agency, the Department of Health, Education and Welfare, to appoint non-APA ALJ hearing officers to hear disability cases, which was a specific exception to the APA provisions. However, the non-ALJ

55. 42 U.S.C. § 405(b)(1) (1994 & Supp. 1999) (emphasis added).

56. H.R. Rep. No. 95-617, pt. 2, at 3 (1977).

57. See *infra* notes 91-95 and accompanying text.

adjudications were permitted only through December 31, 1959, which was renewed for one year through December 31, 1960, but was never renewed again.⁵⁸ The need for special legislation to temporarily permit non-APA ALJ disability adjudications underscored Congress' intention that the APA apply to Title II disability program cases and that APA ALJs adjudicate them.

The Supreme Court considered how the due process requirements of the APA work with the pre-existing Social Security Act in *Richardson v. Perales*, in which the Court considered whether the admission of hearsay physician reports in the course of a SSA Title II disability claim hearing violated the procedural due process requirements of either the Social Security Act or the APA.⁵⁹ "The Social Security Act has been with us since 1935."⁶⁰ The SSA "operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan."⁶¹

We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act

[The APA] provisions [5 U.S.C. § 556(d)] conform, and are consistent with, rather than differ from or supercede, the authority given the Secretary by the Social Security Act's §§ 205(a) and (b) [42 U.S.C. § 405(a)-(b)] . . . to receive evidence "even though inadmissible under rules of evidence applicable to court procedure." Hearsay, under either Act, is thus admissible up to the point of relevancy.⁶²

Accordingly, the Court found that the practice of admitting hearsay

58. ACUS report, *supra* note 23, at 808-09 & n.110-111 (citing Supplemental Appropriation Act of 1959, Pub. L. No. 85-766, 72 Stat. 864, 878 (1958); Departments of Labor and Health, Education and Welfare Appropriations Act of 1960, Pub. L. No. 86-158, 73 Stat. 339, 352 (1959)).

59. *Richardson v. Perales*, 402 U.S. 389 (1971).

60. *Id.* at 399 (citation omitted).

61. *Id.* at 403.

62. *Id.* at 409-10 (citations omitted).

physician reports in the course of a SSA disability claim hearing does not violate the procedural due process requirements of either the Social Security Act or the APA.⁶³ As Congress observed in its legislative history supporting its legislation that made the SSI hearing examiners permanent APA ALJs, “the Court found the relevant issue to be one of due process guarantees under the Constitution and not whether one statutory means of insuring due process (the APA) or another (the Social Security Act) was controlling.”⁶⁴

What makes *Perales* important is that the Supreme Court implicitly assumed that both the APA and the Social Security Act apply to SSA disability hearings in its analysis that resulted in its holding that hearsay was admissible in conformity with the identical procedural due process requirements of both Acts. The Court’s statement that it “need not decide whether the APA has general application to social security disability claims . . . ”⁶⁵ was made not to deny the general applicability of the APA to Social Security disability claims, but for two other reasons.

First, the statement is the Court’s conclusion that it is not necessary to expressly rule on the general applicability of the APA because it has found that the APA and Social Security Act administrative procedures at issue are the same because Congress modeled the APA upon the Social Security Act.⁶⁶ Indeed, the Court expressly held that the SSA ALJs’ “three-hat” role of acting on behalf of the claimant and government in the hearing process, in addition to being the impartial decisionmaker, is consistent with SSA, APA and constitutional due process standards, since the ALJs do not act as counsel and the SSA hearing system works fairly and

63. *Id.* at 402, 408-10 (holding that a written physician’s report may be substantial evidence that supports an ALJ’s finding of a claimant’s lack of disability in an SSA disability claim under the Social Security Act and the APA, despite opposing evidence in the record, the report being hearsay, and the lack of cross-examination of the physician at the hearing, when the claimant did not exercise his right under both Acts to subpoena the physician to have the opportunity to cross-examine him).

64. H.R. Rep. No. 95-617, pt. 2, at 4 (1977).

65. *Richardson*, 402 U.S. at 408.

66. *Id.* at 409.

well.⁶⁷ “[The SSA] operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan.”⁶⁸

Second, the Court overruled the Fifth Circuit Court of Appeals holding in the *Cohen v. Perales* decision which stated that the APA “does not control the method of conducting hearings under the Social Security Act, if in conflict therewith . . .” because the APA “provides that its provisions: [Do] not supercede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute.”⁶⁹ The Supreme Court did not expressly describe this portion of the Circuit Court’s decision.⁷⁰

Thus, the holding of the Court of Appeals for the Fifth Circuit in *Cohen* was wrong in two respects. First, the Court of Appeals erroneously had concluded that the Social Security Act permits the admission of hearsay, but that the APA does not:⁷¹ a notion that the Supreme Court expressly overruled.⁷² Second, the Court of Appeals misunderstood that the sentence in section 556(b) of the Administrative Procedure Act on which it relied as making only narrow exceptions to the provision in that subsection for *who* may preside over an APA hearing. The sentence does *not* state a general rule that an APA provision does not supercede another statute’s procedure for conducting proceedings when the APA provision is in conflict with it. Although the Supreme Court did not discuss the second problem with the Circuit Court’s holding, the legislative history of the APA is unequivocal in its statements that section 556(b) makes only narrow exceptions to who may preside over an APA hearing.⁷³

67. *Id.* at 410.

68. *Id.* at 403.

69. *Id.* at 409-10; *Cohen v. Perales*, 412 F.2d 44, 50 (5th Cir. 1969) (quoting Administrative Procedure Act, 5 U.S.C. § 556(b) (2000)).

70. *Richardson*, 402 U.S. at 398.

71. *Cohen*, 412 F.2d at 50-51.

72. *Richardson*, 402 U.S. at 409-10.

73. See discussion *infra* Part III.

In part because the Supreme Court did not expressly state in *Richardson v. Perales* that the APA applies to Title II disability program adjudications, but that it need not rule whether the APA applies,⁷⁴ in 1976, Congress expressly ended what it described as the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law Number 94-202, which is entitled *An Act to Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI, and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes*.⁷⁵ Among other things, the provisions of Public Law Number 94-202 “clearly placed all social security cases (OASDI, SSI, and Medicare) under the APA.”⁷⁶

Finally, the seven U.S. circuit courts of appeal that have addressed the issue since *Richardson* have stated that the APA applies to the Title II disability program hearing process, either by stating the general applicability of the APA to the hearing process,⁷⁷ or by stating that a particular APA provision applies to a specific aspect of the hearing process.⁷⁸

74. *Richardson*, 402 U.S. at 408-10.

75. The Social Security Amendments of 1976, Pub. L. No. 94-202, 89 Stat. 1135 (1976).

76. H.R. Rep. No. 95-617, pt. 2, at 5 (1977) (emphasis added). The Social Security Act Amendments of 1976 and its legislative history are discussed in more detail in Part II(D), which describes the SSI statute.

77. *Mullen v. Bowen*, 800 F.2d 535, 536 n.1 (6th Cir. 1986) (“Hearings under section 205(b), 42 U.S.C. § 405(b) [of the Social Security Act], must also conform to the requirements of the Administrative Procedure Act”); *Dotson v. Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983) (“[The Administrative Procedure] Act applies to administrative hearings under the Social Security Act.”); *Nash v. Califano*, 613 F.2d 10, 11, n.4 (2d Cir. 1980) (“The hearings, which are conducted pursuant to section 205(b) of the Social Security Act, 42 U.S.C. § 405(b), must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 551ff.”); *Caswell v. Califano*, 583 F.2d 9, 15 n.13 (1st Cir. 1978) (“The Secretary’s claim that the Administrative Procedure Act is not applicable to actions of the Social Security Administration is contrary to both the language of the statute and the case law of this and other circuits . . . We reject it.”) (citations omitted).

78. *Butera v. Apfel*, 173 F.3d 1049, 1057 (7th Cir. 1999) (“The Commissioner’s regulation [authorizing ALJs to issue subpoenas to develop the record, 20 C.F.R. §§ 404.950(d)(1), 416.1450(d)(1)] is consistent with the Administrative Procedures Act, which entitles an administrative claimant to ‘such cross-examination as may be required for a full and true disclosure of the facts.’”)

Therefore, the APA unequivocally applies to adjudications of claims under the Title II Disability Insurance Benefits Program.

C. Social Security Act Title XVIII Medicare Program Adjudications Are APA Adjudications

The Medicare program (“Medicare Act”), which provides federally funded hospital and supplementary medical insurance for elderly and disabled people, was established in 1965 as Title XVIII of the Act.⁷⁹ The Medicare Act provides, in pertinent part, that an individual who is “dissatisfied with any determination under [42 U.S.C. § 1395ff(a)] . . . as to [entitlement to Medicare Part A or Part B benefits] shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) [42 U.S.C.S. § 405(b)]”⁸⁰ Therefore, Congress expressly intended that the APA apply to the Medicare adjudication process just the same as Congress intended for Title II adjudications.

In *Bowen*, the Supreme Court implicitly held that the APA generally applies to the Medicare Act when it expressly affirmed the decision by the U.S. Court of Appeals for the District of Columbia that both the APA and the Medicare Act barred the Secretary of Health and Human Services from issuing a rule that retroactively sets new cost limits for Medicare payments for health services: “The [circuit] court based its holding on the alternative grounds that the

(quoting Administrative Procedure Act, 5 U.S.C. § 556(d) (2000)); *Wallace v. Bowen*, 869 F.2d 187, 194 (3d Cir. 1989) (“[W]hether cross-examination of the author of a report is necessary for a full and true disclosure of the facts is a question entrusted to the ALJ in the first instance.”); *Brown v. Bowen*, 794 F.2d 703, 708 (D.C. Cir. 1986) (“The ALJ’s implicit rejection, without even a breath of explanation, of the very evidence on which he relied for his earlier conclusions violated the elementary requirement that ALJ’s not only state their findings but explicate the reasons for their decision.”); *Cook v. Heckler*, 783 F.2d 1168, 1172 (4th Cir. 1986) (This case involved applications for disability and widow’s benefits. In reference to the ALJ decision, “the Secretary is required by both the Social Security Act, 42 U.S.C. § 405(b), and the Administrative Procedure Act, 5 U.S.C. § 557(c), to include in the text of her decision a statement of the reasons for that decision.”).

79. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended at 42 U.S.C. §§ 1395-1395ccc (1994 & Supp. 1999)).

80. 42 U.S.C. § 1395ff(b)(1) (1994).

APA, as a general matter, forbids retroactive rulemaking, and that the Medicare Act, by specific terms, bars retroactive cost-limit rules. We . . . now affirm.”⁸¹ The Supreme Court did not discuss the APA further because it found that the Secretary’s retroactive cost-limit rule was invalid on the threshold issue of whether the Medicare Act permitted retroactive rulemaking.⁸²

In 1976, Congress expressly ended what it described as the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law Number 94-202, which is entitled *An Act to Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI, and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes*.⁸³ The provisions of Public Law Number 94-202 “clearly placed all social security cases (OASDI, SSI, and medicare) under the APA.”⁸⁴

Therefore, the APA applies to Medicare program adjudications.

D. Social Security Act Title XVI Supplemental Security Income Program Adjudications Are APA Adjudications

In the Social Security Amendments of 1972, Congress added the Supplemental Security Income Program (“SSI”) for aged, blind and disabled people in Title XVI of the Act.⁸⁵ The SSI statute provides, in pertinent part, as follows:

Any such decision by the Commissioner of Social

81. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), *aff’d*, 821 F.2d 750 (D.C. Cir. 1987).

82. *Id.* at 215-16.

83. Social Security Act Amendments of 1976, Pub. L. No. 94-202, 89 Stat. 1135 (1976).

84. H.R. Rep. No. 95-617, pt. 2, at 5 (emphasis added). The Social Security Amendments of 1976 and its legislative history are discussed in more detail in Part II(D), which describes the SSI statute.

85. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 1465-1479 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383(c) (1994 & Supp. 1996-99)).

Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. *The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse . . . and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse the Commissioner's findings of fact and such decision.*⁸⁶

Therefore, Congress expressly intended the APA to apply to the SSI adjudication process just the same as Congress intended for Title II and Title XVIII adjudications by its use of the same language as in Title II to trigger the applicability of the APA due process requirements.

The amendment made by that law provided that SSI cases would be adjudicated with "reasonable notice and opportunity for a hearing [sic]." *These words were meant to trigger the application of the APA to SSI adjudications* [The statute was] meant to apply the APA to SSI cases, but it did not specifically require APA hearing examiners since it permitted the Secretary of Health, Education, and Welfare ["HEW"] to appoint ALJs without Civil Service Commission [OPMs predecessor] approval.⁸⁷

Instead, the 1972 statute expressly created an exception to the APA requirement that APA adjudications must be presided over by APA judges by authorizing the Secretary to appoint "qualified" hearing examiners to adjudicate SSI cases "without meeting the specific standards prescribed for hearing examiners" that are set forth

86. 42 U.S.C. § 1383(c)(1)(A) (1994) (emphasis added).

87. H.R. Rep. No. 95-617, pt. 2, at 3 (1977) (emphasis added).

in section 3105 of the Administrative Procedure Act.⁸⁸

The use of non-APA hearing examiners to hear SSI cases resulted in confusion regarding the applicability of the APA to SSI adjudications. The HEW Secretary understood that the APA applied to the SSI hearings and that APA ALJs could be used to adjudicate them. However, during the early 1970s, when he requested a list of eligible APA ALJ candidates to appoint to hear the SSI cases, the Civil Service Commission refused to provide a list on the ground that Congress' exception to allow non-APA hearing examiners to hear the cases meant that the APA did not apply to SSI program adjudications. Also, because the non-APA hearing examiners were not authorized to hear Title II and Title XVIII cases, claimants who filed claims under more than one program, usually the Title II disability and Title XVI SSI programs, could not get a full resolution of their claims within one hearing, if their SSI claims were heard by the non-APA hearing examiners.⁸⁹ Congress also expressed concern that the Federal Circuit Court of Appeals in *Cohen* held that the APA did not apply to Title II disability adjudications and that the Supreme Court in that case "found the relevant issue to be one of due process guarantees under the Constitution and not whether one statutory means of insuring due process (the APA) or another (the Social Security Act) was controlling."⁹⁰

In 1976, Congress ended the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law Number 94-202, which is entitled *An Act to Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI, and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes*.⁹¹ This statute did two things:

[Public Law Number 94-202] clearly placed all social

88. H.R. Rep. No. 95-617, pt. 2, at 3 (1977) (quoting section 1631(d)(2) of the Social Security Amendments of 1972 (codified as amended at 42 U.S.C. § 1383 (1994 & Supp. 1996-99)).

89. S. Rep. No. 94-550, at 4-5 (1975); H.R. Rep. No. 95-617, pt. 2, at 3-4 (1977); ACUS Report, *supra* note 23, at 809-11.

90. H.R. Rep. No. 95-617, pt. 2, at 4 (1977).

91. Social Security Act Amendments of 1976, Pub. L. No. 94-202, 89 Stat. 1135 (1976).

security cases (OASDI, SSI, and Medicare) under the APA. Public Law 94-202 also authorized HEW-appointed hearing examiners to hear all three types of cases, and provided that for a 3-year period (expiring December 31, 1978) HEW-appointed hearing examiners would be deemed to be temporary Administrative Law Judges [appointed pursuant to 5 U.S.C. § 3105].⁹²

The Senate Report regarding Public Law Number 94-202 states that “[t]he performance of the Civil Service Commission Office of the Administrative Law Judges in overruling the administering agency (HEW) in its legal opinion that SSI was under the APA does not reflect the will of Congress.”⁹³ The House Report regarding Public Law Number 94-202 similarly states:

The performance of [the Civil Service Commission Office of the Administrative Law Judges] in overruling the administering agency (HEW) in its legal opinion that SSI was under the APA and in downgrading title II social security adjudications as bearing “little resemblance to the full-blown adversarial proceedings conducted by Administrative Law Judges, under the Administrative Procedure Act, in regulatory agencies” does not reflect the will of Congress.⁹⁴

The Senate Report regarding Public Law Number 94-202 made Congress’ intent crystal clear that the APA applies to all adjudications of Social Security Act claims that have been denied by SSA:

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

92. H.R. Rep. No. 95-617, pt. 2, at 5 (1977) (emphasis added).

93. S. Rep. No. 94-550, at 5 (1975).

94. H.R. Rep. No. 95-617, pt. 2, at 5 (1977) (quoting H.R. Rep. No. 94-679, at 4 (1975)).

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.

Moreover, the specific enumeration of these provisions of the APA as applicable to the temporary ALJs should not be interpreted to make these adversary proceedings or otherwise “judicialize” procedures under title II, XVI, and XVIII. The enumeration of these provisions also should in no way suggest that they are not applicable to the regular Social Security ALJs. The [Senate Finance] committee and the Department of HEW consistently over the years have declared that the language in title II (and under the provisions of this bill, title XVI) of the Social Security Act call for “on-the-record” hearings which invoke the provisions of the Administrative Procedure Act.⁹⁵

In 1977, Congress enacted Public Law Number 95-216, containing a section entitled *Appointment of Hearing Examiners*, which deemed the temporary ALJs to be permanent ALJs appointed pursuant to 5 U.S.C. § 3105 of the APA.⁹⁶

There is no congressional legislative history regarding the Act or APA that is contrary to the proposition that Social Security Act adjudications are covered by the APA and thus are APA adjudications. Congress enacted the Joint Explanatory Statement of the Committee of Conference and Conference Report on H.R. 4277 in 1994, to establish the Social Security Administration as an independent agency in the executive branch of the federal government. A paragraph that is labeled as the description of the

95. Sen. Rep. No. 94-550, at 5-6 (1975).

96. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 1559 (1977).

present law regarding the status of the Office of Chief Administrative Law Judge contains an erroneous statement that the SSA follows the APA procedures, but is not required to do so by law:

The Social Security Act requires SSA to conduct hearings to consider appeals of SSA decisions by beneficiaries and applicants for benefits. These hearings are conducted by administrative law judges (ALJs). Although not required by law, the agency follows the procedures of the Administrative Procedure Act (APA) with respect to the appointment of ALJs and the conduct of hearings.⁹⁷

First, this statement is not supported by any references to the abundant legislative history of the Social Security Act, the APA, or any other authority. Second, this statement bears no relationship to that which it purports to describe, namely the present law regarding the legal status of the Office of the Chief Administrative Law Judge, which is not even mentioned anywhere in the statement of the present law. Finally, the Conference Report makes it clear that the House version of the bill posited a Chief ALJ who would be appointed by, and report directly to, a three member Social Security Board. However, the Senate amendments, which were enacted into law, had no such Board or provisions for changing the Office of the Chief ALJ, so no change was made. Thus, the erroneous statement regarding the applicability of the APA to Social Security Act adjudications was unnecessary to lay the foundation to explain the proposed specific changes regarding the Office of the Chief ALJ that were not enacted. Therefore, the erroneous statement is nothing more than unresearched gratuitous dictum and is not part of the legislative history of either the APA or Social Security Act.⁹⁸

Lastly, three U.S. Circuit Courts of Appeals implicitly have stated that the APA applies to the supplemental security income program hearing process by stating that a particular APA provision applies to

97. 140 Cong. Rec. H6843 (daily ed. Aug 4, 1994); H.R. Conf. Rep. No. 103-670 (1994) (enacted as Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-295, 108 Stat. 1464 (1994)) (codified as amended at 42 U.S.C. §§ 901-10 (1994 & Supp. 1997-99)).

98. 140 Cong. Rec. at H6868.

a specific aspect of the hearing process.⁹⁹

Accordingly, SSI program adjudications are APA adjudications, and Public Law Number 94-202 and the legislative history both of it and Public Law Number 95-216 also expressly state that the APA applies not only to SSI program adjudications, but to Title II disability program adjudications and Title XVIII Medicare program adjudications, as well.

III. 5 U.S.C. § 556(B) OF THE APA PROVIDES ONLY THAT APA ADMINISTRATIVE LAW JUDGES MUST PRESIDE OVER SOCIAL SECURITY ACT ADJUDICATIONS WITH NARROW EXCEPTIONS THAT ARE NOT APPLICABLE TO THE SOCIAL SECURITY ACT ADJUDICATIONS

As is stated in section II(B) of this article,¹⁰⁰ the Court of Appeals for the Fifth Circuit in *Cohen* misunderstood the sentence in 5 U.S.C. § 556(b) of the APA when it relied on it in stating that the APA “does not control the method of conducting hearings under the Social Security Act, if in conflict therewith . . .” because the APA “provides that its provisions . . . [Do] not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute.”¹⁰¹ Section 556(b) makes only narrow exceptions to the provision in that subsection for *who* may preside over an APA hearing. The sentence does *not* state a general rule that an APA provision does not supercede another statute’s procedure for conducting proceedings when the APA provision is in conflict with it.

99. *Brown v. Apfel*, No. 00-2236, 2001 U.S. App. LEXIS 5054, at * 59 (4th Cir., Mar 29, 2001) (per curiam) (“[T]he Commissioner is obliged under both the Social Security Act, 42 U.S.C.A. § 405(b)(West Supp. 2000), and the Administrative Procedure Act, 5 U.S.C. § 557(c) (1994), to include an explanation of what evidence, or inference drawn therefrom, were relied on in arriving at a decision.”); *Butera v. Apfel*, 173 F.3d 1049, 1057 (7th Cir. 1999); *Brown v. Bowen*, 794 F.2d 703, 708 (D.C. Cir. 1986).

100. See *supra* notes 69-73 and accompanying text.

101. *Cohen v. Perales*, 412 F.2d 44, 50 (quoting Administrative Procedure Act, 5 U.S.C. § 556(b) (2000)).

Who may preside over hearings that are required by 5 U.S.C. § 554 is expressly specified in 5 U.S.C. § 556(b) of the APA, which was section 7(a) of the original statute:

There shall preside at the taking of evidence (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more [administrative law judges] appointed [under section 3105 of this title]; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings, in whole or part by or before boards or other [employees] specially provided for by or designated pursuant to statute.¹⁰²

The current version of this provision has been broken into two sentences at the semi-colon,¹⁰³ which apparently led to the confusion by the Court of Appeals for the Fifth Circuit in *Cohen* in interpreting the import of what is not being superceded by the APA.

The legislative history of the APA is unequivocal in its statements that 5 U.S.C. § 556(b) makes only narrow exceptions to who may preside over an APA hearing. The Manual states that the portion of this provision that states that:

[N]othing in this Act shall be deemed to supercede the conduct of specified classes of proceedings, in whole or in part by or before boards or other [employees] specially provided for by or designated pursuant to statute.' . . . is designed to permit agencies to continue to utilize hearing officers or boards . . .¹⁰⁴

when a statute either (1) identifies them by a specific job title to hold a particular type of hearing or (2) “authorizes the agency to designate

102. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 241 (1946) (showing language updates from the current version codified at 5 U.S.C. § 556(b) (2000)).

103. Administrative Procedure Act, 5 U.S.C. § 556(b) (2000).

104. Manual, *supra* note 2, at 71 (quoting Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 241 (1946) (showing language updates from the current version codified at 5 U.S.C. § 556(b) (2000))).

a specific officer or employee or one of a specific class of officers or employees to conduct the hearing.”¹⁰⁵ Examples of statutes stated in the Manual that provided for hearing officers who still may be used without regard to 5 U.S.C. § 3105 included interagency boards, Interstate Commerce Act boards and other such boards and committees that did *not* include the then Social Security Board.¹⁰⁶

A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with [5 U.S.C. § 3105]

Generally, whoever presides at the hearing (whether an examiner appointed pursuant to [5 U.S.C. § 3105], a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the [APA].¹⁰⁷

In 1945, the Attorney General commented on section 7, the bill that became the APA without substantial changes.¹⁰⁸ The Attorney General stated that section 7(a):

[I]s not intended to disturb presently existing statutory provisions which explicitly provide for certain types of hearing officers

Subject to this qualification, section 7(a) requires that there shall preside at the taking of evidence one or more examiners appointed as provided in this act, unless the agency itself or one or more of its members presides. This provision is one of the most important provisions in the act. In many agencies of the Government this provision may mean the appointment of a substantial number of hearing officers having no

105. Manual, *supra* note 2, at 71-72.

106. Manual, *supra* note 2, at 72 (citing S. Rep. No. 79-752, at 41-42 (1945)).

107. Manual, *supra* note 2, at 72 (citing S. Rep. No. 79-752, at 21 (1945); H.R. Rep. No. 79-1980, at 34-35 (1946)).

108. Manual, *supra* note 2, at appendix B.

other duties.¹⁰⁹

In the final Senate Report regarding the APA, Congress strongly stated the narrow scope of the exception provision in section 7(a) of the APA:

Should the preservation in section 7(a) of the “conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute” prove to be a loophole for avoidance of the examiner system in any real sense, corrective legislation would be necessary. That provision is not intended to permit agencies to avoid the use of examiners but to preserve special statutory types of hearing officers who contribute something more than examiners could contribute and at the same time assure the parties fair and impartial procedure.¹¹⁰

In the final House Report about the APA, Congress stated that this exception “is not a loophole for the avoidance of the examiner system”.¹¹¹

Congress more recently has stated that “[s]ection 556 of title 5 requires that (unless the agency itself presides) administrative law judges (ALJ’s) shall preside over all rule making or adjudicatory proceedings to which the APA applies.”¹¹²

Nothing exists that suggests that the Social Security Act ever has contained language that would permit an exception to the blanket requirement that APA ALJs must be used for adjudications pursuant to the Act.

Accordingly, 5 U.S.C. § 556(b) makes only narrow exceptions to the provision in that subsection for *who* may preside over an APA

109. Manual, *supra* note 2, at 132 (citations omitted).

110. S. Rep. No. 79-752, at 30 (1945).

111. H.R. Rep. No. 79-1980, at 34 (1946).

112. H.R. Doc. No. 95-617, pt. 2, at 2 (1977).

hearing. This APA subsection does *not* state a general rule that an APA provision does not supersede another statute's procedure for conducting proceedings when the APA provision is in conflict with it.

IV. THE ADMINISTRATIVE PRACTICE OF THE SSA AND OPM IS CONSISTENT WITH SOCIAL SECURITY ACT ADJUDICATIONS ALSO BEING APA ADJUDICATIONS THAT ARE PRESIDED OVER BY APA ADMINISTRATIVE LAW JUDGES

The SSA and OPM have longstanding administrative practices of (a) following the APA by appointing SSA ALJs pursuant to the APA procedure, which mandates the OPM Competitive Civil Service Appointment process, and (b) prominently stating in the SSA that ALJ, SSA Hearing Office Chief ALJ, and SSA Chief ALJ official job descriptions require that the ALJs hold hearings and issue decisions on adjudications pursuant to Titles II, XVI and XVIII of the Act pursuant to the APA. These practices are entitled to some deference and are consistent with the interpretation that Social Security Act adjudications are APA adjudications that are presided over by APA ALJs.

The Supreme Court in *Bowen v. Georgetown University Hospital* gave agency administrative practices some deference in interpreting the validity of a rule promulgated under the Medicare Act.¹¹³ When the Supreme Court invalidated the retroactive Medicare cost-limits rule issued by the Secretary of Health and Human Services, it relied in part on the agency's administrative practice over time in implementing the relevant Medicare Act statute, which was consistent with the Court's interpretation that cost-limit rules may not be retroactive. The Supreme Court refused to give any deference to the contrary interpretation of the contested statute offered by the agency's counsel only during litigation to support the contested rule:

Our interpretation of [the disputed clause] is consistent with the Secretary's past implementation of that provision

113. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

....

We have never applied the principle of [giving deference to agency interpretations of statutes that the agency is empowered to enforce] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." . . . Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.¹¹⁴

No Commissioner of the SSA ever has issued a position or policy statement that has questioned the application of the APA to Social Security Act adjudications.

The authority within the APA for agencies to appoint ALJs is in the portion of section 11 of the APA that currently is codified as 5 U.S.C. § 3105, which provides in pertinent part that: "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."¹¹⁵ The words in the original section that made the appointment expressly "subject to the civil service" laws were "omitted as unnecessary inasmuch as appointments are made subject to the civil service laws unless specifically excepted."¹¹⁶ The words in the original section that made the appointment expressly subject to the "other laws not inconsistent with this [Act]" were "omitted as unnecessary because of the organization of [Title V]."¹¹⁷

According to the Senate Judiciary Committee Report on the APA:

114. *Id.* at 211-13 (citations omitted) (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)).

115. 5 U.S.C. § 3105 (2000).

116. *Id.*

117. *Id.*

The purpose of this section [codified at 3105 and the sections described below] is to render examiners independent and secure in their tenure and compensation Recognizing that the entire tradition of the Civil Service Commission [OPM's predecessor] is directed toward security of tenure, it seems wise to put that tradition to use in the present case.¹¹⁸

The House Judiciary Committee was in accord:

That examiners be "qualified and competent" requires [OPM's predecessor] to fix appropriate qualifications and the agencies to seek fit persons. In view of the tenure and compensation requirements of the section, designed to make examiners largely independent in matters of tenure and compensation, self-interest and due concern for the proper performance of public functions will inevitably move agencies to secure the highest type of examiners.¹¹⁹

According to the Attorney General in his October 19, 1945 opinion statement to Senate Judiciary Committee Chairman regarding the then pending APA bill, the APA "provides for the selection of hearing officers on a basis designed to obtain highly qualified and impartial personnel and to insure their security of tenure."¹²⁰ According to the Attorney General's attachment to the opinion statement, in which he addresses the sections of the APA bill provisions in detail, "[a]ppointments are to be made by the respective employing agencies of personnel determined by the Civil Service Commission [OPM's predecessor] to be qualified and competent examiners."¹²¹ "Examiners' salaries should be high enough to attract superior personnel."¹²²

118. S. Rep. No. 79-752, at 29 (1945).

119. H. Rep. No. 79-1980, at 46 (1946).

120. Manual, *supra* note 2, at 124.

121. Manual, *supra* note 2, at 138.

122. H. Rep. No. 79-1980, at 47 (1946).

The appointment of ALJs pursuant to section 3105 is effected by a competitive civil service process administered by the OPM.¹²³ OPM has issued regulations to “conduct competitive examinations for administrative law judge positions.”¹²⁴ The examination process, which is set forth in OPM Examination Announcement No. 318, is a periodic “open competition . . . for entrance into the competitive service as administrative law judges.”¹²⁵ The exam has several steps including a detailed written application and other documents to establish that a candidate meets the minimum qualifications, a written test, a panel interview, and an inquiry to personal references. A numerical rating that is adjusted by the application of the veterans’ preference retention laws and regulations is assigned to each passing candidate. The candidates are placed on a list of eligible candidates in score rank order, which is called the open competitive register. When an agency wishes to fill a vacancy, OPM will certify at least three names from the open competitive register to the agency for consideration.¹²⁶ Reduction in force statutes and regulations, including veterans preference retention laws and regulations, apply to ALJs.¹²⁷

Thus, unless an agency is holding hearings pursuant to sections 556 and 557 of the APA, the requirement that APA ALJs must be appointed, and the OPM competitive service appointment process for APA ALJs, does not come into play. The SSA has employed APA ALJs, formerly known as hearing examiners, since the APA went into effect. In 1947, thirteen of the first 197 hearing examiners who were appointed pursuant to the APA were employed by the Social Security Administration to adjudicate cases pursuant to the Act.¹²⁸ The SSA has employed APA ALJs to adjudicate Act benefits cases ever since, except upon those rare and brief occasions when Congress permitted SSA to hire non-APA adjudicators pursuant to the legislation described in this article that made specific and temporary

123. 5 U.S.C. §§ 1104(a)(2), 1305 (2000).

124. 5 C.F.R. § 930.201(c) (2002); 5 C.F.R. §§ 930.201-.216 (2002) (dealing with the appointment, pay and removal of ALJs).

125. 5 C.F.R. § 930.203(a) (2002).

126. 5 C.F.R. § 930.203(f) (2002).

127. 5 C.F.R. §§ 930.215(a)-(b) (2002).

128. ACUS Report, *supra* note 23, at 804 (citing U.S. Civil Service Commission, 64 Ann Rep. 30 (1947)).

exceptions to the APA. Therefore, SSA's and OPM's long standing administrative practice of appointing APA ALJs demonstrates that both agencies interpret the APA to apply to adjudications pursuant to the Act, and thus require the employment of APA ALJs.

Also, OPM, the agency that administers the civil service process by which ALJs are appointed, and SSA, have consistently included statements in their jointly issued Standard Position Description for the Administrative Law Judges employed by the Office of Hearings and Appeals of the Social Security Administration (the "Position Description") that the APA applies to the ALJs' conduct of hearings, decision of cases, and performance of their other duties. Both the edition of the Position Description that was in effect during 1984 that is published as the appendix to *Ass'n of Administrative Law Judges v. Heckler*,¹²⁹ and the current version that was issued on August 12, 1994,¹³⁰ state in the introductions to the description of the ALJs' major duties and responsibilities that:

Under the direct delegation from the Secretary of Health, Education, and Welfare, *and in the manner prescribed by the Administrative Procedure Act, the administrative law judge holds hearings and makes and issues decisions on appeals from determinations made in the course of administration of Titles II and XVIII of the Social Security Act.*¹³¹

SSA ALJs' "duties and responsibilities" are described by OPM and SSA as follows:

Under the provisions of Titles II and XVIII of the Social Security Act and applicable Federal, State, and

129. *Ass'n of Admin. L. Judges v. Heckler*, 594 F. Supp. 1132, 1144-47 (D.D.C. 1984).

130. Office of Personnel Management and Office of Hearings and Appeals, Social Security Administration, Standard Position Description for the Administrative Law Judges employed by the Office of Hearings and Appeals of the Social Security Administration (August 12, 1994) (on file with author) [hereinafter 1994 Position Description].

131. *Heckler*, 594 F. Supp. at 1145; 1994 Position Description, *supra* note 130, at 1 (emphasis added).

foreign laws, and in conformity with the Administrative Procedure Act, and with the full and complete individual independence of action and decision, and without review, the administrative law judge has full responsibility and authority to [hold hearings and issue decisions as stated under the above Titles and perform a long list of enumerated duties and responsibilities to carry out the ALJ function, including] . . . (18) fully consider all the evidence of record and issue decisions within the requirements of the Administrative Procedure Act, which decisions are completely independent and final, signed only by him, and published to parties in interest without prior review

The administrative law judge may also take other action not inconsistent with the Administrative Procedure Act such as perfecting a record or presiding at hearings and issuing decisions in matters remanded by the Federal courts.¹³²

Regarding the “supervision and guidance” of SSA ALJs, the position description states that “[t]he Social Security and Administrative Procedure Acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions” of holding hearings and issuing decisions.¹³³

The first page of the 1994 version of the SSA ALJ position description is a an OPM Form, OF 8, that includes a “supervisory certification” by SSA management that states that the position description “is an accurate statement of the major duties and responsibilities of this position and its organizational relationships and that the position is necessary to carry out Government functions for which I am responsible.”¹³⁴ The “supervisory certification” is

132. *Heckler*, 594 F. Supp. at 1145-46; 1994 Position Description, *supra* note 130, at 2 (emphasis added). Reference to Title XVI was not included in the earlier version of the Position Description, although Congress had long before made Title XVI hearings subject to the APA and the revised Position Description does include it.

133. *Id.* at 1146; 1994 Position Description, *supra* note 130, at 3 (emphasis added).

134. 1994 Position Description, *supra* note 130, at I.

signed by both the SSA Chief Administrative Law Judge, as the ALJs' immediate supervisor, and the Associate Commissioner of the SSA Office of Hearings and Appeals, as the ALJs' higher-level supervisor.¹³⁵

In each of the approximately 140 OHA offices, there is a Hearing Office Chief ALJ whose duties include administrative responsibility for the OHA office in addition to hearing a docket of cases. OPM and SSA jointly issued a Standard Position Description for the Hearing Office Chief ALJs employed by the SSA OHA that states that the APA applies to their conduct of hearings, decision of cases, and performance of their duties regarding the ALJs in their offices.¹³⁶ The Hearing Office Chief ALJs' "duties and responsibilities" are described by OPM and SSA as follows:

Under the provision of Titles II, XVI, and XVIII of the Social Security Act and applicable Federal, State, and foreign laws, and *in conformity with the Administrative Procedure Act*, and with full and complete individual independence of action and decision, and without review, the HOCALJ has full responsibility and authority to hold hearings and issue decisions as stated under the above Titles.

HOCALJs fully consider all the evidence of record and issue decisions within the requirements of the Administrative Procedure Act, which decisions are completely independent and final

. . . .

Provides advice and guidance to Administrative Law Judges in substantive program policy and procedural matters relating to the adjudication of cases under the Social Security Act, as amended, consistent with the decisional independence accorded Administrative Law Judges pursuant to the provisions

135. *Id.*

136. Office of Personnel Management and Office of Hearings and Appeals, Social Security Administration, Standard Position Description for the Hearing Office Chief Administrative Law Judges employed by the Office of Hearings and Appeals of the Social Security Administration 2-3 (undated) (emphasis added) (on file with author).

of the Administrative Procedure Act.¹³⁷

There is a Chief ALJ whose duties are to nationally administer the SSA OHA ALJ hearing process. OPM and SSA jointly issued a Standard Position Description for the Chief ALJ employed by the SSA OHA on November 9, 1988, that states that the APA applies to the SSA OHA ALJs' conduct of hearings and decision of cases, and performance of the Chief ALJ's duties regarding the SSA OHA ALJs across the country.¹³⁸ The Chief ALJ's "duties and responsibilities" are described by OPM and SSA as including the following: "Provides counsel, guidance and advice to professional field personnel on implementing policy, programs and procedures, while *assuring that the administrative law judge's decisional independence under the Administrative Procedure Act is maintained.*"¹³⁹

The Chief ALJ's "scope and effect of work" is described by OPM and SSA as including the following: "Cases must be processed expeditiously, while still recognizing the individual ALJ's responsibility to conduct administrative hearing proceedings in an impartial manner under the Administrative Procedure Act."¹⁴⁰

The Senate Report regarding Public Law Number 94-202 also described SSA's then parent agency's repeated and consistent statements that the APA applies to the adjudications of Social Security Act claims that have been denied by SSA: "The [Senate Finance] committee and the Department of HEW consistently over the years have declared that the language in title II (and under the provisions of this bill, title XVI) of the Social Security Act call for 'on-the-record' hearings which invoke the provisions of the Administrative Procedure Act."¹⁴¹

137. *Id.*

138. Office of Personnel Management and Office of Hearings and Appeals, Social Security Administration, Standard Position Description for the Chief Administrative Law Judges employed by the Office of Hearings and Appeals of the Social Security Administration 1 (November 9, 1988) (on file with author).

139. *Id.* at 2 (emphasis added).

140. *Id.* at 4.

141. S. Rep. No. 94-550, at 6 (1975).

Therefore, both SSA and OPM (and OPM's predecessor, the Civil Service Commission) have administrative practices of long duration of (1) employing APA ALJs since the inception of the APA in 1947, and (2) repeatedly and expressly stating in the SSA job descriptions, that ALJs, Hearing Office Chief ALJs, and Chief ALJs adjudicate Social Security Act claims by holding hearings and deciding the cases pursuant to the provisions of the APA. These administrative practices by SSA and OPM are consistent with the interpretation that Social Security Act adjudications are APA adjudications that are presided over by APA ALJs.

V. CONCLUSION

In 2000, the SSA Commissioner decided to issue a written statement in response to a public request made by an SSA ALJ at the Ninth National Educational Conference of the Association of Administrative Law Judges ("AALJ") that the Commissioner confirm the applicability of the APA to Social Security Act adjudications.¹⁴² The contents of this article were submitted as a memorandum of law by the AALJ to the SSA General Counsel's Office and helped lead to the SSA Commissioner's issuance in 2001 of his position statement regarding the applicability of the APA to the Social Security Act hearing process.¹⁴³ The Commissioner's statement in its entirety is as follows:

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

The Social Security Administration (SSA) has a long tradition, since the beginning of the Social Security programs during the 1930s, of providing the full measure of due process for people who apply for or who receive Social Security benefits. An individual who is dissatisfied with the determination

142. AALJ is the organization that represents the ALJs employed by the Social Security Administration and Department of Health and Human Services.

143. Memorandum from the AALJ, to the SSA (November 2000) (on file with author).

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

I trust this is responsive to the question that was raised.¹⁴⁴

Thus, the legislative history of the APA and the Act, decisions of the federal courts, and the long-standing administrative practice of the OPM and SSA firmly establish that Social Security Act adjudications by ALJs also are Administrative Procedure Act adjudications.

144. Letter from Kenneth S. Apfel, SSA Commissioner, to Judge Ronald G. Bernoski, President, Association of Administrative Law Judges (January 9, 2001) (on file with author).

