AALJ Posthearing Statement to Social Security Subcommittee

In our view, the legislative history of the APA and subsequent case law makes plain thatadministrative hearings before the Social Security Administration are to be conducted under both the Social Security Act and the Administrative ProcedureAct.

The legislative history of the Administrative Procedure Act is well-documented, and most notably, in the record entitled, "Proceedings in the House of Representatives May 24 and 25, 1946 and Proceedings in the Senate of the United States March 12 and May 27, 1946,"[1] wherein, among other statements, Senator McCarran of Nevada eloquently presides over the introduction of the proposed legislation. He recounts in detail the many years of study and debate, both in the Executive and Legislative branches of government, which underlie what was then acknowledged as a broad-sweeping legislative reform. We begin here because it is vital to understand, now in retrospect, the significance of this legislation, intended to apply to all administrative agencies; and which has now been questioned by some within the Social Security Administration as to its applicability to Social Security adjudications. The Administrative Procedure Act was not then and is not now, piecemeal legislation to be avoided where possible; but is, and was intended to be, instead, a fundamental reform in the structure and operation of the Executive branch agencies, as applicable today as when first proposed and later enacted in 1946.

In 1944 Congress began taking up once again the question of reform within the administrative agencies. This was a continuation of undertakings begun in the mid-1930's, and most notably by the President's Committee on Administrative Management, which issued their report on the state of "the fourth branch of government" in 1937. In 1941, Attorney General Tom Clark issued his "Final Report of Attorney General's Committee on Administrative Procedure."[2] Calling for broad reforms, action on the various reports were delayed with the advent of hostilities in World War II.

With victory in Europe and over Japan, World War II came to a triumphant close and the Administrative Procedure Act ("APA") was again considered by Congress in March and May of 1946 – eventually approved unanimously by both Houses of Congress.[3] The proceedings before the United States Senate on March 12, 1946 reveal an unwavering conviction that the APA was intended to apply across all Executive Branch administrative agencies to right what were then perceived as global wrongs in the administrative (the so-called "fourth branch") agencies in the Executive Branch of government. This political discussion – which presaged the introduction and passage of the APA in 1946 – leaves little room for speculation that the APA was piecemeal legislation, designed only to apply in limited circumstances and to select agencies.[4]

Instead, the Act's legislative history makes abundantly plain that the APA was intended to be broad sweeping legislation designed to restore to American government fundamental freedoms for the American people, freedoms which had become clouded in the murky waters of unregulated administrative organs whose existence, presence and actions were not contemplated

by the nations' founders, and whose conduct in the realms of investigation, prosecution and adjudication had become so burdensome as to all but undo what was thought preserved in the Constitution. Against this backdrop the question raised by the Social Security Administration today – whether the APA applies to its proceedings – raises an even more significant question, *to-wit:* whether this is but yet a return to the pre-APA days of the 1930's – days described with loathing by the President's Committee on Administrative Management in 1937.[5]

The Intent of the APA was to Restore Constitutional Principles to Administrative Adjudication

The Administrative Procedure Act defines the scope of its reach as regards administrative adjudications when it provides at Title 5 U.S.C. §554(a) that the act is applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." These simple words belie the depth of the wrongs sought to be undone in the passage of the APA. Ultimately, the purpose of this requirement in the APA is to ensure due process with a full, fair and impartial hearing. As is evident from the legislative history, a critical element of this needed reform was creation of a mechanism for the separation of functions within individual agencies; as well creation of a "semi-independent" decision maker, designed to be free from the influence of the agency.[6] The need for a statutory embodiment of these fundamental constitutional rights is most clearly seen when Senator McCarran declared to the United States Senate on March 12, 1946 that the APA was needed to reform what had become an untenable situation for Americans. In his view, the Executive Branch administrative agencies had become haphazard constructs, operating without direction or guidance, adrift from Constitutional underpinnings.[7]

The APA and the Social Security Act

Senator McCarran explains on the Senate floor in 1946 that "Section 5 of the bill [the APA] concerns adjudications. The initial provision of this section makes it clear that subsequent provisions of the section apply only where the case is otherwise required by statute to be determined upon an agency hearing, except that, even in that case, the following classes of operations are expressly not affected: First, cases subject to trial *de novo* in court; second, selection or tenure of public officers other than examiners; third, decisions resting on inspections, tests, or elections; fourth, military, naval, and foreign affairs functions; fifth, cases in which an agency is acting for a court; and, sixth, the certification of employee representatives."[8]

The legislative history further provides in Senate Report 95-697 that: "Hearing examiners, [now designated Administrative Law Judges (ALJ's) pursuant to Civil Service Regulation] are an integral part of the rule-making and adjudicatory procedures required by the Administrative Procedure Act (APA) of 1946 [now codified at *5 U.S.C. 551* et seq.] To insure the independence and impartiality of the administrative process, section 556 of title 5 requires ALJs to serve as presiding officers with respect to rule-making *or adjudicatory hearings* (unless the agency itself, or one or more of its members, presides). S. Rep. No. 95-697, at 2 (1978). (Emphasis added.)

The Social Security Act at 42 U.S.C. §405(b) (1) specifically provides for a hearing for any individual who asserts his or her rights may be prejudiced by "any decision the Commissioner of Social Security has rendered." If a hearing is held, this same section requires that "on the basis of evidence adduced at the hearing, [the administrative law judge may] affirm, modify or reverse the Commissioner's findings of fact and such decision." This is the very measure of an "adjudicatory hearing." There is now little question that such hearings, mandated by §405b, constitute a "final decision" of the Commissioner under §405g of the Social Security Act, triggering the application of the APA. This is most clearly explained by the Second Circuit in *Cappadora v. Celebreeze*, 356 F.2d 1, 7-8 (2nd Cir. 1966) (later followed by the United States Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192, 201 (1977)), wherein the Second Circuit states:

On a strictly literal reading, §405(g) could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing, albeit a hearing not required by the statute. Such an interpretation, however, would be unnatural and unsound, and scarcely consistent with the wise counsel to reject "the tyranny of literalness" and remember that "a restrictive meaning for what appear to be plain words may be indicated by the Act as a whole." *United States v. Witkovich*, 353 U.S. 194, 199, 77 S. Ct. 779, 782, 1 L. Ed. 2d 765 (1957) . . . Accordingly, in addition to wide-ranging powers suitable to effective achievement of the assigned task, the agency was authorized to make an initial determination of each claim *ex parte* and, in contrast to the many requirements of notice and hearing in the usual regulatory statute, ***was compelled to hold a hearing in only one instance*** -- where an adverse *ex parte* determination had been made and timely request for a hearing was filed, 42 U.S.C. § 405(b). ***In this context the reasonable reading of § 405(g) is that it was intended to apply to a final decision rendered after a hearing thus made mandatory,*** not to a decision which could lawfully have been made without any hearing at all. (Emphasis added.)

Equally clear is the fact that the provisions under §405b do not fall within the exceptions to Section 5 of the APA, as summarized by Senator McCarran, above, squarely placing Social Security hearings, required, as noted above by the Social Security Act, within the ambit of the APA. Those who seek a different result, argue yet a further point. They assert that for the APA to apply, hearings must also be required by the organic statute to be "on the record." They argue that such is not required by the Social Security Act.

In this, they are incorrect.

Quite apart from the legislative history of the APA, some have urged that the specific language of Section 5, now codified at 5 U.S.C. §554 (*"... in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing ..."*) is not triggered by the Social Security Act, as there is no specifically articulated requirement that hearings be "on the record." [9] Close reading of the Social Security Act is to the contrary. The language utilized in the Act shows that hearings were intended to be "on the record" – a conclusion not reached simply by reference to legislative history, but from the language of the Social Security Act itself. Title 42 U.S.C. §405(b)(1) directs "[t]he Commissioner of Social Security . . . to make findings of fact, and decisions as to the rights of any individual applying for a payment under" the act. As Professor Victor Rosenblum points out, section 405(g) "requires

that '[a]s part of his answer, the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.'" The section 405(g) requirement "that the Secretary furnish a transcript of the record can only mean that a record must be maintained in order to facilitate judicial review of the propriety of application of the facts to the law."[10]

Others have echoed this same analysis, arguing that the APA provides that its provisions will be applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." *5 U.S.C § 554*[a] (2000). "Since every decision in the Social Security Act is rendered on the evidence of record as developed at the hearing stage, the APA must apply to Title II hearings."[11]

The Social Security Act provides that in response to an appeal for judicial review, the Commissioner of Social Security, "as a part of the . . . answer . . . shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based."[12] As noted, it is well-settled that the requirement to file "a certified copy of the transcript of the record" must mean creation of the record in the first instance. These issues were definitively debated and resolved with the passage of the 1972 Supplemental Security Income legislation and the subsequent appointment of what were initially temporary "SSI judges" as administrative law judges under the Administrative Procedure Act:

"The section 405(g) requirement "that the Secretary furnish a transcript of the record can only mean that a record must be maintained in order to facilitate judicial review of the propriety of application of the facts to the law." 'The requirement that the Secretary furnish a transcript of the hearing "triggers the need to appoint ALJs pursuant to § 3105 of the APA.'" Several commentators, however, have disputed this analysis. In response to an argument in 1973 before the Civil Service Commission over whether the 1972 SSI amendments required the appointment of ALJsas presiding officers, the General Counsel of the Civil Service Commission argued a literal interpretation of the statute.' He asserted that the absence of an "explicit requirement that the determination be made 'on the record' as required by section 554 (a) of the APA" meant that APA coverage did not extend to SSI hearings.

In answer, the "HEW General Counsel argue[d] that the cross reference in section 1631(d)(1) to 205(g) meets the 'on the record' requirement because, on judicial review, 'the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.'" 'The Ways and Means Committee staff, writing in 1974 in support of the adoption of clarifying amendments, supported the latter (HEW) view.' The staff did not argue that the amendments would change the SSI's approach, but rather would *"strengthen* the argument that the determination *is* on the record.'"[13]

This conclusion is further reinforced when considering the requirement for judicial review – both under the Social Security Act and the APA. Again, looking to Senator McCarran's words in 1946: "Section 10 [of the APA, now at 5 U.S.C. §701] [14] is the section which relates to judicial review. This section does not apply in any situation so far as there are involved matters with respect to which existing statutes preclude judicial review, or with respect to which agency action is by law committed to agency discretion. Subsection (a) of section 10 provides that any

person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review."[15]

The Social Security Act does not preclude judicial review; and, indeed, provides for just such a remedy at Section 205(g) of the Social Security Act, codified at 42 U.S.C. §405(g). This section states that "any individual, after any final decision of the Commissioner of Social Security made after a hearing . . . may obtain review of such decision by a civil action commenced . . . in the district court of the United States for the judicial district in which the plaintiff resides . . ." "Section 10(c)" of the APA [now at 5 U.S.C. §704] provides for review of agency action *if that action is made reviewable specifically by statute*. The APA thus looks to the organic statute – here, the Social Security Act, as triggering the right of judicial review. This is precisely the case with the Social Security Act.

The Interplay Between the Social Security Act and the Administrative Procedure Act in Judicial Review

Courts which have considered the question of the interplay between the Social Security Act and the Administrative Procedure Act in requiring judicial review have variously concluded that the Administrative Procedure Act and the Social Security Act must be read *in pari materia;* and more specifically, that Section 405 of the Social Security Act, providing for judicial review, must be read *in pari materia* with Section 1009 [now at 5 U.S.C. §701 *et seq.*] of the Administrative Procedure Act. See, *Miller v. Ribicoff*, 195 F. Supp. 534 (W.D.S.C. 1961); *Sayer v. Richardson*, 360 F. Supp. 199, 201 (W.D. La. 1973). See also, *Couch v. Udall*, 265 F. Supp. 848, 850 (W.D. Okla. 1967).[16] "Literally translated, the Latin phrase *in pari materia* means "on the same subject." Black's Law Dictionary 807 (8th ed. 2004). The doctrine of *in pari materia* is a rule of statutory construction providing "that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Id.

The United States Supreme Court in *United States v. Stewart*, 311 U.S. 60, 61 S. Ct. 102, 85 L. Ed. 40 (1940), embraces this principle of statutory construction as regards two statutes relating to farm loan bonds:

> It is clear that all acts *in pari materia* are to be taken together, as if they were one law. *United States* v. *Freeman*, 3 How. 556, 564. That these two acts are *in pari materia* is plain. Both deal with precisely the same subject matter, *viz.*, the scope of the tax exemption afforded farm loan bonds. The later act can therefore be regarded as a legislative interpretation of the earlier act (*Cope* v. *Cope*, 137 U.S. 682, 688; cf. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331-332) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. It is therefore entitled to great weight in resolving any ambiguities and doubts. Cf. *United States* v. *Stafoff*, 260 U.S. 477, 480.

Close reading of the requirement for judicial review in Section 405(g) of the Social Security Act *in pari materia* with the Administrative Procedure Act, results in the following interplay, described by the court in *Julian v. Folsom*:

The Social Security Act plainly is not excepted from the review provisions of the Administrative Procedure Act under Section 10. The later enacted provisions of Section 10 must be read *in pari materia* with those of the Social Security Act. Cf. *Willapoint Oysters v. Ewing*, 9 Cir., 174 F.2d 676, 685-687; United States *ex rel. Trinler v. Carusi*, 3 Cir., 166 F.2d 457. Without dealing with the question of whether, at this time, the scope of review provided in the Administrative Procedure Act is any broader, as a practical matter, than that in the Social Security Act, the review to be made in the case at bar must meet the standards set by the more expansive language of the later act.

Thus, while no hearing *de novo* may be had by the court and any actions, findings and conclusions of the Secretary supported by substantial evidence are conclusive on the reviewing court, the courts 'must be influenced by a feeling that they are not to abdicate their conventional judicial functions' and are responsible for assuring that an agency 'keeps within reasonable grounds.' *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490, 71 S.Ct. 456, 95 L.Ed. 456. The record as a whole must be reviewed and the court must set aside any actions, findings and conclusions unsupported by substantial evidence. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 483; *Universal Camera Corp. v. National Labor Relations Board*, supra; *Gooding v. Willard*, 2 Cir., 209 F.2d 913, 916.[17] (Emphasis added.)

Despite a series of rulings from various courts that the Social Security Act must be read *in pari materia* with the later-enacted Administrative Procedure Act, the Social Security Administration nevertheless argued that the Administrative Procedure Act does not apply to the Social Security Act. Such was the case in *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978). The First Circuit squarely declined the argument, holding:

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. See *Ruiz-Olan v. Secretary, HEW*, 511 F.2d 1056, 1058 (1st Cir. 1975); *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1972); Cf. *Richardson v. Perales*, 402 U.S. 389, 409, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1970). We reject it.

In *Ruiz-Olan v. Secretary, HEW*, 511 F.2d 1056, 1058 (1st Cir. 1975) the First Circuit held applicable the Administrative Procedure Act as governing the standard of review to be applied by the federal court when engaged in judicial review of the then-Secretary's disability decision. The court stated: "As to the refusal to reopen, we agree that this administrative action is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 (1970), notwithstanding §§ 405(g) and (h) of the Social Security Act. *See Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1972); *Davis v. Richardson*, 460 F.2d 772 (3d Cir. 1972); *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966). *But see Stuckey v. Weinberger, supra.* [citations omitted.] But review is restricted to ascertaining whether the administrative action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, 5 U.S.C. § 706(2)(A)."

In *Maddox v. Richardson*, *supra*, the Sixth Circuit also held that the Administrative Procedure Act governed judicial review under §405(g), holding "that 42 U.S.C. § 405(g) makes provision

for judicial review of the merits of a claim following a final decision of the Secretary. The Administrative Procedure Act, on the other hand, makes provision for review only under the limited criteria set forth in that Act. The provision applicable here limits review to final agency action for which there is no other adequate remedy in a court. It is clear that the Secretary's refusal to reopen is final in that no further administrative steps remain to be taken; and that it is equally clear that, if the Administrative Procedure Act does not apply, no judicial review will be available. Accordingly, the Secretary's decision not to reopen seems to be squarely within the meaning of 5 U.S.C. § 704."

The Court continued, holding, in effect, that the application of the Administrative Procedure Act was in fulfillment of Congressional intent to safeguard the rights of the individual (much as asserted by Senator McCarren in 1946.)[18]

Finally, In *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420 (1971), the United States Supreme Court considered the adjudicative process in Social Security hearings, reversing the holding of the Court of Appeals that written reports, while admissible in such hearings, did not constitute substantial evidence supportive of the hearing examiner's decision. In doing so, the Court addressed the claimant's arguments that "the processing of claims" is governed by the Administrative Procedure Act and not the Social Security Act.[19] In this, the claimant argues that the APA provides for cross-examination of the physician preparing a report. Alternately, the claimant attacks the inquisitorial jurisprudence embodied in the Social Security Act, raising a question of due process, given that the then-hearing examiner is charged with at one point with "gathering the evidence . . . to make the Government's case as strong as possible" and "that naturally he leans toward a decision in favor of the evidence he has gathered."[20]

In response, the Court neither agrees nor disagrees that "the APA has general application to social security disability claims," but cites to the APA in stating, "the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act. See Final Report of the Attorney General's Committee on Administrative Procedure, contained in Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., 157 (1941); see also the remarks of Senator McCarran, chairman of the Judiciary Committee of the Senate, 92 Cong. Rec. 2155."

The Court further finds that the APA at § 556 "conform[s], and . . . [is] . . . consistent with, rather than differ[s] from or supersede[s], the authority given the Secretary by the Social Security Act's §§ 205 (a) and (b) "to establish procedures," and "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits," and to receive evidence "even though inadmissible under rules of evidence applicable to court procedure."[21] In so finding, the Court effectively applies the principle of *in pari material* – a conclusion reinforced by the fact that the Government did not argue that the APA was inapplicable, but rather the reverse. The Court's holding, declining to address the question of APA applicability actually mirrors the argument advanced by the Government in its brief (citations omitted):

"The Government did not argue the inapplicability of the APA; instead, **it assumed that the APA was applicable. The Solicitor General, arguing for the government, stated that "the**

broad question of the general applicability" of the APA to such hearings "'is of no consequence here. For, assuming its applicability, the Administrative Procedure Act specifically authorizes the procedures which the Secretary follows under the Social Security Act.'" This argument by the Solicitor General, coupled with the Supreme Court's finding that "[w]e need not decide whether the APA has general application to Social Security disability claims," shows that the Perales Court did not alter "the scope of the APA's coverage."[22] (Emphasis added.)

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

Thus, it is plain that when the question of judicial review has been considered by the courts, the Administrative Procedure Act does not give way to 42 U.S.C. §405(g); but instead is read *in pari materia*, allowing judicial review as provided by the Social Security Act, but nevertheless establishing the breadth of such review under the Administrative Procedure Act.[23]

Conclusion

To understand the effect of the APA and its relationship to the Social Security Act it is important that we consider in the first instance the legislative history attendant to the Act. As we began with the Senator McCarran's address to the Senate, so should we thus conclude.

Senator McCarran in his address in March 12, 1946 to the Senate read into the record an article by Willis Smith, who in 1946 was then president of the American Bar Association, entitled, *"Drafting the Proposed Federal Administrative Procedure Act."* Senator McCarran read the article to the United States Senate to "lend emphasis" to the bill then being introduced.

Mr. Smith writes of Senate Bill 7 or "S.7" as the Administrative Procedure Act was known, that the "main questions" addressed in the bill were "how to provide for rule making where no formal hearing is provided, how to assure fairness in adjudications, how to state all the essentials of a right to judicial review, and how to make examiners [now, "administrative law judges"] independent."[24] He further explained that the then-proposed "Federal Administrative Procedure Act" "deals broadly with the problem of administration and is a measure of good government." He went on, stating, "it deals with procedure, not privileges, and provides a general method of assuring that government will operate according to law."[25]

Smith further declares, "contrary to the impression which some people seem to have, the proposed Administrative Procedure Act is not a compromise. The problem was not 'how much' but 'how.' How to assure public information, how to provide for rule making where no formal hearing is provided, how to assure fairness in adjudications, how to confer various incidental procedural rights, how to limit sanctions, how to state all the essentials of a right to judicial review, and how to make examiners independent – these were the main questions."[26] More than anything else, however, Smith makes this simple point: the APA was not a compromise because "if the statute should prove unworkable, it might prejudice procedural legislation for all

time . . . Mainly . . . it was a simple matter of good citizenship and good statesmanship to seek the best and fairest provisions for each subject."[27]

Professor Bernard Schwartz aptly summarizes the pre-APA decision-making process which spurred the need for reform. "Before the APA, the presiding officer at agency hearings was a staff member to whom the job of hearing officer had been delegated. As summarized by the leading official study, 'In general, it has been customary to designate hearing officers before whom evidence may be adduced – whether they be a board of three or more individuals, or, as is more common, a single hearing officer, variously known as a trial examiner, a referee, a presiding officer, a district engineer, a deputy commissioner or a register.'" In pre-APA terms, such individuals were often termed "examiners," a term that carried over into the language of the APA itself. These staff members became the administrative equivalent of a trial judge, but without the power to actually make a decision. Only the agency head had the pre-APA power to decide – and as Professor Schwartz points out, the one actually presiding was not the agency head, but a designee who "was a judge controlled by the agency . . . and one who was more a monitor than a true judge, since he did not have the power to decide the case."[28]

Compounding this problem was a combination of functions, such that the agency became the investigator, prosecutor and judge. The Supreme Court views such combinations critically, noting that "a fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge . . . [T]he safeguards it did set up were intended to ameliorate the evils from the commingling of functions."[29]

To right these wrongs, the APA thus requires an internal separation of functions within an agency "by separating those in the agency who investigate and prosecute from those who hear and decide." The Social Security Act does not, in itself, cure the wrongs which prompted the ultimate passage of the Administrative Procedure Act. Separation of functions and the preservation of a fair, unbiased, impartial hearing are fundamental to enactment of the APA. Declaring that the APA does not apply to Social Security hearings may well have the unintended consequence of removing these safeguards – potentially heralding a return to the pre-APA era.

The broad-sweep of the APA cannot, in conclusion, be minimized nor denied. The APA extends its reach to agency rulemaking and adjudications. Indeed, no court has found that the Social Security Act stands apart from the APA. To the contrary, many courts have found that the two statutes stand *in pari materia* – to be considered together. No court has concluded that hearings are not required under the Social Security Act as part and parcel of the agency's "final decision." Neither has any court concluded that such hearings are not "on the record." A final agency decision in applications for benefits necessarily requires a hearing; and the Social Security Act provides not only for judicial review but for submission to the federal court a record of the proceedings underlying the agency's action. These requisites satisfy the APA requirements and trigger a requirement for hearings by administrative law judges, appointed under and rendering decisions in accord with the Administrative Procedure Act.

Finally, it must be noted that the Social Security Administration must and does abide by the APA in rulemaking. In this, the agency clearly recognizes the applicability of the APA. Indeed,

several courts have concluded, applying the APA, that even POMS – the Program Operations Manual System – which the agency describes as providing interpretive internal guidance, and therefore argues, is not subject to the APA – is a final decision by the Commissioner, constituting final agency action subject to appeal under the Administrative Procedure Act. See,*Hall v. Sebelius***,** 689 F. Supp. 2d 10, 20 (D.C. 2009); *Brow v. Secretary of Health & Human Services*, 627 F. Supp. 1467 (D.Ver. 1986).

Again, thank you for providing the Association of Administrative Law Judges an opportunity to express its views on an issue so vital to the American people.

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[1] "ADMINISTRATIVE PROCEDURE ACT, Proceedings in the House of Representatives May 24 and 25, 1946 and Proceedings in the Senate of the United States March 12 and May 27, 1946." http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/proceedings-05-1946.pdf

[2] The complete report is found at, http://www.law.fsu.edu/library/admin/1941report.html

[3] See, n. 1 at p. 295.

[4] Id. at page 311. Senator McCarran endorses the broad sweep of the then-proposed APA:

"Let me say to the Senators now present—and I think I can speak for the Committee on the Judiciary—that I do not believe a more important piece of legislation has been or will be presented to the Congress of the United States than the one which I am trying in my humble way to explain to the Senate today, because it deals with something which touches the most lowly as well as the most elevated and lofty citizen in the land**. It touches every phase and form of human activity, and it deals with that which at the opening of my statement I described as the fourth dimension or fourth branch of our democracy.** In other words, by the Constitution the executive, the legislative, and the judicial branches of our Government were set up; but now we have a fourth branch, the administrative form of our Government. (Emphasis added.)

[5] The Committee observes of the so-called 'fourth branch' of government, the administrative agencies: "They are vested with duties of administration . . . and at the same time they are given important judicial work . . . The evils resulting from this confusion of principles are insidious and far-reaching . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as

prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness."

[6] See, note 3, *supra*.

[7] See, ADMINISTRATIVE PROCEDURE ACT, Proceedings in the House of Representatives May 24 and 25, 1946 and Proceedings in the Senate of the United States March 12 and May 27, 1946, at p. 295. http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/proceedings-05-1946.pdf

[8] Id. at pages 315-316.

[9] See, Wolfe, Jeffrey, *"Are You Willing to Make that Commitment in Writing: The APA, ALJs and SSA,"* 55 Okla. L. Rev. 203, 235-36 (2002).

[10] Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., Recent Studies Relevant to the Disability Hearings and Appeals Crisis 171 (Comm. Print 1975) (Victor Rosenblum) [hereinafter *Recent Studies*].

[11] Donna Price Cofer, Judges, Bureaucrats, and the Question of Independence, A Study of the Social Security Administration Hearing Process, Westport, Conn.: Greenwood Press, 67 (1985).

[12] 42 U.S.C §405(g).

[13] See, Wolfe, n. 10, page 237 (2002).

[14] Note – the references to "Section 10" and "Chapter 7" of the APA refer to the changes to the nomenclature of the APA with the passage of Pub. L. 88-352, title VI, Sec. 603, July 2, 1964, 78 Stat. 253, which resulted in the following changes to the organic structure of the APA-

"Chapter 7 of title 5" and "that chapter" substituted in text for "section 10 of the Administrative procedure Act" and "that section", respectively, on authority of Pub. L. 89-554, Sec. 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees. Prior to the enactment of Title 5, section 10 of the Administrative Procedure Act was classified to section 1009 of Title 5.

[15] Id. at page 323.

[16] That court held, in-part that: "Section 10(e) of theAdministrative Procedure Act prescribing the function of judicial review of agency action must be read ***in*** *pari materia* with the appropriate section of the Social Security Act on the subject of judicial review. *Rafal v. Flemming*, 171 F.

Supp. 490 (E.D.Va.Norfolk Div.1959). Under circumstances similar to the case at bar the Court has stricken interrogatories after finding that its review was restricted to the record of the hearing before the administrative bodies and the evidence produced therein. *Ussi v. Folsom*, 157 F. Supp. 679 (N.D.N.Y.1957), affirmed 254 F.2d 842; *Head v.Flemming*, 188 F. Supp. 297 (D.Oregon 1960)."

[17] 160 F. Supp. 747, 750-51 (S.D. N.Y. 1958).

[18] See, 464 F.2d 617, 621-22 (6th Cir. 1972).

[19] 402 U.S. 389, 409 (1971).

[20] Id.

[21] Id.

[22] SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 94TH CONG.,

RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 171 (Comm. Print

1975) (Victor Rosenblum)

[23] For example, review of the Commissioner's final decision in a Social Security appeal following hearing, is set forth in §405g, as is described by the holding by the Court in *Weinberger v. Salfi,* 422 U.S. 749, 95 S. Ct. 2457; 45 L. Ed. 2d 522 (1975), discussed briefly below.

[24] ADMINISTRATIVE PROCEDURE ACT, Proceedings in the House of Representatives May 24 and 25, 1946 and Proceedings in the Senate of the United States March 12 and May 27, 1946, at p. 295.

http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/proceedings-05-1946.pdf

[25] Id.

[26] Id. at 297.

[27] Id.

[28] Bernard Schwartz, "Adjudication and the Administrative Procedure Act," 32 Tulsa L.Rev. 203, 204 (Winter 1996).

[29] Id. at 207.