

(As published in Western New England Law Review,  
Vol. 6, Issue 3, 1984)

# CONTEXTS AND CONTENTS OF "FOR GOOD CAUSE" AS CRITERION FOR REMOVAL OF ADMINISTRATIVE LAW JUDGES: LEGAL AND POLICY FACTORS

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## I. INTRODUCTION

Push has been coming to shove recently in sectors of relationships between administrative law judges and employing agencies, with conflicts at the Social Security Administration in the visible forefront. The lure and trauma of battle over the power of agencies to prescribe and sanction methodologies and outputs for administrative law judges have left in limbo implementation of earlier consensus-oriented proposals for incremental improvements in selection and monitoring of the judges<sup>1</sup> and have, instead, placed priorities on

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This article was originally prepared for the Administrative Conference of the United States. It represents only the views of the author and not necessarily those of the Conference. The author was Washington and Lee University's Frances Lewis Scholar in residence while researching and drafting this article and deeply appreciates the limitless collegial generosity given him.

1. Two fine studies bearing on selection of administrative law judges were conducted by Amiel T. Sharon for the Examination Services Branch of the U.S. Office of Personnel Management's Personnel Research and Development Center and published by OPM in 1980 without commentary or implementation. Sharon, *An Investigation of Reference Ratings for Applicants for Administrative Law Judge* (PRR 80-6) (1980); Sharon, *Validation of the Administrative Law Judge Examination* (PRR 80-15) (1980) (available from Office of Personnel Management, Wash., D.C.).

The LaMacchia Committee's study a decade ago of opinions and beliefs concerning the efficacy and adequacy of administrative law judge adjudication was the most thorough and detailed undertaken to date. Chaired by the Civil Service Commission's then Deputy Counsel, the LaMacchia Committee sought the views of administrative law judges and sampled the opinions of federal agency officials, private practitioners, and Bar Association representatives about the quality and quantity of administrative law judge work products, relationships between judges and their agencies, standards of review of administrative law judge decisions, and criteria for recruitment of administrative

legal jousts before the Merit Systems Protection Board (MSPB) and the federal courts.

Because the core of the sanctioning power over administrative law judges is found in 5 U.S.C. § 7521(a)'s provision for removal "for good cause,"<sup>2</sup> this article shall focus on legislative history, policy issues and precedents that provide its contexts, limit its contours and suggest its contents. Adoption by Congress, in 1946, of the "good cause" standard for removal of hearing examiners as part of

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law judges. See UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM. REPORT) (1974). The findings of the LaMacchia Study were summarized in the author's 1975 Report to the Administrative Conference, SUBCOMM. ON SOCIAL SECURITY OF THE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 171-245 (Comm. Print 1975).

An Advisory Committee on Administrative Law Judges was established by the then Civil Service Commission in 1976 to make recommendations to the Commission for improvements in managerial effectiveness and utilization of administrative law judges. Prior to being disbanded by the Carter administration as a consequence of the administration's hostility as a matter of principle to advisory committees, the Advisory Committee on Administrative Law Judges made four explicit recommendations and called for "thorough study" of other key issues not ripe for resolution by consensus. The four recommendations were 1) that the Civil Service Commission take appropriate steps to remove administrative law judges from the coverage of the Veteran's Preference Act; 2) that the practice of selective certification be abandoned upon removal of administrative law judges from the coverage of the Veteran's Preference Act; 3) that the Civil Service Commission reduce the list of types of occupations that do not count towards qualifying experience for administrative law judge positions; and 4) that the Civil Service Commission modify its requirement of recency of qualifying experience for appointment as an administrative law judge.

On the issue of tenure of administrative law judges, the Final Report of the Advisory Committee stated:

There was some concern expressed that the [administrative law judge] system, with only two removals in the past 30 years, was not designed to eliminate the marginal performer. While recognizing that [administrative law judges] were protected against annual performance evaluation, consideration was given to the thought that [administrative law judge] performance could be assessed at the end of a given term appointment, e.g., five years, with the suggestion that only the satisfactory performer be offered reappointment. On the other hand, it was pointed out that term appointments would be less likely to attract private practitioners who would hesitate to change careers for brief periods of time. In the end, the Committee felt that the [administrative law judge] tenure issue required thorough study before APA amendment could be entertained.

ADVISORY COMM. ON ADMINISTRATIVE LAW JUDGES, FINAL REPORT TO THE UNITED STATES CIVIL SERVICE COMM'N (Feb. 14, 1978).

2. 5 U.S.C. § 7521(a) (1982). Section 7521(a) provides:

An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

the Administrative Procedure Act<sup>3</sup> (APA) is the starting point. The Supreme Court's approaches to and decision in *Ramspeck v. Federal Trial Examiners Conference*<sup>4</sup> in 1953 will then be analyzed as the paramount case involving agency powers over administrative law judges. Subsequently, Attorney Generals' opinions and Supreme Court observations regarding the roles and functions of administrative law judges are considered contextually as preludes to an analysis of current conflicts before the MSPB and the federal courts. The author seeks at the conclusion to distill guidelines that can govern implementation of the "good cause" standard so as to accord maximum protection to decisional independence and integrity of administrative law judges, while at the same time assuring agencies and the public of conscientiousness, competence and professionalism in judging.

## II. LEGISLATIVE HISTORY AND "GOOD CAUSE"

If the contents of "for good cause" were clear to a certainty, its contexts would be superfluous and irrelevant. But reasonable doubt existed and continues to exist over precisely the extent of independence Congress intended to confer on hearing examiners through in-

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### 3. Section 11 of the Administrative Procedure Act of 1946 provided:

Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to Sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records and pay witness fees as established for the United States courts.

Ch. 324, § 11, 60 Stat. 237, 244 (1944) (codified as amended at 5 U.S.C. § 7521(a) (1982)).

The sections of the Classification Act of 1923 held inapplicable to hearing examiners by section 11 of the APA concerned criteria for setting rates of compensation and their relationships to efficiency ratings of personnel by agency officials. Ch. 346, 55 Stat. 613, 614 (1941).

4. 345 U.S. 128 (1953).

corporation of that standard into section 11 of the original APA.<sup>5</sup> Similarly, reasonable doubt existed over the weight to be accorded hearing examiners' opinions in a judicial application of the substantial evidence standard of review. Justice Frankfurter delivered the Supreme Court's decision in *Universal Camera Corp. v. NLRB*,<sup>6</sup> a landmark recognition of the purpose and salience of a hearing examiner's decisional independence.<sup>7</sup> This reversed Chief Judge Learned Hand's painfully derived hypothesis that reviewing judges were bound to uphold agency decisions, regardless of a hearing examiner's findings and opinions, as long as substantial evidence could be found in the record to support the agency's conclusions.<sup>8</sup> But just as Justice Jackson had to avow in *Wong Yang Sung v. McGrath*<sup>9</sup> the year before, that the APA contains "many compromises and generalities and, no doubt, some ambiguities"<sup>10</sup> and that its "legislative history is more conflicting than the text is ambiguous,"<sup>11</sup> Justice Frankfurter needed to point out that Congress adopted the APA as a whole "with unquestioning—we might even say uncritical—unanimity"<sup>12</sup> and with a palpable lack of that "clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will."<sup>13</sup>

Compromise heightens capacity for consensus but does so at the cost of concomitant ballooning of ambiguity. As Professor Nathanson noted, with his typical understatement at the time the APA was adopted, "the compromise worked out in the drafting of the Act between advocates of uniformity in administrative procedure and the defenders of diversity and flexibility did not always result in a product that is crystal clear."<sup>14</sup> Small wonder then, that computer-like precision in delineating the contents of "for good cause" is available only in dreams. Nonetheless, notwithstanding the avowed uncertainties of legislative intent behind key provisions of the APA, points of specific adoption and rejection by Congress established sufficient

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5. Ch. 324, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. § 7521(a) (1982)).

6. 340 U.S. 474 (1951).

7. *Id.* at 475.

8. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (1950), *vacated*, 340 U.S. 474 (1951).

9. 339 U.S. 33 (1950).

10. *Id.* at 40-41.

11. *Id.* at 49.

12. *Universal Camera*, 340 U.S. at 482.

13. *Id.* at 483.

14. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 419 (1946).

contextual meaning to induce Justice Jackson to write of the APA's ascertainable "formula,"<sup>15</sup> and Justice Frankfurter to conclude that the APA established a "mood" that "must be respected even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application."<sup>16</sup>

Insofar as the standard for removal of hearing examiners was concerned, the context especially worth analyzing was the contrast of section 11's language with the proposal of the Attorney General's Committee on Administrative Procedure.<sup>17</sup> Congress's rejection of the tenure proposal for hearing examiners made by the Attorney General's Committee, and the comments about the choice by leading members of the Senate and House Judiciary Committees, throw significant light upon the legislature's objective in utilizing the terminology of "for good cause."

Accompanying the Attorney General's Committee's Report was "A Bill" putting in the form of proposed legislation, the principal recommendations for improvements in the administrative process that it believed susceptible of legislative treatment. Section 302 of Title III focused on appointment and removal of "hearing commissioners." Nomination was to be by "each agency entrusted with the duty of deciding cases", but the power of appointment was to be vested in an independent Office of Federal Administrative Procedure which must find appointees "qualified by training, experience and character to discharge the responsibilities of the position."<sup>18</sup> No political test or qualification was to be permitted; all nominations and appointments were to be "made on the basis of merit and efficiency alone."<sup>19</sup>

Section 302(5) of the Attorney General's Committee's Bill dealt explicitly with "term of office" for the "hearing commissioners":

Each commissioner shall be appointed for the term of seven years and shall be removable, within that period, only:

- a) Upon charges, first submitted to him by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty; or
- b) Upon charges of like effect, first submitted to him, by the Attorney General of the United States, which the Attorney Gen-

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15. *Wong Yang Sung*, 339 U.S. at 40.

16. *Universal Camera*, 340 U.S. at 487.

17. ATT'Y GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMIN. PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77TH CONG., 1ST SESS. (1941).

18. *Id.* at 196.

19. *Id.*

eral is authorized to make in his discretion after investigation of any complaint against a hearing commissioner made to him by a person other than the agency; or

- C) Upon certification by the Director, after application by the agency, that lack of official business or insufficiency of appropriation renders necessary the termination of the hearing commissioner's appointment.<sup>20</sup>

Although the Attorney General's Committee was aware and supportive of the need for hearing officials to be free of any undue influence, they deemed seven year tenure sufficient to provide the necessary insulation from political invasion. Congress, in passing the APA, rejected the Committee's conception of tenure for a specific term (as well as its "commissioner" title for hearing officers, preferring "examiner") and chose instead the "for good cause" standard as the only mode of removal. Thus, section 11 of the APA, as adopted in 1946, specified that there shall be appointed by and for each agency "as many qualified and competent examiners as may be necessary" for proceedings pursuant to the statute:

who shall be assigned to cases in rotation as far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof.<sup>21</sup>

Explaining the policy behind this language of section 11, the Senate Judiciary Committee stated:

That examiners be "qualified and competent" requires the Civil Service Commission 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, self-interest and due concern for the proper performance of public functions will inevitably move agencies to secure the highest type of examiners.

The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers. Recognizing that the entire tradition of

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20. *Id.*

21. Ch. 324, § 11, 60 Stat. 237, 244 (1946).

the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the commission. It must afford any examiner an opportunity for a hearing before acceding to an agency request for removal, and even then its action would be subject to judicial review. The hearing and decision would be made under sections 7 and 8 of this bill. The requirement of assignment of examiners "in rotation" prevents an agency from disfavoring an examiner by rendering him inactive.

In the matter of examiners' compensation the section adds greatly to the Commission's powers and function. It must prescribe and adjust examiners' salaries, independently of agency ratings and recommendations. The stated inapplicability of specified sections of the Classification Act carries into effect that authority. The Commission would exercise its powers by classifying examiners' positions and, upon customary examination through its agents, shift examiners to superior classifications or higher grades as their experience and duties may require. The Commission might consult the agency, as it now does in setting up positions or reclassifying positions, but it would act upon its own responsibility and with the objects of the bill in mind.<sup>22</sup>

The House Judiciary Committee repeated most of the Senate Committee's observations about section 11.<sup>23</sup>

Congressman Walter, in the House of Representatives' discussion of the APA, supported further tie-in of examiner "independence" with utilization of Civil Service Commission machinery in removal cases:

One of the most controversial proposals in the field of administrative law relates to the status and independence of examiners who hear cases where agencies themselves or members of boards cannot do so. . . .

It is often proposed that examiners should be entirely independent of agencies, even to the extent of being separately appointed, housed, and supervised. At the other extreme there is a demand that examiners be selected from agency employees and function merely as clerks. In framing this bill we have rejected the latter view, as the Attorney General's Committee on Administrative Procedure throughout the greater part of its final report rejected it, and have made somewhat different provision for

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22. S. DOC. NO. 248, 79th Cong., 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 215 (1946) [hereinafter LEGISLATIVE HISTORY].

23. *Id.* at 280-81.

independence. Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission.

Accordingly, section 11 requires agencies to appoint the necessary examiners under the civil service and other laws not inconsistent with the bill. But they are removable only for good cause determined by the Civil Service Commission after a hearing, upon the record thereof, and subject to judicial review. Moreover, their compensation is to be prescribed and adjusted only by the Civil Service Commission acting upon its independent judgment. The Commission is given the necessary powers to operate under this section, and it may authorize agencies to borrow examiners from one another.

If there be any criticism of the operation of the civil-service system, it is that the tenure security of civil-service personnel is exaggerated. However, it is precisely that full and complete tenure security which is widely sought for subordinate administrative hearing and deciding officers. Section 11 thus makes use of past experience and existing machinery for the purpose.<sup>24</sup>

In his *Foreword* to the brief volume, *Legislative History of the Administrative Procedure Act*,<sup>25</sup> Senator McCarran, the Judiciary Committee Chairman, maintained that the Act, "Although it is brief, . . . is a comprehensive charter of private liberty and a solemn undertaking of official fairness."<sup>26</sup> He may have conveyed more than he intended when he noted that this statute has been through "a sieve of consideration by the Congress."<sup>27</sup>

Professor Morgan Thomas of the University of Michigan maintained, soon after adoption of the APA, that:

[T]he main change [made by the APA] lay in the new independence which hearing examiners were to have. To that end they were explicitly made free of supervision by the investigatory, prosecuting and administrative staffs of their agencies. . . . Within each agency, cases were generally to be rotated so that agency in-

24. *Id.* at 371.

25. LEGISLATIVE HISTORY, *supra* note 22.

26. *Id.* at III.

27. *Id.* Senator McCarran added that the statute "upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men." *Id.*

fluence could not be made effective through assignment of cases. Moreover the Civil Service Commission was entrusted with the broad powers which the agencies themselves had previously exercised over their trial examiners. Thus the Commission was given authority to prescribe examiners' grades and salaries and to pass on promotions independently of agency ratings or recommendations. And an examiner could be removed only if "good cause" were established at a Civil Service Commission hearing.<sup>28</sup>

The guarantee of security of tenure for hearing examiners by the Civil Service Commission was, according to Professor Thomas, "the appropriate way to ensure that the examiners would be free from subservience to their agencies."<sup>29</sup> But he probed the scope and dimensions of hearing examiners' freedom from subservience to their agencies no more deeply than had Senate and House spokesmen in discussing "for good cause." Did freedom from subservience require or countenance freedom from accountability? Did it prohibit all agency sanctions and discipline against hearing examiners? Or only those that could prescribe, control or otherwise influence improperly hearing examiners' decisions? Can a line be drawn and feasibly enforced between sanctions that do and do not intrude upon decisional independence?

### III. APPLICATION OF THE STANDARD

#### A. *Incumbent Trial Examiners at the Enactment of the APA*

The great expectation that the Civil Service Commission would be a paragon of fairness and equity, if not wisdom, in administering the standards and processes for removal of examiners, was materially corroded at the program's outset when the issue of retention of incumbent examiners serving at the time the APA took effect had to be faced. The APA legislative history's pervasive silence extended to whether those who were trial examiners when the legislation took effect would have to requalify. Some argued that the lack of criticism of existing examiners in the legislative history meant that they were automatically protected by section 11. On the other hand, others maintained that the APA in effect abolished all the old trial examiner positions and created a whole new set of jobs for competi-

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28. Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431, 431-32 (1950) (footnote omitted).

29. *Id.* at 473-74.

tion on equal terms by all applicants.<sup>30</sup>

The Civil Service Commission coped with the dispute by appointing an advisory committee to assist in drafting rules for implementation of its APA roles. That not all members of Congress thought incumbent examiners to be role models was made clear by Senate Judiciary Committee Chairman Alexander Wiley in a note to Civil Service Commissioner Arthur Flemming in which he insists that the Commission demonstrate that the hearing examiners "will not be men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise. . . ." <sup>31</sup> The Senator sought "substantial proof" that the Commission would fill these posts with "men of the highest unimpeachable calibre" rather than with men who simply have occupied similar positions in the Federal Government today, who largely are of one party, and who may lack the approach of private enterprise in their work."<sup>32</sup>

The Commission deferred definitive action on the status of incumbents until after June 11, 1947, the date the APA provisions were to take effect. It authorized "conditional reappointment" of incumbents pending final action and, in January 1948, appointed a Board of Examiners with the authority to determine which incumbent examiners were "eminently qualified" and therefore appointable without competitive examination.<sup>33</sup> The Board of Examiners consisted of two State Supreme Court Judges, one employee of the Civil Service Commission, and three practicing attorneys who had held high American Bar Association positions.<sup>34</sup> Professors Morgan Thomas and Ralph Fuchs, the two major scholars studying hearing examiner issues at the time, were in agreement that not much was known about the details of the Board of Examiners' procedures and practices in individual cases. Fuchs declared that, "It is not possible on the basis of available data to evaluate accurately the quality of the

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30. *Id.* at 433. Thomas told "The Story of the Qualifying Process" in objective detail, *see id.* at 433-58, and subjected it to incisive critique, *id.* at 458-75.

31. *The 350 Hearing Examiners: Chairman Wiley Asks Open Choices for Fitness*, 33 A.B.A. J. 421, 422 (1947) [hereinafter referred to as *The 350 Hearing Examiners*]. In the same vein, *see generally* "The Hearing Examiners: Undecided Questions as to Their Selection," 33 A.B.A.J. 688 (1947).

32. *The 350 Hearing Examiners*, *supra* note 31, at 422.

33. Details of the Commission's procedures and practices were described both by Thomas, *supra* note 28 at 433-58, and by Professor Ralph Fuchs of Indiana University, who had been a member of the Attorney General's Committee on Administrative Procedure. *See* Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950).

34. Fuchs, *supra* note 33, at 747.

examinations that were given. . . ."<sup>35</sup> It was known that investigation of incumbents was conducted by Commission staff under the direction of the Examiners, and oral interviews were conducted by the Examiners in panels of two or more.<sup>36</sup> But, as Thomas noted regarding the investigators' work: "How widely they consulted the references (listed by the incumbents) and other persons who at that time or in the past had supervised the incumbents is not known."<sup>37</sup>

The Board of Examiners' decisions, which were accepted and translated into the Commission's own official action, were announced in a Commission press release on March 11, 1949.<sup>38</sup> Of 212 incumbents rated by the Board of Examiners, 54 or 25.5% were disqualified. They included 3 out of 5 at the United States Maritime Commission, 3 out of 5 at the Department of Agriculture, 14 out of 41 at the National Labor Relations Board (NLRB), 10 out of 30 at the Civil Aeronautics Board (CAB) and 12 out of 48 at the Interstate Commerce Commission (ICC).<sup>39</sup> The only reasons assigned for the disqualifications were "overall characteristics" or "lack of sufficient specialized experience."<sup>40</sup>

Objections and protests followed. Every affected agency appealed on behalf of its examiners. For example, the NLRB complained that: "The action has eviscerated the hearing examiner staff at a time when its caseload is singularly great . . . . The Board will be unable efficiently to pursue its regular operations without the services of these trained men, many of whom have been with the Board for over a decade."<sup>41</sup>

The ICC Practitioners Association called upon Congress to investigate the Civil Service Commission's "violence to one's sense of justice and fair play" in the rating of incumbent examiners.<sup>42</sup> On their own behalf, examiners complained that it was impossible for them to appeal effectively since the Board of Examiners had failed to identify in what respects each hearing examiner had been found wanting.<sup>43</sup>

Responding to the criticism, the Commission's staff subse-

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35. *See id.* at 751.

36. *Id.* at 752 & n.62.

37. Thomas, *supra* note 28, at 440.

38. *Id.* at 441-42.

39. *Id.* at 442-43.

40. *Id.* at 442.

41. Quoted by Thomas, *supra* note 28, at 444.

42. *Id.* at 455 (quoting 16 I.C.C. Prac. J. 706, 710 (1949)).

43. *Id.* at 445.

quently prepared a "Basis of Findings" item for each instance of disqualification and listed criticisms such as "lack of fairness," "arbitrariness," "immaturity," or "biased in certain respects" in place of the previous "overall characteristics." Where disqualification was due to lack of sufficient specialized experience, the Commission then specified the experience not credited as being "specialized."<sup>44</sup> Attacks on the work of the Board of Examiners did not abate, however. Indeed, charges escalated, ranging from lack of legitimate authority to economic and religious bias.<sup>45</sup> The charges, countercharges, and evidence introduced in ensuing proceedings indicate that "serious misstatements and omissions" were contained in the 1948 investigations of incumbents.<sup>46</sup> Where second investigations were undertaken, there were "marked discrepancies" with the reports of the first investigations.<sup>47</sup>

These events, not surprisingly, led to the resignation of the Board of Examiners and to further changes in the Civil Service Commission's register of eligible hearing examiners.<sup>48</sup> On December 13, 1949, the Commission rescinded its firing of the incumbent examiners found less than eminently qualified by the Board of Examiners, "herald[ing] the end of one of the bitterest behind-the-scenes fights Washington has seen in recent years."<sup>49</sup> Professor Thomas praised the Commission's action as a necessary corrective rather than a capitulation to the "temptation to contrive petty ways of muddling through and saving face."<sup>50</sup> Professor Fuchs cautioned that the hearing examiner program would remain a fiasco "if the Civil Service Commission continues to permit itself to be pushed first in one direction and then in another by outside pressures."<sup>51</sup> It is "particularly depressing," he added, "that an agency of government that traditionally embodies the highest rectitude should appear in such a role."<sup>52</sup>

The federal government's only experience prior to recent MSPB proceedings with evaluation and removal of incumbent hearing officers turned out to be a model of how *not* to proceed. From the establishment of the Board of Examiners to the final effectual

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44. *Id.*

45. *Id.* at 445-54.

46. *Id.* at 452.

47. *Id.* at 453.

48. *Id.* at 456.

49. *Id.* at 431.

50. *Id.* at 475.

51. Fuchs, *supra* note 33, at 767.

52. *Id.*

“grandfathering” of the incumbents into APA status, the experience was marked by dissonance, ambiguity, vacillation and pressure. The problem was not primarily that the “for good cause” standard of removal was not deemed applicable by the ill-fated Board of Examiners; it was that both Board and Civil Service Commission eschewed consistent adherence to any rational standard for deciding which hearing examiners would be retained and which would leave as the APA era dawned. Instead, Board and Commission fell “victim to the winds of the moment.”<sup>53</sup>

### B. *Case Law*

Hearing examiners and the District of Columbia Federal District Court made the contents of “for good cause” a central legal issue when the Civil Service Commission adopted rules in 1951<sup>54</sup> for promotion, compensation and reductions in force of hearing examiners. Ultimately, the Supreme Court’s decision in *Ramspeck* rejected the construction of “for good cause” put forth by the examiners and accepted by District Judge Bolitha Laws when, instead of the narrow “personal disqualification” connotation emphasized in the district court, the Supreme Court majority adopted a concept of “for good cause” in accordance with the findings and reasons of the Commission.<sup>55</sup>

Ruling on motions for summary judgment filed by both plaintiffs and defendants in the action, Judge Laws had granted the examiners’ motion and denied the Commission’s without any doubt as to the meaning of the APA’s section 11. Separation of hearing examiners by reductions in force was contrary to the Act because, in part, the statute’s language, stating that examiners may be removed “only for good cause,” had to be construed in light of the “significant” finding that “reduction in force provisions in earlier drafts of legislation governing administrative procedure were omitted from the Administrative Procedure Act as passed. . . .”<sup>56</sup> Judge Laws maintained that “the importance of security of tenure to independence of judgment needs no argument and was clearly recognized by the Attorney General’s Committee on Administrative

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53. *Id.* at 768.

54. 5 C.F.R. § 34.15 (Supp. 1951).

55. 345 U.S. at 143.

56. Federal Trial Examiners’ Conference v. Ramspeck, 104 F. Supp. 734, 740-41 (emphasis added by court), *aff’d*, 202 F.2d 312 (D.C. Cir. 1952), *rev’d*, 345 U.S. 128 (1953).

Procedure. . . ."<sup>57</sup>

Whether or not Judge Laws was correct in viewing the Attorney General's Committee proposal for a seven year term for hearing examiners as recognition of security tenure's importance, the court of appeals' majority, consisting of Judges Miller and Proctor, routinely agreed with him in a two-paragraph, seventy word opinion.<sup>58</sup> Judge Bazelon dissented at some length, repudiating in particular the notion that "for good cause" was confined to "a *personal* shortcoming—malfeasance, incompetence or some kindred disqualification."<sup>59</sup> Quoting from Senate Report 752 in the APA's Legislative History, Bazelon maintained that Congress "put 'the entire tradition of the Civil Service Commission . . . to use' when it prescribed a new system of tenure for hearing examiners in section 11."<sup>60</sup> Criteria for reductions in force "are now a firmly embedded implementation of that 'tradition.'"<sup>61</sup>

In two particularly salient paragraphs, Judge Bazelon contended that the examiners' view of section 11,

which is adopted by the [district] court, goes much farther along the road toward complete examiner independence than Congress itself was willing to travel. In enacting [section] 11, Congress sought to strike a balance between the need for administrative efficiency and expertise and the need for freeing hearing examiners from dictation or intimidation by the agencies. Accordingly, Congress did not adopt any of the extreme proposals to isolate hearing examiners from the agencies or insulate them completely from expressions of the agencies' views. . . . Instead Congress adopted the less extreme proposal of removing from the agencies and giving to the Commission wide powers over the selection, compensation and removal of hearing examiners. This was the means adopted to end "the present situation in which examiners are mere employees of an agency."<sup>62</sup>

Judge Bazelon's concluding paragraph enlarged upon the administrative discretion dimension of this analysis. Proceeding from the premise that much of the attack on the Commission's regulations has been "leveled at the possibility they offer for frustrating the pur-

57. *Id.* at 741.

58. *Ramspeck v. Federal Trial Examiners' Conference*, 202 F.2d 312 (D.C. Cir. 1952), *rev'd*, 345 U.S. 128 (1953).

59. *Id.* at 313 (Bazelon, J., dissenting) (quoting Brief for Appellees at 36) (emphasis added).

60. *Id.*

61. *Id.*

62. *Id.* at 314-15.

pose of the Administrative Procedure Act to free hearing examiners from agency domination and coercion," Judge Bazelon admitted "that the possibility exists cannot be denied."<sup>63</sup> But, he insisted, that possibility

is not so gross as to make the regulations invalid. . . . Congress has a right to rely upon the administrators to keep faith with the spirit of the statute. The record in this case does not reveal that that confidence was misplaced. If individual instances of abuses should arise in the future which threaten to thwart the spirit of the statute, the means are available to put the matter right.<sup>64</sup>

Without mentioning Judge Bazelon's dissent directly, the Supreme Court majority accepted his view of section 11 although its reasoning was neither as overt or precise. What is abundantly clear from the record of the case, notwithstanding any imprecision of reasoning, is that the justices rejected the views of Judge Laws and the court of appeals' majority and largely ignored additional arguments presented in the examiners' brief by Charles Rhyne, Eugene Bradley, Eugene Mullin and Brice Rhyne.<sup>65</sup>

Counsel for the examiners stressed, for example, the difference in meaning between statutory provision for removal of personnel for "such cause as will promote the efficiency of the service" and removal "only for good cause." The former clearly authorized a reduction in force because such reductions, undertaken when work and funds were no longer available, could be said to promote the service's efficiency. But "only for good cause" required "something more than normal civil service tenure."<sup>66</sup>

Rhyne further argued that, in section 11, Congress chose deliberately to use phraseology different from standard traditional Civil Service tenure language; it rejected efficiency of the service as the criterion for removal of hearing examiners and chose to provide examiners with "extraordinary protection" consonant with the uniqueness of their functions within the administrative process, as compared with agency employees in general.<sup>67</sup> Congress did not provide simply that examiners shall be removable for good cause or that they shall be removable for good cause only after hearing but that they shall be removable "only for good cause," language which

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63. *Id.* at 316.

64. *Id.*

65. 345 U.S. at 129-43.

66. Rhyne brief for Federal Trial Examiners' Conference at 74; *Ramspeck*.

67. *Id.* at 81.

is "manifestly different and which clearly excludes removal for any reason other than good cause."<sup>68</sup> Because good cause "connotes a personal disqualification," an employee removed by reduction in force procedures has not been removed "for good cause."<sup>69</sup>

To cope with the argument by counsel for the Commission that the examiners were claiming "lifetime jobs during 'good behavior' irrespective of the workload of their agencies or the availability of funds with which to pay them," Rhyne maintained that respondents

never contended that a hearing examiner has an inalienable right to retain his salary when there is no work for him to do. . . . Section 11 does not purport to state all the reasons for which examiners may be removed. It does state all the reasons for which they may be removed "by the agency in which they are employed". . . . There . . . is no doubt as to the power of Congress to remove examiners, or to abolish their positions.<sup>70</sup>

Furthermore, the APA's authorization of interagency borrowing of examiners and of assignment of them to duties compatible with their responsibilities as examiners were the statute's designated ways for dealing with workload changes.<sup>71</sup>

Counsel for the examiners sought to reinforce their argument that removals by reductions in force are prohibited by section 11 with a detailed discussion of the requirements for and prohibitions of efficiency ratings. Statutes and regulations governing reductions in force traditionally required that efficiency ratings be taken into account.

When Congress forbade efficiency ratings for examiners, it knew that efficiency ratings were utilized by the agencies in reduction in force to determine not only the relative standing of an employee within his competitive level but also the very competitive level in which he was to be placed. Congress' action in prohibiting efficiency ratings for examiners is utterly inconsistent with an intent that examiners be subject to removal by reduction in force.<sup>72</sup>

Without discussing at all the similarities and differences between the "efficiency of the service" standard and "for good cause" standard for removal of personnel, the Supreme Court majority simply punctured the examiners' and lower courts' positions by pro-

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68. *Id.* at 75.

69. *Id.* at 71.

70. *Id.* at 80.

71. *Id.* at 81.

72. *Id.* at 76.

claiming that “[a] reduction in force for the reasons heretofore provided by the Civil Service Commission and removal of an examiner in accordance therewith is ‘good cause’ within the meaning of [section] 11.”<sup>73</sup> Echoing Judge Bazelon’s faith in the corrective and preventive roles of the Commission, the justices maintained that “[i]t must be assumed that the Commission will prevent any devious practice by an agency which would abuse this Rule. The Rule provides for examiner appeal to the Commission, so there is opportunity to bring abuses to the Commission’s attention.”<sup>74</sup>

At the core of the reversal by the Supreme Court majority of the lower courts’ rulings, was the justices’ rejection of the proposition that the APA was designed to make trial examiners “very nearly the equivalent of judges even though operating within the Federal system of administrative justice.”<sup>75</sup> Justice Minton, who wrote the majority’s opinion, regarded this statement in a letter from Senator McCarran, then Chairman of the Senate Judiciary Committee, to Chairman Ramspeck of the Civil Service Commission as “taken out of context” because of its having been “written over five years after the [APA] was enacted.”<sup>76</sup> Thus he refused to consider it illustrative of the intent of Congress at the time it passed the Act. Whereas the dissenters stressed, as a prime APA objective, giving examiners “a new status of freedom from agency control,”<sup>77</sup> the majority saw prevention of agency abuses of examiners’ integrity and impartiality as the key objectives of the Act rather than the achievement of total independence. The thrust of the APA, according to Minton, was that hearing officers “were not to be paid, promoted or discharged at the whim or caprice of the agency or for political reasons.”<sup>78</sup> In other respects, traditional personnel practices of the Civil Service Commission were to be retained, including “reduction in force for lack of funds, personnel ceilings, reorganizations, decrease of work, and similar reasons.”<sup>79</sup>

Although the Supreme Court’s decision in *Ramspeck* denied APA hearing officers the total independence they sought, it emphasized at the same time the obligation of the Civil Service Commis-

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73. *Ramspeck*, 345 U.S. at 143.

74. *Id.* at 142.

75. *Id.* at 144 (Black, J., dissenting) (quoting S. Doc. No. 82, 82d Cong., 1st Sess. 9).

76. *Id.* at 143 n.9.

77. *Id.* at 144.

78. *Id.* at 142.

79. *Id.* (citation omitted).

sion to "prevent any devious practice by an agency" that would abuse examiners' integrity or impartiality or subject them to political controls.<sup>80</sup> The APA did not reduce the responsibility of an agency to assure that it had a sufficient number of competent examiners to handle its business properly, but it clearly put the responsibility in the Commission's hands to insure that examiners would be free from the influences of politics, whim or caprice.

The Supreme Court has not, since the *Ramspeck* decision, considered directly the scope and contours of "for good cause." Nonetheless, its decision 25 years after *Ramspeck*, in *Butz v. Economou*,<sup>81</sup> can be cited as an extension of the justices' concern with the independence of administrative law judges beyond the majority's position in 1953. Whereas the majority in *Ramspeck* rejected the proposition that trial examiners were "very nearly the equivalent of judges even though operating within the Federal system of administrative justice,"<sup>82</sup> Justice White pointed out in *Butz* that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages."<sup>83</sup>

While Justice White's extended observations regarding administrative law judges in the *Butz* case could be dismissed as pure dictum, it is more likely that they constituted both an affirmation of judicial respect for these hearing officials whose role is "functionally comparable to that of a judge," and a hint that the courts might have to reassess their present approach to judicial review of agency decision making if the independence of administrative law judges were reduced:

More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work . . . and because they were often subordinate to executive officials within the agency. . . . The Administrative Procedure Act contains a number of provisions designed to guarantee

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80. *Id.*

81. 438 U.S. 478 (1978).

82. *Ramspeck*, 345 U.S. at 143 n.9.

83. 438 U.S. at 512-13.

the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners . . . . When conducting a hearing under [section] 5 of the APA . . . a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. . . . Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. . . . Hearing examiners must be assigned to cases in rotation so far as is practicable. . . . They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. . . . Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.<sup>84</sup>

If these "safeguards" are removed and the "independent judgment" of administrative law judges is jeopardized, it would be only natural to expect a revision of present comity and perhaps a reversion by the courts to the adversarial if not hostile dimensions of judicial review of agency action of yesteryear.

The 1980 decision by the Court of Appeals for the Second Circuit in *Nash v. Califano*<sup>85</sup> provided an additional supportive footnote to the Supreme Court's emphasis on the independence of administrative law judges in *Butz*. The underlying issue in the *Nash* case was whether an administrative law judge had standing to sue when an agency allegedly interfered with his or her decisional independence.<sup>86</sup> The district court judge had ruled that Simon Nash, a judge with twenty-two years experience in the Social Security Administration's Bureau of Hearings and Appeals,<sup>87</sup> had not suffered the injury-in-fact required by the doctrine of standing when Nash was subjected to the Bureau's program of monitoring and reviewing the decisions of its administrative law judges.<sup>88</sup> Among other contentions, Judge Nash complained that arbitrary monthly production quotas had been established by the Agency and that what the Agency designated as a "quality assurance program" was in reality

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84. *Id.* at 513-14 (citations omitted).

85. 613 F.2d 10 (2d Cir. 1980).

86. *See id.* at 11-14.

87. *Id.* at 12.

88. *Id.* at 13.

an attempt to direct the number of decisions awarding or denying Social Security benefits. Administrative law judges who deviated from the "average" 50 percent reversal rate for all decisions were allegedly counseled and admonished to bring their rates in line with the national average on pain of sanctions.<sup>89</sup>

While carefully noting that his ruling dealt in no way with the merits of Judge Nash's contentions, Judge Kaufman first quoted from Justice White in *Butz* on the current structuring of agency adjudication so as to assure administrative law judges "independent judgment."<sup>90</sup> He continued by ruling that "express prohibitions of performance evaluation and substantive review [by the administrative law judge's agency] contained in 5 U.S.C. § 4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights."<sup>91</sup> Judge Kaufman closed the panel's unanimous opinion that Judge Nash had standing to sue with the admonition that "good administration must not encroach upon adjudicative independence [for] the principal goal of judicial and quasi-judicial administration [which is] reduction of delay without compromise to the demands of due process [requires for its fulfillment] judicial independence [as] one important part."<sup>92</sup>

### C. Attorney General Opinions and the Horsky-Mahin Study

The dimensions and nuances of administrative law judge independence received specific attention from attorneys general in three

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89. *Id.* at 15 (quoting *Butz*, 438 U.S. at 513).

90. *Id.*

91. *Id.* at 17.

92. *Id.* at 17-18. In a Seventh Circuit case decided in February, 1983, the court ruled that Social Security Administration administrative law judges do not have standing to seek an injunction against an instruction SSA issued to its judges concerning a "new policy" for dealing with retroactive cessation of disabilities. According to Judge Posner of the Seventh Circuit, "The instruction . . . did truncate the administrative law judges' adjudicative discretion," *D'Amico v. Schweiker*, 698 F.2d 903, 905 (7th Cir. 1983); but "[t]he withdrawal, as in this case, of one issue from the factfinding power of the administrative law judges does not significantly impair 'decisional independence.'" *Id.* at 907. Judge Posner construed Judge Kaufman's decision upholding standing in *Nash* as stemming from impairment of the administrative law judges "qualified right of decisional independence" and concluded that no significant impairment of such independence was wrought here by withdrawal of adjudicative discretion over retroactive cessation of disabilities. *Id.* at 907. Whereas standing may be appropriate to "housekeeping" cases involving judges, it is not appropriate, according to Judge Posner, to cases involving "substantive directives" that put the judicial officers suing to enjoin them "in the position of taking sides in controversies" they are supposed to adjudicate impartially. *Id.* at 907.

opinions between 1951 and 1977.<sup>93</sup> These, together with a comprehensive study in 1960 of hearing examiner roles in the decisional machinery of the Social Security Administration by Charles Horsky<sup>94</sup> suggest a distinction between administrative law judges' independence of judgment and independence of personal behavior and work habits. Attorney General Levi's 1977 ruling on the power of an agency official to reprimand a judge drew the distinction explicitly;<sup>95</sup> and the Horsky Report did so implicitly.<sup>96</sup> Attorney General Ford's 1951 opinion<sup>97</sup> and Attorney General Katzenbach's 1964 opinion,<sup>98</sup> on aspects of promotion of hearing examiners, were compatible with the Levi-Horsky distinction.

Faced with the question of whether, as a general rule, employing agencies may promote hearing examiners, or whether the Civil Service Commission was charged with the responsibility of the selection of hearing examiners for promotion, Peyton Ford ruled that the APA's requirement in section 11 that examiners "shall receive compensation prescribed by the Commission independently of agency recommendations or ratings,"<sup>99</sup> plainly meant that salaries and promotions of examiners should be kept separate from any agency control. Ford stressed that "the hope of promotion may motivate men as strongly as the fear of loss of their jobs. If salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes."<sup>100</sup> The employing agency is not forbidden to make suggestions or recommendations to the Civil Service Commission, but the Commission must assume "the full responsibility for the selection of those to be promoted" and must arrive at its decisions "through the independent exercise of its own judgment."<sup>101</sup>

Attorney General Katzenbach's 1964 opinion focused on a narrow facet of the promotion issue: "When an agency proposes to fill a Chief Hearing Examiner's position by the promotion of one of its

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93. See 41 Op. Att'y Gen. 74 (1951); 42 Op. Att'y Gen. 289 (1974); 43 Op. Att'y Gen. 1 (1977).

94. Horsky & Mahin, *The Operation of the Social Security Administration Hearing and Decisional Machinery* (1960) (mimeo).

95. 43 Op. Att'y Gen. 1 (1977); see *infra* text accompanying notes 104-09.

96. See *infra* text accompanying notes 110-20.

97. 41 Op. Att'y Gen. 74 (1951).

98. 42 Op. Att'y Gen. 289 (1964).

99. 5 U.S.C. § 7521(a) (1982).

100. 41 Op. Att'y Gen. 74, 78 (1951).

101. *Id.* at 79.

hearing examiners, must the Civil Service Commission select the hearing examiner who is to be promoted?"<sup>102</sup> Katzenbach ruled that, because the designation of the chief hearing examiner "quite clearly involves something more than a mere increase in compensation," and because even the increase in compensation rests on the individual's "substantial administrative and managerial responsibilities" rather than on his or her quasi-judicial responsibilities, the agencies have the power to appoint an incumbent hearing examiner to chief hearing examiner, and the Civil Service Commission does not have that power.<sup>103</sup>

It is of course possible, Katzenbach recognized,

that the carrot of an appointment to a Chief Hearing Examiner position could be used to exert a subtle influence on the examiner to decide as the agency wishes. However, the same possibilities already exist with regard to appointments to membership in the agency or to other highly paid positions in the Federal Government. Congress recognized that such possibilities can never be wholly eliminated; it sought merely to minimize them.<sup>104</sup>

If a fine line could be maintained between promotion for managerial functions and promotion for performance of quasi-judicial roles, could a parallel distinction be drawn regarding reprimands? Attorney General Levi explicated such a distinction in responding to the question: "May the head of an agency of the Federal Government issue a reprimand to an [a]dministrative [l]aw [j]udge employed in his agency without initiation of proceedings before the Civil Service Commission?"<sup>105</sup>

Recognizing at the outset that the question presented posed "in a new context the recurrent issue of the intended scope of the independence of administrative law judges from the control of their parent agencies," Levi stated that the APA provided administrative law judges "a certain degree of independence of status but not complete independence from administrative control."<sup>106</sup> Reprimands for failure to report to work on time or to put in a full day did not have to await the adjudication of charges by the Civil Service Commission. On the other hand, independence of action in the conduct of formal APA proceedings was clearly established by the APA for hearing

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102. 42 Op. Att'y Gen. 289 (1964).

103. *Id.* at 297-300.

104. *Id.* at 299.

105. 43 Op. Att'y Gen. 1 (1977).

106. *Id.* at 3.

officers. Such functions as regulating the course of the hearing, holding conferences for settlement or simplification of issues, disposing of procedural requests, and making or recommending decisions, as set out in section 556(c),<sup>107</sup> were typical of roles requiring unencumbered independence of judgment. Thus, while not ruling out reprimands for purely administrative infractions, "the clear legislative prescription for independence of adjudicatory action clearly does prevent the use of the reprimand as a means of affecting, controlling or sanctioning an administrative law judge's decision in a formal APA proceeding."<sup>108</sup>

In the particular instance, the administrative law judge had been reprimanded for issuing a decision in violation of a commitment that had been made by the Interior Department to a federal district court judge to withhold administrative action in the case. Levi unequivocally construed the issuance of a decision by an administrative law judge as constituting an exercise of his APA adjudicatory responsibilities:

The action to be taken was not ministerial; nor do the facts as presented involve any formal judicial injunction against issuance. Judgment, then, had to be exercised—and a sort of judgment which, in the context, was essentially judicial, and was to be made by the administrative law judge according to his own understanding and conscience. In my view, therefore, an agency reprimand with respect to that decision was improper.<sup>109</sup>

Reprimands for administrative infractions could be administered by agencies but were not entrusted solely to agency discretion. According to Attorney General Levi, the dangers of abuse through using such reprimands as instruments of punishment for "displeasing adjudicatory activity" required subjecting the judges to the supervision and correctives of the Civil Service Commission.<sup>110</sup> In sum, then, reprimands by employing agencies for judgment-related action by administrative law judges were forbidden; reprimands for administrative infractions were permissible, subject to the Commission's responsibility to protect against abuse. Levi's opinion made explicit an analysis of the contours of the independence of administrative law judges that was implicit in a study done by Charles Hor-

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107. 5 U.S.C. § 556(c) (1982).

108. 43 Op. Att'y Gen. 1, 6.

109. *Id.* at 7.

110. *Id.* at 5.

sky for the Social Security Administration seventeen years earlier.<sup>111</sup>

Charles Horsky and Amy Mahin of the Washington firm of Covington and Burling, having undertaken the assignment from the Social Security Administration "to recommend measures that would facilitate and expedite the disposition of cases," determined, by the time they filed their report in December, 1960, that "we could be of greater service by attempting to insure that overemphasis on speed would not be the occasion for underemphasis on fair procedures."<sup>112</sup> As a component of relationships between speed and fairness, they examined the extent to which agency hearing examiners had been accorded the "independence" to which they were entitled by the APA.

Interestingly, the authors ascribed to the Court the position of the minority in *Ramspeck* and then proceeded to inquire: "What is meant by or included within the term 'independence,' or 'freedom from agency control' to use the language of the Supreme Court?"<sup>113</sup> Their complex answer endeavored to draw a fine line between freedom from control in fact-finding and freedom from control in determining policy.

Horsky and Mahin began their analysis with the proposition that, taken as a whole, section 11 of the APA "indeed represents a significant 'bill of rights' for Federal hearing examiners."<sup>114</sup> But it did not establish an unlimited sphere of entitlement to non-interference. It did not make an examiner the equivalent of a federal district court judge, for example, nor did it confine the agency relationship with an examiner to one similar to a court of appeals judge and district court judge. They preferred viewing the examiner "as a member of a regulatory team—-independent of the agency to be sure, in the section 11 sense, but nonetheless subordinate in the sense

111. Horsky & Mahin, *supra* note 94.

112. *Id.* at 462. Horsky and Mahin were requested by the Social Security Administration to make a study of:

(1) Operations under the existing organizational structure of the Office of Hearings and Appeals; (2) Practices, procedures and instructions affecting the relationship between the Office of Hearings and Appeals, its hearing examiners and appellants; (3) The effect of (1) and (2) upon the independence of hearing examiners in deciding cases under Title II of the Social Security Act and upon the fairness of hearings.

*Id.* at 2. Based upon that study, Horsky and Mahin were to make recommendations "for such changes as may be necessary or appropriate which would (1) assure the independence of hearing examiners and the impartiality of the hearing and review process; and (2) facilitate the disposition of cases by hearing examiners and the Appeals Council." *Id.*

113. *Id.* at 375-76.

114. *Id.* at 377.

that his work must mesh with and adapt and conform itself to the role and responsibility of the agency."<sup>115</sup>

The examiner must be "free from outside interference from any source" in making determinations as to the facts in each case. "To conclude from that, however, that the examiner must therefore be free to make his determination as to the decision in every case free from similar interference is to ignore the basic distinction between facts, on the one hand, and law and policy of the agency, on the other."<sup>116</sup> Implementation of basic policy set by Congress is the province of the agency through rule making or through a course of decisions. The only time an examiner is justified in making policy decisions is "when the policy of the agency has not yet been defined in the circumstances with which he must deal."<sup>117</sup>

The examiner's independence, and the safeguards to that independence contained in section 11 relate not to matters of law or policy but "to his judgments in connection with the facts. No matter how unpleasant or unwelcome or embarrassing the facts may be to an agency, the examiner must be free from any pressures which would color or distort his report of them."<sup>118</sup> Thus, a request to an examiner to submit his decision to the agency for comment before releasing it is clearly "unwise and improper."<sup>119</sup> But efforts to improve the quality and "reasonable productivity" of examiners can be undertaken through "post-reviews."

Although Horsky & Mahin believed that the agency had the power and responsibility to improve the performance of deficient examiners, including increasing their disposition rate, they were opposed to "norms which are set across the board for hearing examiners generally and norms derived from fixed quotas set in advance."<sup>120</sup> They suggested, without drawing any conclusion regarding its relationship to removal, that a distinction be drawn

between the examiner who is producing to the limit of his capacity and producing far less than the average examiner and the examiner who is likewise producing far less but for reasons of inattention to his work, poor work habits, inefficient use of his clerical assistants, unwillingness to seek advice or help on problems where

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115. *Id.* at 379.

116. *Id.* at 381.

117. *Id.* at 382.

118. *Id.* at 383.

119. *Id.* at 390.

120. *Id.* at 398.

advice and help are available and useful, and the like.<sup>121</sup>

The Attorney Generals' opinions and the Horsky-Mahin study contributed authoritative analysis and contextual substance to the contours of the "independence" of administrative law judges but they failed to come to grips with what constitutes "for good cause" when proceedings for suspension or removal of administrative law judges are commenced.

#### D. *Merit Systems Protection Board*

The first determination by the Civil Service Commission of whether particular deficiencies in performance by a hearing officer met the "for good cause" standard of removal was undertaken in 1978. While that case was pending, the adjudicatory authority of the Civil Service Commission was transferred to the new Merit Systems Protection Board (MSPB). Action against an administrative law judge was initiated by the Director of the Office of Hearings and Appeals of the Social Security Administration (SSA) on grounds that the judge had conducted an unauthorized hearing after the Bureau's Appeals Council had removed that case from his jurisdiction. Further, the judge had refused to deliver case files after official requests to do so, and presided over cases with acute partiality and lack of judicial temperament. After a hearing before the MSPB's administrative law judge, a comprehensive "recommended decision" was issued against the SSA judge in December 1978, finding that "good cause has been established for the removal."<sup>122</sup>

The SSA judge relied upon the Supreme Court's decision in *Butz* for the contention that an administrative law judge was not answerable in any respect for conduct involving the performance of duties in officially assigned cases. The MSPB's judge rejected this defense, stating that "the respondent confuses judicial independence with judicial immunity." Although it is "almost a universal rule" that a judge cannot be removed because of errors or mistakes in judgment, nothing in the APA or in the *Butz* opinion "can be construed as precluding removal of an administrative law judge for misconduct, incompetence or other failings in the performance of adjudicatory duties."<sup>123</sup>

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121. *Id.* at 397.

122. *In re Chocallo*, 2 M.S.P.B. 23, 70 (1980) (McCarthy, J., recommended decision) (memorandum opinion and order of the Merit Systems Protection Board, 2 M.S.P.B. 20 (1980)).

123. *Id.* at 27.

Citing the American Bar Association's Code of Judicial Conduct as professional recognition of the propriety of disciplinary action for judicial misconduct,<sup>124</sup> the MSPB's judge concluded that conducting a hearing and issuing a decision after jurisdiction legally had been taken away and refusal to comply with orders to deliver case files became "the antithesis of law and order which the judge personifies. . . ."<sup>125</sup> In addition, the MSPB's judge found that the SSA judge had displayed, in another specific case, a "truly startling example of intemperate judicial conduct" in refusing to accord reasonable opportunity for the designated attorney to be heard and to represent the interests of his client. Furthermore, respondent "misused the hearing process" by conducting a unilateral inquiry into privileged communications between attorney and client. Other manifestations of "flagrant and uncontrolled bias" by the SSA judge were found in the use of sarcastic and scathing language to denounce the attorney's veracity, intelligence, and emotional soundness.<sup>126</sup>

Each of the foregoing actions was found to constitute "good cause" for removal. The MSPB's judge was careful to note nonetheless, that removal proceedings based upon events in the hearing room should be reserved for serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior: "The Commission is not constituted to serve as a performance evaluation board . . . to decide whether isolated remarks or rulings made by an administrative law judge in the course of a hearing measure up to some undefined ideal expected of those who conduct proceedings under the Administrative Procedure Act."<sup>127</sup>

The MSPB commended its judge for a "meticulous well-conceived and correct interpretation and application of the facts and law."<sup>128</sup> Consonant with its understanding of the major underlying purpose of the APA, the Board insisted that "a careful balance must be created between judicial independence and judicial accountability."<sup>129</sup> The Board closed its opinion with the assurance that agencies considering similar actions against administrative law judges "will be very carefully scrutinized for adequate bases in meeting the 'good cause' standard. Imposition of this degree of review in such

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124. See generally CODE OF JUDICIAL CONDUCT (1972).

125. *Id.* at 36.

126. *Id.* at 62.

127. *Id.* at 43, 62-65.

128. *Id.*; *In re* Chocallo, 2 M.S.P.B. 20, 21 (1980) (memorandum opinion and order).

129. *Id.* at 22.

instances is essential to ensure the necessary balance between the interests to be considered and the Board will not neglect its duty in fulfilling that goal."<sup>130</sup>

In a subsequent case involving alleged personal misconduct by an SSA judge for hostile acts toward fellow employees (including closing and holding down the vinyl lid of a copying machine on the fellow employee's hand while that employee was seeking to retrieve her original memorandum that complained about remarks the judge had made), the Board sustained findings by the MSPB judge in his "Recommended Decision" that there was "good cause" for a 30 day suspension of the SSA judge.<sup>131</sup> The MSPB judge ruled that "such aggressive, disrespectful behavior toward a fellow employee must be disapproved;"<sup>132</sup> and the Board agreed.<sup>133</sup>

#### IV. LOW PRODUCTIVITY AS "GOOD CAUSE" FOR REMOVAL

As chronicled in the preceding section of this article, after a lengthy prelude of authoritative contextual, declaratory and admonitory opinions by courts, attorneys general and researchers construing the APA's constraints on agency powers vis a vis administrative law judges, overt invocation and application of "for good cause" began in 1978 in actual removal and disciplinary proceedings instituted by agencies before the Merit Systems Protection Board. It has since been gathering steam. The steam is currently being generated at full throttle as, for the first time since adoption of the APA, the professional fate of some administrative law judges hinged on whether "for good cause" is held to be satisfied by proving that they consistently produced fewer decisions per month than the average produced by their peers in the agency and failed, after notice and alleged opportunity to do so, to improve their yield of decided cases.

The proceedings instituted in *SSA v. Goodman*<sup>134</sup> by the Department of Health and Human Services (HHS) against SSA Judge Robert W. Goodman is a prototype that warrants explication. The charge against Judge Goodman by the Office of Hearings and Appeals of the Social Security Administration, filed on April 23, 1982, was that:

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130. *Id.*

131. *In re Glover*, 2 M.S.P.B. 73 (1980) (recommended decision) (memorandum opinion and order, 2 M.S.P.B. 71 (1980)).

132. *Id.* at 80.

133. *Id.*; *In re Glover*, 2 M.S.P.B. 71, 72 (1980) (memorandum opinion and order).

134. No. HQ75218210015 (MSPB Apr. 6, 1983) (recommended decision), *rev'd*, No. HQ75218210015 (MSPB Feb. 6, 1984).

Goodman's productivity level is, and has been for some time, unacceptably low. This inefficiency in the conduct of his official duties, resulting from his failure to increase his output to a minimally acceptable level of productivity, has contributed to undue delays experienced by claimants awaiting a hearing decision under section 205(b) of the Social Security Act and is detrimental to the efficiency of the service.<sup>135</sup>

The charge equated "inefficiency" with "unacceptably low" productivity, and "for good cause" with "inefficiency" in the conduct of official duties and detriment to "efficiency of the service." His productivity was deemed "unacceptably low" because his 1980 average of 15.6 dispositions per month was far below the average of 30 dispositions per month maintained by all the SSA judges who were on duty during the fiscal year. For fiscal year 1981 Goodman's average was 15.8 dispositions per month compared with an average of 32 for all SSA judges. In addition to his "unacceptably low" disposition rate, Goodman was alleged also to have "failed to carry a minimally acceptable workload." His annual average monthly "pending" for 1981 was 64 compared with 178 for all SSA judges. This placed an "unfair, unwarranted burden on the other administrative law judges and delays the processing of all social security claims within the hearing office."<sup>136</sup>

Goodman maintained that the complaint should be dismissed on three primary grounds: the action subjected him to a "performance rating" contrary to APA's section 4301(2)(D);<sup>137</sup> it violated the Act's "for good cause" standard codified in section 7521;<sup>138</sup> and it violated the 1978 settlement agreement executed by SSA after the challenge by administrative law judges to establishment of workload goals in *Bono v. United States Social Security Administration*.<sup>139</sup> Even if standards could legally be established to measure the per-

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135. *Id.* at A-1 app. ("Details of the Charge Against Judge Goodman") (Reidy, J., recommended decision).

136. *Id.* at A-2 app.

137. 5 U.S.C. § 4301(2)(D) (1982).

138. *Id.* § 7521.

139. Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979). Judge Bono filed the Brief of the Association of Administrative Law Judges and Request for Opportunity to Participate in Oral Hearing in support of Judge Goodman, August 25, 1983. Not surprisingly, he contended, inter alia, that the SSA's acts leading to and culminating in the filing of the charges against Judge Goodman were "in violation of specific provisions of the APA, the Federal OPM Personnel Regulations pertaining to [administrative law judges], and the agency's acknowledged policy of prohibiting announcements of quotas or goals of production to [administrative law judges] in its employ, and its agreement entered into in July 1979 to refrain from establishing quotas and goals in numbers." Brief at 14, *Bono*.

formance of administrative law judges, the complaint was defective, according to Goodman, because no standard had ever been submitted for approval to the Office of Personnel Management or has ever been made known to him.<sup>140</sup>

A hearing on the charges was held before MSPB Administrative Law Judge Edward J. Reidy over five days in September and October 1982, and Judge Reidy issued his "recommended decision" on April 6, 1983.<sup>141</sup> Reidy rejected Goodman's contentions as to the legitimacy and validity of the action against him. The MSPB judge proceeded by recommending that Goodman be removed from service as an administrative law judge because his persistent inefficiency as manifested by a production record far below average and by his failure to improve it or to offer a satisfactory explanation for it, constituted "good cause" for removal. Judge Reidy suggested at the same time that Goodman be retained as an HHS employee but that he be transferred to a position better suited to his skills. Although he couched his conclusions in the "belief that respondent's position is one of distinction and authority, not of subservience and that, if anything, his obligations are greater, not lesser, on account of his status,"<sup>142</sup> Judge Reidy rejected quickly Judge Goodman's arguments that APA's sections 4301(2)(D) and 7521 were violated by proceeding against him based upon performance-related grounds rather than conduct-related grounds. Admitting that Judge Goodman was "industrious," "conscientious," "articulate" and "conducts his hearings in a professional manner,"<sup>143</sup> Reidy found, nonetheless, that striking the necessary balance between judicial independence and judicial accountability, consistent with the Supreme Court's ruling in *Ramspeck*, required rejection of the "attenuated interpretation" of "for good cause" pressed by Goodman. "Good cause is not analogous to good behavior."<sup>144</sup> Nothing in section 7521 prevents action against an administrative law judge "merely because the action is performance based."<sup>145</sup> Given the language of section 4301(2)(D), Judge Goodman's performance "cannot be measured against any standards or critical elements that are performance standards which form the basis for determining unacceptable performance under Chapter 43;" but "his performance may properly be considered to

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140. *Goodman*, No. HQ75218210015, slip op. at 6 (recommended decision).

141. *Id.*

142. *Id.* at 20 n.9.

143. *Id.* at 20.

144. *Id.* at 22.

145. *Id.* at 32.

ascertain whether he had been so inefficient that good cause for his removal has been manifested under [section] 7521."<sup>146</sup>

In concluding that performance-related removals pursuant to chapter 75, as distinguished from Chapter 43, have been upheld, Judge Reidy cited two 1982 Court of Appeals decisions, *Drew v. Department of the Navy*<sup>147</sup> and *Darby v. IRS*<sup>148</sup> without further discussion. "What this complaint involves, I conclude, is a performance-related charge filed consistent with the 'only for good cause' provisions of [section] 7521"; the complaint "is not rooted in a performance evaluation or rating tied to specified criteria established in an agency performance appraisal system within the contemplation of Chapter 43 actions."<sup>149</sup>

With regard to the *Bono* settlement, Judge Reidy first questioned whether the MSPB was "the forum wherein the power to enforce that settlement resides";<sup>150</sup> but then, assuming *arguendo* that it was, he found "no desecration of that agreement." The key paragraph in the settlement provided that SSA's Office of Hearings and Appeals (OHA) "will not issue directives or memoranda setting any specific number of dispositions by [administrative law judges] as quotas or goals."<sup>151</sup> Reidy found that the complaint against Goodman was not for failure to make a specific number of dispositions as quotas or goals, but for failure to improve his yield, given ample time and encouragement.<sup>152</sup> Goodman's persistently low productivity, not his failure to meet a particular level of dispositions per month, was what had placed him "in a category of [administrative law judges] whose work habits and production shortcomings warranted exploration" and, after sustained failure to improve or to offer an adequate explanation for not improving, made him one of four SSA judges against whom charges were brought.<sup>153</sup>

Having determined that performance-related charges could constitute good cause for removal under section 7521, Judge Reidy focused on the standard of proof necessary to establish good cause. He construed the MSPB's ruling in *In re Chocallo*,<sup>154</sup> albeit a con-

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146. *Id.*

147. 672 F.2d 197 (D.C. Cir. 1982).

148. 672 F.2d 192 (D.C. Cir. 1982).

149. *Goodman*, No. HQ75218210015, slip op. at 33 (recommended decision).

150. *Id.* at 27.

151. *Id.* (quoting the 1978 settlement agreement, see *supra* notes 136-38 and accompanying text).

152. *Id.* at 29.

153. *Id.* at 29-30.

154. 2 M.S.P.B. 23 (1980); see *supra* text accompanying notes 122-30.

duct case on its facts, to signal and approve of removal actions grounded on charges of inefficiency and to require the showing by a preponderance of the evidence that any judge proceeded against was not "merely sub-par or imperfect," but manifested "substantial and identifiable deficiencies."<sup>155</sup> Applied to Goodman,

it must be established that his productivity is so unacceptably low such that the Board is entirely satisfied that the showing made warrants removal in the interest of promoting the efficiency of the service. Anything less than a serious deficiency or a compelling showing as a grounds for dismissal would not only fall shy of good cause but smack of an impermissible intrusion into the independence of [administrative law judges].<sup>156</sup>

Judge Reidy reviewed low productivity, lack of adequate justification and failure to improve even slightly through counseling and offers of assistance, and noted that Goodman's "supervisors have lost confidence in his ability to perform adequately the duties of his position."<sup>157</sup> Taking notice that Goodman's answers at the hearing were "in more detail than the questions required and more wordy than the interrogator desired,"<sup>158</sup> Judge Reidy concluded that, given its swollen workload, Goodman's inability to meet the growing demands of the job was a burden the agency could not efficiently endure. While he encouraged HHS "to ascertain if there might be another assignment whereby the skills and diligence of Judge Goodman might be utilized,"<sup>159</sup> he still urged the MSPB to

enter an order finding that the preponderant evidence forcefully shows that respondent's productivity level has been unacceptably low revealing inefficiency in the conduct of his official duties so as to warrant the removal of Robert W. Goodman from employment with the federal government, and that such removal will promote the efficiency of the service.<sup>160</sup>

The MSPB set oral argument for September 22, 1983 for its hearing in the Goodman case.<sup>161</sup> The agency's Notice of Hearing instructed participants that briefs submitted should be limited to four issues, two of which focused on the Board's authority and dis-

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155. *Goodman*, No. HQ75218210015, slip op. at 34 (recommended decision).

156. *Id.*

157. *Id.* at 42.

158. *Id.* at 36 n.17.

159. *Id.* at 42.

160. *Id.* at 44.

161. 48 Fed. Reg. 33,946-47 (July 26, 1983).

cretion to specify the sanction to be applied when "good cause" had been found under section 7521. The two key issues bearing on the content and application of "for good cause" were:

What is the relationship, if any, of the "good cause" standard of [section] 7521(a) to the "efficiency of the service" standard of [section] 7513 and/or to the "good behavior" standard of Article III of the [United States] Constitution? If low productivity may constitute good cause for removal of an administrative law judge, what evidence must the employing agency introduce in order to meet its burden of proof?<sup>162</sup>

Counsel for Judge Goodman—John Bodner, Albert Cornelison and Lewis Barr of Howrey and Simon—repeated the earlier arguments that the charges were disguised performance ratings of administrative law judges and thus forbidden by law; that they violated the *Bono* settlement; and that, even assuming "inefficiency" could be "good cause," the conclusion that Goodman was inefficient was unsupported by any preponderance of the evidence. In addition, counsel contended that Goodman was denied due process in the hearing before Judge Reidy by virtue of being precluded from litigating fully the issue of inefficiency. They also urged that dismissal was much too severe a penalty, in any event, because Goodman "served with distinction for more than a decade, . . . [had] never been criticized for the handling of a single case, [had] followed OHA's own guidelines for [administrative law judges] and [had] sought only to assure that claimants receive the full and fair hearings and the adequate written decisions required by law."<sup>163</sup> Finally, they cited this writer's testimony before the Senate Subcommittee on Governmental Affairs for the proposition that administrative law judges perform judicial functions that parallel within the administrative process the roles of our other federal judges within the broader governmental process and warrant similar protection against pressures and influences.<sup>164</sup>

On the issue of the evidence that must be introduced if low pro-

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162. *Id.* at 33,946.

163. Respondent's Request to Participate in Oral Argument and Supporting Memorandum at 3, *Goodman*.

164. *Id.* at 11 (citing Rosenblum testimony, *Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcommittee on Oversight Management of the Senate Committee on Governmental Affairs*, 98th Cong., 1st Sess. 91-92 (1983) [hereinafter Report]). The Subcommittee reached the conclusion that "The [administrative law judge] is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy." *Report*, at 38.

ductivity legitimately could be deemed "good cause," counsel for Goodman insisted, citing Professor Mashaw's studies of *Social Security Hearings and Appeals*<sup>165</sup> and *Bureaucratic Justice*<sup>166</sup> as key authorities, that there must be some objective, pre-formulated standard against which to judge an administrative law judge's performance.<sup>167</sup> Counsel maintained that "OHA should have conducted a study, or compiled empirical support to show that Judge Goodman was indeed inefficient."<sup>168</sup> Goodman's actual case production rate was "unfairly compared with an abstract national average statistical rate,"<sup>169</sup> which was "skewed" against Judge Goodman because it was "derived, in large measure, from the output of high-producing [administrative law judges] who [did] not properly fulfill their duties as [administrative law judges]."<sup>170</sup> In any event, Goodman's counsel urged, the agency must notify its judges regarding case production standards by which their productivity will be measured, and must be reasonably responsive to the requests and suggestions of the administrative law judge for assistance in raising his or her production rate. Goodman's request for a second hearing assistant, instead of a decision writer as most administrative law judges were given, was ignored, except for one brief interim period.<sup>171</sup>

The brief filed by the Office of Personnel Management (OPM) was especially interesting because, while it concurred in Judge Reidy's finding "that the complainant [had] instituted proper removal actions against respondent and that good cause was established to warrant respondent's removal from his position of administrative law judge pursuant to [section] 7521,"<sup>172</sup> it also asserted as "inappropriate" the removal of administrative law judges pursuant to an "efficiency of the service standard."<sup>173</sup> Decisions like *Ramspeck* "clearly differentiate subordinate and semi-independent administrative law judges from life tenured federal judges." Simi-

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165. J. MASHAW, *SSA HEARINGS AND APPEALS* (1978).

166. J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

167. Respondent's Request to Participate in Oral Argument and Supporting Memorandum, at 12-15, *Goodman*. Invoked in particular was Professor Mashaw's statement that: "If the quality of performance is to be judged, there obviously must be some standard against which to judge it. The more specific and objective the goals of the organization can be made, the easier it will be to determine whether or not performance meets expectations." *Id.* at 12 (quoting J. MASHAW, *BUREAUCRATIC JUSTICE* 149 (1983)).

168. *Id.*

169. *Id.* at 13.

170. *Id.* To the same effect see *id.* at 13 n.3, 15 n.7.

171. *Id.* at 15-16.

172. Brief of Office of Personnel Management at 3, *Goodman*.

173. *Id.* at 14.

larly, the "good cause" and "efficiency of the service" standards were "developed independent of one another."<sup>174</sup> The OPM brief did not undertake to analyze the compatibility with these legal views of Judge Reidy's invocations of "efficiency of the service" concomitantly or exchangeably with "good cause."

The Merit Systems Protection Board issued a unanimous final decision in the *Goodman* case on February 6, 1984, ruling that the "record in this case does not reveal the existence of good cause."<sup>175</sup>

Although the Board determined that "there is no generic prohibition to the filing of this charge,"<sup>176</sup> and did not employ terms of endearment to evaluate "the unreasonably methodical manner in which the respondent handled his cases,"<sup>177</sup> it concluded that the agency's evidence "did not prove the agency's charge that respondent had failed to achieve a minimally acceptable level of productivity."<sup>178</sup> That Judge Goodman's case dispositions were shown to have been half the national average was not adequate proof of unacceptably low productivity "[i]n the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity."<sup>179</sup> Especially in light of agency acknowledgement that its cases "did vary in difficulty" and "are not fungible,"<sup>180</sup> nation-wide case disposition averages could not be relied upon as guides for measuring reasonable productivity. "Where, as here the agency's entire case rests upon comparative statistics, proof of their validity is an essential element of the agency's case."<sup>181</sup>

Issues identical to those raised before the MSPB in the *Goodman* case have been raised in Federal court litigation,<sup>182</sup> and in another MSPB case against an SSA judge, *SSA v. Balaban*.<sup>183</sup>

Stanley M. Balaban, an SSA judge in the Long Beach, Califor-

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174. *Id.*

175. *SSA v. Goodman*, No. HQ75210015, slip op. at 19 (MSPB Feb. 6, 1984).

176. *Id.* at 15.

177. *Id.* at 5.

178. *Id.* at 16.

179. *Id.* at 17.

180. *Id.* at 18.

181. *Id.* at 19.

182. *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980), raised such issues but only the question of standing has been resolved thus far. Examples of pending cases are *Nash v. Heckler*, Civ. No. 78-281 (W.D.N.Y. filed May 30, 1978) and *Association of Admin. Law Judges v. Heckler*, No. 83-0124 (D.D.C. heard Mar. 5, 1984). See also Judge Simon Nash's observations on these issues in his Brief by Intervenor in Support of Respondent, *Goodman*.

183. No. HQ752812100014 (MSPB Feb. 22, 1983), *cert. denied*, 103 S. Ct. 128 (1983).

nia office was, like Goodman, charged with an "unacceptably low level of productivity" in fiscal years 1980, 1981 and part of 1982, as compared with the average number of dispositions by all administrative law judges in the Social Security Administration.<sup>184</sup> In rejecting Balaban's motion to dismiss, which challenged the legitimacy of removal proceedings based on performance ratings under sections 4301(2)(D) and 5721 and contended the proceeding against him violated the *Bono* settlement<sup>185</sup> (as had Goodman),<sup>186</sup> MSPB Judge John J. McCarthy phrased the agency's burden of proof slightly differently than did Judge Reidy in his recommended decision in the Goodman case. Judge Reidy placed the burden on the agency to establish, by a "preponderance of the evidence," that the administrative law judge failed to increase his unacceptably low productivity after notice and opportunity.<sup>187</sup> Judge Reidy subsequently integrated the preponderance test with satisfaction by the MSPB "that the showing made warrants removal in the interest of promoting the efficiency of the service."<sup>188</sup> Judge McCarthy maintained that the "good cause" requirement for actions against administrative law judges was "similar" to the "efficiency of the service" standard applicable to other federal employees,<sup>189</sup> but he avoided classifying the standard of proof as a "preponderance of the evidence." Rather, he seemed to favor requiring, an "obvious and severe" test for performance failure that warranted a conclusion the administrative law judge was "grossly incompetent or inefficient."<sup>190</sup>

In order to draw the requisite line between acceptable and unacceptable administrative law judge performance, the MSPB required "evidence of the nature and difficulty of the work and the conditions affecting the productivity of OHA judges," McCarthy maintained.<sup>191</sup> A "simplistic answer" to the question of when the level of performance should be considered unsatisfactory would be that

removal of less efficient judges and retention of only the more pro-

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184. His 1980 average was 18.2 cases per month, 15.3 in 1981, and 13.2 in the first five months in 1982. By comparison, the national monthly average was 30 cases in 1980 and 32 in 1981. *Id.* at 3.

185. *Id.* at 16-17.

186. *See supra* notes 137-39 and accompanying text.

187. *Goodman*, No. HQ75218210015, slip op. at 17 (recommended decision).

188. *Balaban*, No. HQ752812100014, slip op. at 34. Judge Reidy reiterated applicability of the preponderance requirement and relevance of the efficiency of the service standard at the end of his recommended decision. *Id.* at 43-44.

189. *Id.* at 10.

190. *Id.* at 15.

191. *Id.*

ductive judges would increase "the efficiency of the service" and satisfy the "good cause" requirement of section 7521. But such an approach to the issue would not take into account the concept of independence which all the interested parties acknowledge to be an important factor. A more valid approach, reasonable in fact and in law, might require a "strong" showing of inefficiency to justify the extreme sanction of removal. Arguably, the failure in performance, i.e., low productivity, should be so obvious and severe as to warrant the conclusion, absent some other explanation, that the administrative law judge is grossly incompetent or inefficient.<sup>192</sup>

In addition to the possible differences between MSPB Judges Reidy and McCarthy on burden of proof, their equality of certitude in dismissing the respective SSA judges' challenges to the legality of the proceedings against them was tempered by a difference between their interpretations of precedent for the actions. McCarthy's rejection of Balaban's claims that the APA and Civil Service Reform Act<sup>193</sup> barred performance-related actions to remove administrative law judges was based primarily on his acceptance as applicable precedent of the MSPB's language in the *Chocallo* "mis-behavior" removal case.<sup>194</sup> McCarthy then appended to his invocation of *Chocallo* the finding:

While the principle of independence must be respected when performance-based reasons are advanced to justify removal or disciplinary action, the mere realization that an agency may propose to the Board that such an action be taken does not of itself constitute such a threat to independence as to warrant a general rule holding such a proposal to be contrary to law or otherwise barred.<sup>195</sup>

McCarthy nonetheless acknowledged that "research of cases arising under [section] 7521 discloses no case in which either the Board or a

192. *Id.*

193. 5 U.S.C. § 1101 (1982).

194. Construing *Chocallo*, Judge McCarthy maintained:

While the case was essentially one involving misbehavior of an administrative law judge in performing adjudicatory functions, the Board recognized the tension that arises between the need to keep the judge free of improper agency influences and the responsibility of the employing agency to institute disciplinary or removal action before the Board for the good of the Government service. The Board stated that 'a careful balance must be created between judicial independence and judicial accountability' . . . . [T]he board ruled that the fact that duties are being carried out within a hearing room rather than an office 'does not provide an impenetrable shield from appraisal of performance.'

*Id.* at 11-12 (quoting *In re Chocallo*, 2 M.S.P.B. 20, 21 (1980)).

195. *Id.* at 13.

court has addressed the specific question of whether low productivity can justify the dismissal of an administrative law judge."<sup>196</sup>

Reidy also invoked the MSPB's language in the *Chocallo* case in the course of his recommended decision to justify removal for performance-based reasons. He added that the complaint against Goodman was "a performance-related charge filed consistent with the 'only for good cause' provisions of [section] 7521 and not prohibited by any law or regulation."<sup>197</sup> For support, he relied upon the court of appeals' 1982 decisions in *Drew v. United States Department of the Navy*<sup>198</sup> and *Darby v. IRS*<sup>199</sup> which upheld the "use of Chapter 75 procedures for performance based removals," as distinguished from chapter 43 procedures.<sup>200</sup>

The *Drew* and *Darby* decisions of the District of Columbia Circuit did indeed hold that removal proceedings under chapter 75 were separate and distinct from such proceedings under chapter 43; both cases having upheld removals of federal personnel pursuant to chapter 75 after termination of proceedings for "unacceptable performance" pursuant to chapter 43.<sup>201</sup> But citing these cases to support performance-based actions against administrative law judges requires an intermediate step that even OPM declined to take.<sup>202</sup> It requires equating the "good cause" standard with the "efficiency of the service" standard, because *Drew* and *Darby* involved proceedings, *not* under section 7521 which requires the "for good cause" standard, but under section 7513 which requires resort to the "efficiency of the service" standard. The court of appeals ruled 2-1 in both cases that the agency had shown by a preponderance of the evidence that removal of the employee "would promote the efficiency of the service."<sup>203</sup>

Given this explicit tie of the *Drew* and *Darby* rulings to the "efficiency of the service" standard, the only precedent for the proposi-

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196. *Id.* at 11.

197. *Goodman*, No. HQ75218210015, slip op. at 33 (recommended decision).

198. 672 F.2d 197 (D.C. Cir. 1982).

199. 672 F.2d 192 (D.C. Cir. 1982).

200. *Id.* at 195-96. Under chapter 43, agencies are required to establish performance appraisal systems and are authorized to take action against employees for "unacceptable performance." 5 U.S.C. §§ 4302, 4303 (1982). Administrative law judges are exempted from chapter 43 by 5 U.S.C. § 4301(2)(E) (1982). The "for good cause" standard for administrative law judges of section 7521 is under chapter 75, 5 U.S.C. §§ 7501-7543 (1982).

201. *Drew*, 672 F.2d at 200-01; *Darby*, 672 F.2d at 195-96.

202. *See generally* Brief of U.S. Office of Personnel Management, *Goodman*.

203. *Drew*, 672 F.2d at 201; *Darby*, 672 F.2d at 196.

tion that performance-related charges can be found to constitute "good cause" in a removal proceeding under section 7521 prior to *Goodman*, is the language in the course of the *Chocallo* opinion by the MSPB, which avowedly was a "misbehavior" case.<sup>204</sup> While it certainly remains correct as a general rule that an agency's construction of the statute Congress has charged it to administer is entitled to deference, contemporaneity of the construction with adoption of the statute is a key justification for the deference. Whether a first-time construction by the agency, more than 30 years after adoption of the statute, qualifies for deference or invites disdain, is an open question.<sup>205</sup>

The degree of deference that the MSPB's quoted language in *Chocallo* warrants should be dependent upon the relevance of that language to the facts and ruling in the case, the contemporaneity of the language with adoption of the statute, and the consistency of that language with positions, if any, previously taken by the agency on the point at issue. Regarding the last of these factors, issues of unsat-

204. See *supra* note 194. On appeal of the MSPB's decision, the United States District Court for the District of Columbia maintained, in upholding the MSPB, that "an administrative law judge is not immune from review for procedural misconduct, incompetence or other failings in the performance of his or her duties." *Chocallo v. Prokop*, No. 80-1053, slip op. at 3 (D.D.C. Oct. 10, 1980), *aff'd, vacated, and remanded*, No. 80-2518 (D.C. Cir. Feb. 11, 1982) (unpublished). According to MSPB Judge McCarthy, the remand was for the district court to explain its dismissal of plaintiff's claims in constitutional tort. The district court dismissed those claims again by order dated May 3, 1982, accompanied by a memorandum opinion. Order denying Balaban motion to dismiss, *Balaban*, slip op. at 11 n.11 (MSPB Feb. 22, 1983).

205. In *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983), Chief Justice Burger, in upholding IRS denial of tax exempt status to private schools that practice racial discrimination, noted of the IRS interpretation that hadn't been announced until 1970, "That it may be seen as belated does not undermine its soundness." *Id.* at 2030. Although this statement by the Court seems at odds with the author's position in the text, the Court justified the "belated" interpretation of I.R.C. § 501(C)(3)(1982) by the IRS on the ground that

racial discrimination . . . is contrary to public policy. . . . Indeed, it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.

*Id.* at 2030-32. No similar "firm public policy" is evident to require an administrative interpretation that the performance related charges against Judge Goodman are "good cause" for administrative law judge removal under section 7521.

The Supreme Court's explanation for denying deference to the NLRB's belated construction beginning in 1970 that faculty members are "employees" entitled to the protection of the National Labor Relations Act seems more consonant with the situation under discussion. "[W]e accord great respect to the expertise of the Board," said Justice Powell, "when its conclusions are rationally based on articulated facts and consistent with the Act." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980).

isfactory productivity as "good cause" were before the MSPB for the first time in the *Goodman* and *Balaban* cases, and had not previously been argued before that agency or its predecessor, the Civil Service Commission. Nonetheless, there is at least a question whether the Civil Service Commission previously looked with favor on the position, a position compatible with Goodman's and Balaban's arguments, that "good cause" removals are confined to disciplinary infractions.

In *Benton v. United States*,<sup>206</sup> a court of claims proceedings involving the question whether a hearing examiner who was involuntarily retired for disability was "removed" within the meaning of section 11 of the APA and hence subject to the APA's procedural protections, the Civil Service Commission argued that there was a clear distinction between a removal for good cause and a separation based on an involuntary retirement for disability. According to the court of claims' report of the case, the Commission, in implementing its argument for this distinction, maintained that removal for cause "denotes a disciplinary type of action, whereas involuntary retirement is viewed as a non-disciplinary type of action."<sup>207</sup> A judge could be involuntarily retired, the Commission maintained, without being accorded APA procedural protections. The court of claims rejected the Commission's dichotomy and ruled that disability could constitute good cause for removal of hearing examiners. Because involuntary retirement as a result of disability was "removal", the disability must be established through the procedures prescribed by the APA, which, for administrative law judges, was "wholly different from that applicable to 'mere employees of an agency'. . . ." <sup>208</sup> The court of claims concluded: "We cannot agree with defendant that the term 'removal for good cause' has become a term of art in legal parlance and that in every case and in every statute relating to civilian employees of the [g]overnment, it means a removal for disciplinary reasons."<sup>209</sup>

Given the peripheral status of the allegedly supportive language in *Chocallo* to the facts of the case, the uncertainty about consistency between the current position of the agency on the scope of "good cause" and the position of its predecessor agency a decade earlier, and the exposition of the agency's present construction three decades

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206. 488 F.2d 1017 (Ct. Cl. 1973).

207. *Id.* at 1024.

208. *Id.* at 1025.

209. *Id.*

after formulation of the statute, there is little ground for deferring to the MSPB's interpretation. The core issue is not solely one of deference in any event, for a cluster of interrelated factors bear upon accepting and applying performance-related standards as good cause for removal: essentially statutory and judicial texts and contexts of the good cause standard in conjunction with an evaluation of how the standard's underlying objectives can most effectively be served.

## V. GUIDELINES FOR DEFINING "GOOD CAUSE"

The foregoing examination of legislative history, professional commentary and arguments before, and opinions by, courts regarding the standard for removal of administrative law judges, indicates that the meaning of "for good cause" is plainer in terms of *relationships* to comparable standards along a spectrum of strictness than it is in terms of *descriptions* of formal contents. In prescribing the standard to govern removal of administrative law judges, Congress eschewed both the strict constitutional standard of "good behavior" required for removal of federal judges and the loose standard of "such cause as will promote the efficiency of the service"; the latter standard authorized traditionally for removal of non-judicial federal civil service personnel.<sup>210</sup> The obvious inference to be drawn from Congress' eliminating the "efficiency of the service" standard and adopting instead the noun "cause," as used in the traditional civil service standard, and combining it with the same adjective, "good," as used in the constitutional standard, is that more than mere "cause" that promotes the "efficiency of the service" was to be required for removal of administrative law judges. At the same time, less than noxious conduct falling afoul of "good behavior" was to be required. Removal of administrative law judges was not tied exclusively to their behavior. As the *Ramspeck* case made clear,<sup>211</sup> removal could be ordered legitimately as a consequence of economic traumas such as reductions in force. Presumably, other salient occurrences, whose impact on the administrative process exceeds "efficiency of the service" by a sufficient margin to be the equivalent of economic trauma, could also qualify as "good cause."

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210. "The efficiency of the service" standard was adopted in 1912 as section 6 of the Lloyd-LaFollette Act, providing "[t]hat no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing. . ." 37 Stat. 539, 555 (1912). The Supreme Court upheld the standard against a claim of voidness for vagueness in *Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974).

211. See *supra* notes 54-81 and accompanying text.

The APA increased the protection of hearing examiners from what it had been previously, as the Senate Report made plain, in an attempt to render them "independent and secure in their tenure and compensation," thus taking "a different ground than the present situation, in which examiners are mere employees of the agency. . . ."212

The "different ground than the present situation" necessary to establish "good cause" for hearing examiner removals had to be stricter than that necessary to establish "such cause as will promote the efficiency of the service"; "mere employees" already were entitled to that level of protection in "the present situation." No verbal alchemy can transmute the "good cause" standard into the stricter "good behavior" standard; the prohibition is equally compelling upon replacement of legal with prestidigitary techniques to pummel "good cause" into the looser "such cause as will promote the efficiency of the service."

How can the good cause standard be interpreted and applied in practice without confining it to purely behavioral delicts that would make it the equivalent, in effect, of the good behavior standard and without expanding it to encompass every inadequacy in performance that warrants removal to promote the efficiency of the service? Some matters not yet discussed, including the Administrative Conference's 1978 resolution on SSA-administrative law judge interactions,<sup>213</sup> Judge Merritt Ruhlen's Manual<sup>214</sup> for administrative law judges, the Supreme Court's 1983 decision in *Campbell v. Heckler*<sup>215</sup> and recent research by the Center for Judicial Conduct Organizations,<sup>216</sup> considered in conjunction with the earlier analyses of cases, commentaries and contexts can assist in establishing guidelines and monitoring borders.

Resolution 78-2 adopted by the Administrative Conference in 1978 limned three avenues to improvement of agency-judge relationships in the realm of social security disability claims. Terming its recommendations "interstitial and conservative," the Administrative Conference endeavored to "prescribe improvements while reinforcing sound practice."<sup>217</sup> Relevant to the particular concerns of this

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212. LEGISLATIVE HISTORY, *supra* note 22, at 215.

213. Administrative Conference of the U.S., Res. 78-2, 1 C.F.R. § 305.78-2 (1982).

214. M. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES (rev. ed. 1982).

215. 103 S. Ct. 1952 (1983).

216. Letter to the author from Center for Judicial Conduct Organizations, American Judicature Society (Sept. 9, 1983).

217. 1 C.F.R. § 305.78-2, at 99.

paper were:

Recommendations 78-2A2: The Bureau of Hearings and Appeals (BHA) possesses and should exercise the authority, consistent with the administrative law judge's decisional independence, to prescribe procedures and techniques for the accurate and expeditious disposition of Social Security Administration claims. After consultation with its administrative law judge corps, the Civil Service Commission and other affected interests, BHA should establish by regulation the agency's expectations concerning the administrative law judges' performance. Maintaining the administrative law judges' decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies, underlying the Social Security Administration's fulfillment of statutory duties.

78-2B4: The Bureau of Hearings and Appeals should make better use [of] claimants as sources of information by: (a) providing them with available State agency reasons for denial; (b) providing notice of the critical issues to be canvassed at the hearing; and (c) engaging in careful and detailed questioning of the claimant at the hearing.

78-2C2: The Social Security Administration should devote more attention to the development and dissemination of precedent materials. These actions include (a) regulatory codification of settled or established policies (b) reasoned acquiescence or nonacquiescence in judicial decisions (c) publication of fact-based precedent decisions (d) periodic conferences of administrative law judges for discussion of new legal developments or recurrent problems.<sup>218</sup>

Thus, the Conference looked with favor on the articulation of appropriate productivity norms, provided that such norms should be established "by regulation" and posited on consultations with administrative law judges and other affected interests. There is no evidence in any of the proceedings against SSA judges that appropriate productivity norms have ever been articulated, let alone "by regulation" or "after consultation" with administrative law judges. The other integrative and practicable recommendations for codification of precedents and use of claimants for information in a manner that could systematize and simplify many disability cases have encountered recurrent neglect as well. SSA has responded, on the whole, with insularity and opacity to the Administrative Conference's proposal for a consultative, cooperative endeavor.

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218. *Id.* at 99-100.

Judge Merritt Ruhlen's *Manual for Administrative Law Judges*, published by the Administrative Conference, treated administrative law judges' obligations to apply agency policy determinations as entirely compatible with maintaining their decisional independence. He noted that "[i]t is the [j]udge's duty to decide all cases in accordance with agency policy."<sup>219</sup> Nonetheless, if evidence or arguments not previously considered by the agency are introduced "or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the [j]udge has not only a right but a duty to consider such matters and rule accordingly."<sup>220</sup> Ruhlen described administrative law judge appointments as "absolute" in order to insure independence, though he also recognized that the judge is "an employee of the agency, charged with the interpretation and enforcement of its policies and the achievement of its distinct mission. . . ."<sup>221</sup> He stressed that the administrative law judge has a "strong affirmative duty" both "to try a case fairly and to write a sound decision" and "to insure that an accurate and complete record is developed."<sup>222</sup>

The latter obligation extends, when necessary, to directing counsel to research questions of law or policy and directing the parties "to discuss in oral argument, in brief, or in special memoranda during the hearing any issues or points he thinks germane. . . ."<sup>223</sup> He may even "have to call his own witness upon essential matters not covered adequately by the parties."<sup>224</sup> In writing opinions, administrative law judges must be aware that "the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, style-book and guide to citation, and to write, rewrite, rewrite and rewrite."<sup>225</sup>

The clear intimation from Ruhlen's observations is that the administrative law judge who reworks and rewrites decisions to improve them is performing his obligations properly and is not by so doing, furnishing "good cause" for dismissal. Nothing in the record of the proceedings to remove the SSA judges indicates that their performance was appraised with regard to insuring that "an accurate

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219. M. RUHLEN, *supra* note 214, at 79.

220. *Id.*

221. *Id.* at 1.

222. *Id.* at 3.

223. *Id.*

224. *Id.*

225. *Id.* at 95.

and complete record is developed."<sup>226</sup>

Ruhlen's views of the responsibilities of administrative law judges were reinforced by the views of the Supreme Court in *Campbell v. Heckler*<sup>227</sup> in 1983. In reversing the court of appeals' conclusion that a finding by the Secretary of HHS that the claimant was "not disabled" was not supported by substantial evidence unless the Secretary showed "suitable available alternative jobs" for the claimant,<sup>228</sup> the Supreme Court maintained that the court of appeals relied upon a principle of administrative law that was "inapplicable" when the agency, as here, had promulgated valid regulations.<sup>229</sup> When an agency takes administrative or official notice of facts, a litigant must ordinarily be given an adequate opportunity to respond.<sup>230</sup> "But when the accuracy of those facts already has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection."<sup>231</sup> Reasons why the Secretary could choose to rely upon guidelines developed through rulemaking rather than to present testimony of a vocational expert in each case were that the regulations provide that "the rules will be applied only when they describe a claimant's abilities and limitations accurately" and that the regulations require the administrative law judge to "look[k] fully into the issues."<sup>232</sup> The Secretary conceded that the regulations require conscientious inquiry by the administrative law judge but argued that the inquiry undertaken by the judge here "satisfied any regulatory duty."<sup>233</sup>

Concurring in the judgment, Justice Brennan commented that claimant's hearing before the administrative law judge "reflects poorly" on the judge's "duty of inquiry" and noted that the Secretary acknowledged this duty. He did not support the court of appeals decision in the case, however, because "the obligation that the [c]ourt of [a]ppeals would have placed on [a]dministrative [l]aw [j]udges was a poor substitute for good faith performance of the 'duty of inquiry' they already have."<sup>234</sup> Justice Marshall, the lone

226. *Id.* at 3.

227. 103 S. Ct. 1952 (1983).

228. *Campbell v. Secretary*, 665 F.2d 48, 54 (2d Cir. 1981), *rev'd sub nom.* *Campbell v. Heckler*, 103 S. Ct. 1952 (1983).

229. 103 S. Ct. at 1959.

230. *Id.* at 1958.

231. *Id.* at 1959.

232. *Id.* (invoking 20 C.F.R. § 404 (1982), especially §§ 404.1563(a), 404.944, 404 subpart P, app. 2 § 200.00(a)).

233. 103 S. Ct. at 1958 n.12.

234. *Id.* at 1960 (Brennan, J., concurring).

dissenter, disagreed with the other justices' conclusion that the court of appeals did not question the adequacy of the administrative law judge's inquiry at the hearing.<sup>235</sup>

The Justices were unanimous in their perception of administrative law judges' responsibilities for inquiry and judgment. The Secretary could promulgate medical-vocational guidelines through rulemaking in order to improve both the uniformity and efficiency of determinations regarding the existence of suitable jobs in the national economy. The Justices, in a footnote, recognized additional support for the Secretary's guidelines that "[m]ore than a quarter of a million of these claims require a hearing before an [a]dministrative [l]aw [j]udge. . . . [t]he need for efficiency is self evident."<sup>236</sup> Efficiency was equated with avoiding previously inconsistent treatment of similarly situated claimants that resulted from disparities in the testimony of vocational experts. The use of rulemaking to formulate guidelines in order to heighten uniformity in determining the availability of work that claimants could perform was applauded by the Court. By no stretch of the imagination could one find in the Court's decision in *Campbell*, however, a scintilla of support for the proposition that agencies can prescribe decisional minima to which administrative law judges must adhere or face removal. The Justices stressed thoroughness and fairness, not quantity, in reiterating the obligation of administrative law judges to look conscientiously and fully into the relevant issues and to refuse to apply the rules contained in the Secretary's guidelines upon finding that "they fail to describe a claimant's particular limitations."<sup>237</sup> Conscientiousness and thoroughness in probing and weighing issues were seen by the justices as positive components of administrative law judge performance. To switch them into criteria for proving "good cause" for removal of administrative law judges would require that the semantic standards of Big Brother in Orwell's *1984*<sup>238</sup> be substituted for traditional evaluative norms.

Does the foregoing analysis suggest that judges can legitimately mask indolence through talismanic allegations of conscientiousness and thoroughness? Certainly not; for probes of the empirical reality or falsity of such allegations are necessary and proper instruments in assessing whether removal of judges is warranted. Studies of judicial

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235. *Id.* at 1961 (Marshall, J., concurring and dissenting).

236. *Id.* at 1954 n.2.

237. *Id.* at 1958 n.11.

238. G. ORWELL, 1984 (reprint 1982).

discipline by the American Judicature Society demonstrate that the time is past—if it ever existed—when judges could claim total immunity from accountability for their conduct and conscientiousness.<sup>239</sup> Research by the Society's Center for Judicial Conduct Organizations evidences consistent rulings of removability and orders of removal against judges shown to be delinquent in the performance of duties.

In a letter to this author on September 9, 1983 in response to a request for "cases concerning judges who have been disciplined for deciding too few cases or for delay in disposing of cases," American Judicature Society Staff Attorney Terrence Brooks listed 25 such cases, omitting from his compilation "cases where judges have been accused of delay together with other, more serious misconduct."<sup>240</sup> Perusal of the reports of the respective judicial conduct organizations in each of these cases revealed that the judge subjected to discipline failed in some respect beyond the charges leveled at Administrative Law Judges Goodman and Balaban—a factor in addition to low decisional productivity was always present.

A case closest to the allegations against Goodman and Balaban involved an Alabama circuit court judge who was found to be "mentally unable to perform his duties," after "failing to promptly dispose of cases submitted to him and failing to report cases pending decision before him for more than six months."<sup>241</sup> Typical of the charges against the judge was the claim that he exacerbated delays by losing decrees from time to time. For example, after hearing an automobile condemnation case in January 1978, he requested and received a proposed decree from an attorney in May 1978. He signed that decree in August 1978 but then lost it in his office for four months. It was found in December 1978 and finally filed eleven months after the hearing.<sup>242</sup> In other cases before that judge, attorneys "repeatedly wrote letters and made phone calls" urging the judge to decide

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239. See I. TESSITOR, JUDICIAL CONDUCT ORGANIZATIONS (1978). The American Judicature Society's Center for Judicial Conduct Organizations publishes, *The Judicial Conduct Reporter*, a quarterly newsletter, and *The Judicial Discipline and Disability Digest*, a multivolume work cataloging every reported case on judicial discipline since 1960. The November 1979 issue of *Judicature* was devoted to preserving confidence in the Commissions, 63 JUDICATURE 203 (1979). With regard to application of the constitutional "good behavior" standard to federal judges, see R. WHEELER & A. LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE U.S. (1979) (study of the Federal Judicial Center).

240. See *supra* note 216.

241. *In re Powers*, slip op. at 1 (Ala. Ct. of the Judiciary July 11, 1981) (unreported judgment) (mimeo).

242. *Id.* at 5.

submitted matters "but to no avail."<sup>243</sup>

While falling short of malicious, immoral, or venal behavior, the performance of the Alabama judge, and of others removed or disciplined in similar cases, included elements of negligence or indifference, such as losing or mislaying case materials, keeping inaccurate records and unwillingness or inability to discharge administrative duties as presiding officer, in addition to a failure to make timely adjudications.<sup>244</sup>

Although the cases of judicial discipline contained some factor of negligence or indifference in addition to low decisional productivity on the part of the judge, reasonable persons journeying along the slipperly slopes of legal argumentation would have to acknowledge that decisional productivity can be so low as, without more, to constitute good cause for removal. It is submitted that an administrative law judge who presides admirably over hearings and elicits every relevant nuance of testimony and data, but who fails over a period of time to produce any decisions, negates the title of judge and furnishes good cause for removal. Except perhaps, in Gilbert and Sullivan operettas, one who cannot adjudicate cannot be a judge.

On the other hand, an administrative law judge who adjudicates at a pace similar to that at which rabbits multiply could also furnish good cause for removal if high quantity was achieved at the cost of violating the duty of inquiry and failing to look fully into the issues. Analysts of judicial performance should question rather than cheer high disposition rates that exceed, over a period of time, likely compatibility with full inquiry and deliberation. How should maximum and minimum figures be determined for each agency so that a presumption of good cause may appropriately be imposed for disciplinary proceedings against administrative law judges whose disposition rates fall above or below those figures? If it can be done

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243. *Id.* at 7.

244. See, e.g., *In re Heideman*, 387 Mich. 630, 198 N.W.2d 291 (1972); *In re MacDowell*, 303 N.Y.S.2d 748 (N.Y. App. Div. 1977); and *In re Judges of Municipal Court*, 256 Iowa 1135, 130 N.W.2d 553 (1964) cited by the Alabama court in the *Powers* case. Typical of the other cases noted in the American Judicature Society Center for Judicial Conduct Organizations' letter of September 9, 1983 were *In re Zedlar*, (Pa. Mar. 1981) (unreported order) (mimeo) removing a District Justice of Cumberland County for such conduct as refusing to conduct hearings on Mondays and after 11:00 A.M. on Tuesdays through Fridays and for refusing to come to his office on a number of work days; and *In re Stafford*, (N.Y. Judicial Conduct Comm'n Nov. 12 1982) (unreported judgment) (mimeo) removing a justice of Newfield Town Court for having "failed to carry out virtually all her judicial duties", including failure to preside over arraignments, trials and other proceedings.

equitably at all, it must be the product of representative, expert judgment. Compatible with the Administrative Conference's Resolution 78-2, reliance upon consultations with representative judges, judicial organizations and other experts from the profession are far more likely to produce fair and feasible criteria than are decrees by agencies acting alone in sovereign isolation. It would be a mockery of the vaunted methodology of administrative law to exclude from authoritative participation representatives of the individuals and professional groups most directly affected.

The setting, through consultations with representative experts, of decisional productivity standards deemed consistent with full elicitation and evaluation of testimony, data and arguments should be the beginning not the end of inquiries into whether good cause has been shown for dismissal of administrative law judges. The adequacy of support services available to meet particular judges' needs for assistance must be a factor of consideration. Reasonable efforts must be made by the agency to accommodate those needs in accordance with the judges' and not only the agency's perceptions. The professional quality of the written decisions by the judges against whom charges have been brought should also be appraised before any conclusion of "good cause" is reached. Panels of impartial experts selected from peer groups of administrative law judges, other distinguished members of the bench and bar and from law school faculties should be utilized to evaluate the quality of decisions by the charged judges. High quality could explain low productivity and would counsel against disciplinary action in those cases in which judges are charged with consistently falling below minimally acceptable decisional outputs. Any judicial system that prizes quality should have room for judges who, by observing the "write, rewrite, rewrite and rewrite" admonition of Ruhlen's manual,<sup>245</sup> achieve high levels of soundness and clarity. Such practices might play hob with caseload disposition if all the judges were perfectionists; but the same sense of reality that tells us that a judge who decides no cases should not be entitled "judge" also tells us that few judges are addicted to perfectionism. The few in service should be studied and treasured, not purged.<sup>246</sup>

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245. M. RUHLEN, *supra* note 214, at 95.

246. Although there may well be points of divergence between the Board's analysis of good cause in the *Goodman* case, *see supra* text accompanying notes 175-81, and that presented in this article, it is submitted that the Board's ruling and rationale overall are compatible with and conducive to implementation of what this article concludes is the task at hand.

## VI. CONCLUSION

“Good Cause” for removal of administrative law judges is stricter than “efficiency of the service,” the standard used for the removal of other classified civil service personnel, but not as strict as “good behavior,” the constitutional standard governing removal of Article III judges. Improper conduct by a judge—soliciting or accepting bribes, for example—would justify removal under all three standards. Financial stringency leading to reductions in force would be a typical factor held to satisfy “good cause” and “efficiency of the service” but which would not comport with the constitutional standard of “good behavior.” Failure to follow agency directives in decisionmaking provides justification for typical removals pursuant to the “efficiency of the service” standard but is prohibited from use as “good cause” for removal of administrative law judges.

Failure quantitatively to meet a minimum or to stay within a maximum average disposition rate could, arguably, provide a rebuttable presumption of good cause, if the rates have been determined for each agency through consultations with and recommendations by representative experts from the bench, bar and academia concerned with that agency’s administrative adjudication, and if the agency has made reasonable effort to accommodate to particular judges’ perceived and expressed needs for assistance. Resolution 78-2 of the Administrative Conference suggests the procedural *sine qua nons* for establishing quantitative norms. Ruhlen’s Manual for administrative law judges suggests that thoroughness, clarity and recurrent rewriting of opinions are judicial assets. The Supreme Court’s rulings in *Ramspeck*, *Butz*, and *Campbell* offer reminders, over a period of 30 years, of esteem for the role, performance and decisional independence of administrative law judges. The task at hand is to enhance, not jeopardize, the warrant for esteem through cooperative formulation of fair and feasible productivity goals, maximization of assistance to meet the needs of administrative law judges in attaining and maintaining them, and integration of the judges’ findings and critiques into the agencies’ machinery for making and evaluating policy.