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NOTES

Untangling "Operation Common Sense": Reopening and Review of Social Security Administration Disability Claims

In 1980, as part of the Department of Health, Education, and Welfare's¹ "Operation Common Sense," the Social Security Administration ("SSA") reorganized and restated in "simpler language" the regulations governing the process for adjudicating disability claims.² The purpose of this revision was "to make [the regulations] clearer and easier for the public to use."³ Unfortunately, as one court has noted, "the [new regulations] are not a model of clarity in draftsmanship."⁴ Instead, portions of the new regulations have only confused both claimants and courts.

The regulations that have engendered this confusion establish the five steps through which a claimant pursues a disability claim. Under the regulations, the claimant first files for an initial determination.⁵ A claimant dissatisfied with the initial determination may request a reconsideration.⁶ If still dissatisfied after the reconsideration, the claimant may request a hearing with an Administrative Law Judge ("ALJ") of the SSA's Bureau of Hearing and Appeals.⁷ After a decision by an ALJ, the claimant may request a review by the Bureau's Appeals Council.⁸ Finally, if still dissatisfied, the claimant may file an action challenging the claim determination in a federal district court.⁹

In addition to the five normal steps for adjudicating a claim, a claim may also be reopened under a separate section of the regula-

1. Effective May 4, 1980, the Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services ("HHS"). Department of Education Organization Act, Pub. L. No. 96-88, 1979 U.S. CODE CONG. & ADMIN. NEWS (93 Stat.) 668, 695.

2. 45 Fed. Reg. 52,078 (1980) (codified at 20 C.F.R. §§ 404.900-.999). These regulations also apply to Supplemental Security Insurance and some Medicare benefits. *See infra* note 18.

3. 45 Fed. Reg. 52,078 (1980) (Summary).

4. *Weinstein v. Bowen*, 666 F. Supp. 1131, 1136 (N.D. Ill. 1987). The SSA has acknowledged this, and is considering revising these regulations. *See infra* note 142.

5. 20 C.F.R. § 404.902 (1988). The initial determination is the determination made by the SSA that is "subject to administrative and judicial review. The initial determination will state the important facts and give the reasons for [its] conclusions." 20 C.F.R. § 404.902 (1988). *See infra* notes 19-20 and accompanying text.

6. 20 C.F.R. § 404.907 (1988); *see infra* notes 21-22 and accompanying text.

7. 20 C.F.R. § 404.930 (1988); *see infra* notes 23-25 and accompanying text. The SSA is a branch of the Department of Health and Human Services. The Appeals Council and the ALJs are components of the Bureau of Hearing and Appeals, which is part of the SSA.

8. 20 C.F.R. § 404.967 (1988); *see infra* notes 26-32 and accompanying text.

9. 20 C.F.R. § 404.981 (1988); *see infra* notes 31-32 and accompanying text.

tions.¹⁰ A claim may be reopened within one year for any reason, within four years for "good cause," and at any time for certain statutorily enumerated reasons such as fraud or similar fault.¹¹ There has been sharp disagreement among courts over who may initiate this reopening. Although all courts, the Department of Health and Human Services ("HHS"), and claimants agree that a claimant may request that a claim be reopened,¹² disagreement exists over the Appeals Council's ability to reopen *sua sponte*.¹³

Six courts of appeals have addressed this question directly. The First Circuit has held that only claimants may initiate reopening by the Appeals Council.¹⁴ The Fourth, Fifth, Sixth, and Eighth Circuits, adopting the interpretation urged by the Secretary of HHS ("the Secretary"),¹⁵ allow either the claimant or the Appeals Council to initiate the reopening process.¹⁶ The Eleventh Circuit has rejected both of these positions and created a "components analysis" to determine when the Appeals Council has the authority to initiate reopening of a claim, and when only the claimant may petition the Appeals Council for reopening.¹⁷

This Note examines these conflicting interpretations of the regula-

10. 20 C.F.R. §§ 404.987-989 (1988).

11. 20 C.F.R. § 404.988 (1988).

12. See, e.g., *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 169-71 (1st Cir. 1987).

13. Compare *McCuin v. Secretary of Health & Human Servs.*, 634 F. Supp. 431 (D.N.H. 1985) (only claimants, and not the Appeals Council, may initiate reopening), *modified*, 817 F.2d 161 (1st Cir. 1987); *Weinstein v. Bowen*, 666 F. Supp. 1131 (N.D. Ill. 1987) (same); and *DeLong v. Heckler*, 771 F.2d 266 (7th Cir. 1985) (suggesting in dicta that only claimants may initiate reopening) with *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987) (Appeals Council has the authority to reopen *sua sponte*); *Cieutat v. Bowen*, 824 F.2d 348 (5th Cir. 1987) (same); *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983) (same); *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986) (creating a components analysis to decide when the Appeals Council has the ability to reopen *sua sponte*) and *Marsh v. Heckler*, [Sept. 84-Apr. 85 Transfer Binder] Unempl. Ins. Rep. (CCH) (E.D. Cal. 1984) (unpublished decision limiting reopening to errors of fact), *affd. in part, revd. in part*, 779 F.2d 56 (9th Cir. 1985).

14. *McCuin*, 817 F.2d at 167-75.

15. Although not technically the same, the terms "the Secretary" and "the SSA" will be used interchangeably throughout this Note. The SSA is part of HHS and the Commissioner of the SSA reports to the Secretary, who approves final policy decisions.

16. The Eighth Circuit was the first to decide this issue, in *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983). This court noted that only the SSA would have an interest in raising certain of the criteria for reopening, such as fraud, and held that the Appeals Council may reopen *sua sponte*. 709 F.2d at 1215. The Fourth Circuit summarily held that the Appeals Council has the power to reopen. *Zimmermann v. Heckler*, 774 F.2d 615, 617 (4th Cir. 1985). In its decision, the court relied upon the reopening regulations alone. 774 F.2d at 617. The Fifth Circuit relied on *Munsinger*, but provided a more thorough examination of the regulations. *Cieutat v. Bowen*, 824 F.2d 348 (5th Cir. 1987); see *infra* section II.A. Finally, the Sixth Circuit rejected a district court holding that had allowed *sua sponte* reopening for errors of law but not for errors of fact and held that the Appeals Council may reopen *sua sponte* for both types of errors. *Fox v. Bowen*, 835 F.2d 1159, 1162-63 (6th Cir. 1987); see *infra* notes 137-40 and accompanying text.

17. *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986).

tions governing the reopening of claims and concludes that none of the interpretations adopted by the courts dispels the many inconsistencies in the language of the regulations. As a result, this Note proposes an alternative reading of the regulations that both removes many of the inconsistencies in the language of the regulations found in prior interpretations and better serves the regulatory goals articulated by the SSA.

Part I of the Note outlines how the SSA processes a disability claim and illustrates the ambiguity in the language of the reopening regulations that has caused the split in the courts. Part II examines the four interpretations of the reopening regulations created by courts. Part II begins with the Secretary's interpretation and concludes that this interpretation is plainly inconsistent with the language of the regulations. Thus, courts need not defer, as they normally would, to an agency's interpretation of its own regulation. This Part next examines the alternative interpretations of these regulations advanced by various courts, and describes how each interpretation fails to reconcile the language of these regulations. Barring the possibility of interpreting the regulations in a way that completely reconciles the language, the various goals of the SSA should be considered in choosing the best interpretation. Part III demonstrates that allowing *sua sponte* reopening in limited circumstances — under the portion of the regulations that allows reopening forever for, *inter alia*, fraud and similar fault — best effectuates the goals of the SSA. Absent fraud or similar fault, however, the Appeals Council should not initiate reopening, and should use other procedures to fulfill the policy goals of the SSA.

I. SSA AND THE REGULATIONS GOVERNING REOPENING

The disputed regulations describe how a claimant may pursue a claim under Title II of the Social Security Act.¹⁸ This Part describes these procedures in detail.

18. Title II of the Social Security Act authorizes the payment of federal old age, survivors, and disability insurance benefits. 42 U.S.C. §§ 401-433 (1982). Title II establishes the organization of these benefits. It allows the SSA to pay cash benefits to claimants who were wage earners in the Social Security system and the dependents and the survivors of such claimants. 42 U.S.C. § 402 (1982). Title XVI, the Supplemental Security Income ("SSI") program, provides analogous benefits to the needy, aged, blind, and disabled regardless of whether they participated in the Social Security system. 42 U.S.C. §§ 1381-1383(c) (1982). Low-income individuals who are over age 65, blind, or disabled are eligible. 42 U.S.C. § 1382(a) (1982). The hearings and appeals process for Title XVI claims is analogous to that for Title II claims. Compare 20 C.F.R. §§ 416.1400-.1499 (1988) (adjudication procedure for SSI benefits) with 20 C.F.R. §§ 404.900-.999 (1988) (adjudication procedure for social security Title II benefits). Medicare benefit claimants use the Title II regulations as well. To adjudicate Medicare benefits, a claimant is directed to the regulations concerning adjudication under Title II. 42 C.F.R. § 405.701(c) (1988).

This Note is limited to a discussion of Title II benefits. Although the various regulations provide the same adjudication system for Title XVI benefits and for Medicare benefits, interpreting the regulations reasonably requires some understanding of how the SSA system works and not just the language of a relevant regulation. Thus, this Note's conclusions concern Title II and are not necessarily relevant in a Title XVI or Medicare context. However, because courts' analy-

The initial determination, the first step in adjudicating a claim, takes place at the state level.¹⁹ Using forms filed by the claimant, a state examiner determines whether the claimant is disabled within the meaning of the regulations.²⁰ Should the initial determination be unfavorable to the claimant, he has sixty days to file a written request for a reconsideration.²¹ The reconsideration request gives the claimant an opportunity to file additional information pertinent to his disability claim.²² If dissatisfied with the outcome of the reconsideration, the claimant may request a hearing before an ALJ²³ within sixty days of the date he receives notice of the reconsideration decision.²⁴ This is usually the first opportunity for the claimant to appear personally before an individual empowered to reach a decision on his claim.²⁵ If,

ses of the reopening issue are based on the text of the regulations, the language of which is identical, cases involving Medicare and Title XVI can usefully be discussed.

19. Congress directed the Secretary to "make findings of fact, and decisions as to the rights of any individual applying for payment." 42 U.S.C. § 405(b)(1) (1982). The Social Security Administration contracts with state agencies and empowers them to make disability determinations. R. DIXON, *SOCIAL SECURITY DISABILITY AND MASS JUSTICE* 26 (1973). One reason for setting up the system this way was that Congress hoped that claimants would take advantage of state rehabilitation services if they were brought into contact with them. C. MEYER, *SOCIAL SECURITY DISABILITY INSURANCE: THE PROBLEMS OF UNEXPECTED GROWTH* 4, 12 (1979). The state may choose to turn the job of determining disability over to the federal government. 20 C.F.R. § 404.1503 (1988); 42 U.S.C. § 421(a)(1) (1982). If the SSA can supply the medical data necessary for a claim determination more easily, it may do so for the state. Also, the SSA supplies important financial information in every claim determination. L. LIEBMAN, *DISABILITY APPEALS IN SOCIAL SECURITY PROGRAMS* 5 (1985).

20. See 20 C.F.R. §§ 404.603, 404.703 (1988). Disability is defined by the regulations as the "inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months." 20 C.F.R. § 404.1505(a) (1988).

21. 20 C.F.R. § 404.909(a) (1988). The sixty-day limit may be extended for good cause, 20 C.F.R. § 404.909(b), as defined in 20 C.F.R. § 404.911 (1988). People other than the disappointed claimant may request reconsideration of a claim. "[A] person who shows in writing that his or her rights may be adversely affected by the initial determination may request a reconsideration." 20 C.F.R. § 404.908(a) (1988).

22. R. DIXON, *supra* note 19, at 32. The reconsideration follows the same procedures as the initial determination except that a new team renders the decision. Commentary, *Adjudication Process Under U.S. Social Security Disability Law: Observations and Recommendations*, 32 ADMIN. L. REV. 555, 562 (1980). If, however, the claimant has been receiving disability benefits and has been reevaluated as not disabled, the claimant may have a hearing at the reconsideration stage. 20 C.F.R. § 404.913(b) (1988).

23. 20 C.F.R. § 404.929 (1988). The right to a hearing is guaranteed by the Social Security Act. 42 U.S.C. 405(b)(1) (1982). While not given the full protection afforded Article III judges, ALJs are provided some measure of protection from political pressure by the Administrative Procedure Act ("APA"). They are hired by the Office of Personnel Management ("OPM"), not the SSA, and "are entitled to pay prescribed by the [OPM] independently of agency recommendations or ratings . . ." 5 U.S.C. § 5372 (1982). An ALJ may be removed only for good cause as established by the Merit Systems Protection Board. 5 U.S.C. § 7521 (1982). Thus, they are independent of the SSA in all respects. This independence is jealously guarded by the ALJs. See *infra* note 159.

24. 20 C.F.R. § 404.933(b)(1) (1988).

25. *Association of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1133 (D.D.C. 1984) ("The ALJ is the first agency personnel in the review process to interview the claimant in person.").

after the ALJ issues a decision, the claimant remains dissatisfied, he has sixty days to file a written request for review by the Appeals Council.²⁶

The Appeals Council may either grant or deny the claimant's request for review of an ALJ decision.²⁷ Should the Appeals Council choose to review the case, it may issue a decision or remand the claim to an ALJ for a second hearing.²⁸ Furthermore, the Appeals Council has the option of initiating a review on its own motion within sixty days of the ALJ's decision for any reason.²⁹ In certain situations, the regulations require the Appeals Council to review a claim.³⁰ A deci-

26. 20 C.F.R. § 404.968(a)(1) (1988). The Appeals Council is made up of 20 members plus a chairperson, who is the Associate Commissioner of Hearings and Appeals, and who usually does not participate in the daily activities of the Council. Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, in 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1987, at 625, 695 (1988) [hereinafter Koch & Koplow, *The Fourth Bite at the Apple*]. These members, unlike ALJs, are not protected by the Administrative Procedure Act. Instead, they are part of the merit pay system and are evaluated mainly on the quality and timeliness of their work by the Deputy Chair of the Appeals Council. *Id.* at 697-98 & n.208. These performance evaluations can affect a member's compensation in a substantial way. *Id.* at n.208. Some observers believe that, even without APA protections, Appeals Council members enjoy a high degree of *de facto* protection. However, other commentators raise concerns that the Appeals Council is a "partisan 'arm of the Secretary,'" *id.* at 699, and that the Council reflects, in subtle ways, the direction of SSA policymaking by granting fewer or more awards. *Id.* at 698-99.

27. 20 C.F.R. § 404.967 (1988). The Appeals Council will consider the evidence already in the record as well as "any new and material evidence submitted . . . which relates to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. § 404.976(b)(1) (1988) (emphasis added). If it falls within that category, the Appeals Council may consider it, as well as the ALJ record.

28. 20 C.F.R. § 404.967 (1988).

29. HHS regulations provide:

Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address.

20 C.F.R. § 404.969 (1988).

The Appeals Council reviews approximately 10% to 15% of Title II disability cases in which an ALJ has awarded benefits to the claimant. The cases are chosen randomly, picked according to claimants' Social Security numbers by the mailroom clerks in the Office of Disability Operations ("ODO"). The file is then sent to the Appeals Council for review before the claimant begins receiving benefits. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 706-08. These reviews were mandated by the Bellmon Amendments in 1980. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 455-56 (codified as amended at 42 U.S.C. § 421 (1982)); H.R. CONF. REP. NO. 944, 96th Cong., 2d Sess. 57-58, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1392, 1405-06; S. REP. NO. 408, 96th Cong., 1st Sess. 52-56, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1330-34.

A second kind of own-motion review comes about when the ODO flags a claim. These protest cases fall into three categories: (1) claims in which newly received evidence not available to the ALJ suggests that the earlier decision was incorrect; (2) claims in which a defect is detected in the ALJ's medical assessment; or (3) claims in which technical errors are discovered as ODO begins to calculate the benefit level. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 711 n.238.

30. 20 C.F.R. § 404.970 (1988). The four conditions under which the Appeals Council is required to review are (1) where there has been an abuse of discretion by an ALJ; (2) where there has been an error of law; (3) where the conclusions are not supported by substantial evidence; or (4) where there is a broad policy issue involved which may affect the general public. 20 C.F.R.

sion of the Appeals Council not to review is final.³¹ If the claimant is dissatisfied with the outcome of the Appeals Council review, or if the request for a review is refused, he may file a complaint within sixty days in a federal district court.³²

The regulations governing these first stages of the hearing process have not created any confusion. The controversy arises when the Appeals Council does nothing during the sixty-day period in which it has the authority to review the claim on its own initiative. After the sixty-day period has passed, the review process is closed, yet the case may still be reopened.³³ A claim may be reopened within twelve months for any reason,³⁴ within four years for good cause,³⁵ or at any time in certain prescribed situations such as fraud or similar fault.³⁶

The ambiguity in the reopening regulations arises from the inter-

§ 404.970 (1988); see *Bauzo v. Bowen*, 803 F.2d 917, 921-22 (7th Cir. 1986); *Razey v. Heckler*, 785 F.2d 1426, 1427-29 (9th Cir.) (Section 404.969 gives the Appeals Council discretion to review while § 404.970 mandates four instances where the Appeals Council will review.), *modified on other grounds, reh. denied*, 794 F.2d 1348 (9th Cir. 1986).

31. 20 C.F.R. § 404.981 (1988).

32. "The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you . . . file an action in Federal district court, or the decision is revised." 20 C.F.R. § 404.981 (1988).

33. 20 C.F.R. § 404.987 (1988). The regulation states:

Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination or a decision made in your case may be reopened and revised. After we reopen your case, we may revise the earlier determination or decision.

34. "A determination, revised determination, decision, or revised decision may be reopened— (a) Within 12 months of the date of the notice of the initial determination, for any reason . . ." 20 C.F.R. § 404.988(a) (1988).

35. 20 C.F.R. § 404.988(b) (1988). "Good cause" is defined in § 404.989:

(a) We will find that there is good cause to reopen a determination or decision if —

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

20 C.F.R. § 404.989 (1988).

36. 20 C.F.R. § 404.988(c) (1988). The regulations provide that a claim may be reopened at any time if—

(1) It was obtained by fraud or similar fault;

(2) Another person files a claim on the same earnings record and allowance of the claim adversely affects your claim;

(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;

(4) Your claim was denied because you did not prove that the insured person died, and the death is later established —

(i) By reason of an unexplained absence from his or her residence for a period of 7 years; or

(ii) By location or identification of his or her body;

(5) The Railroad Retirement Board has awarded duplicate benefits on the same earnings record;

(6) It either —

play of the three regulations describing how reopening may be initiated. Section 404.987 describes reopening generally and addresses the claimant directly:

[I]f you are dissatisfied with a determination . . . made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination . . . made in your case may be reopened and revised. After we reopen your case, we may revise the earlier determination or decision. . . . You may ask that a determination . . . be revised. . . . The conditions under which we will reopen a previous determination . . . are explained in section 404.988.³⁷

Section 404.987 can be read as allowing only the disappointed claimant to initiate reopening. The section is directed at the claimant and does not specifically mention that the Appeals Council may initi-

(i) Denies the person on whose earnings record your claim is based gratuitous wage credits and another Federal agency (other than the Veterans Administration) has erroneously certified that it has awarded benefits based on that service; or

(ii) Credits the earnings record of the person on which your claim is based with gratuitous wage credits and another Federal agency (other than the Veterans Administration) certifies that it has awarded a benefit based on the period of service for which the wage credits were granted;

(7) It finds that the claimant did not have insured status, but earnings were later credited to his or her earnings record to correct errors apparent on the face of the earnings record . . . to enter items transferred by the Railroad Retirement Board, which were credited under the Railroad Retirement Act when they should have been credited to the claimant's Social Security earnings record . . . or to correct errors made in the allocation of wages or self-employment income to individuals or periods . . . which would have given him or her insured status at the time of the determination or decision if the earnings had been credited to his or her earnings record at that time, and the evidence of these earnings was in our possession or the possession of the Railroad Retirement Board at the time of the determination or decision;

(8) It is wholly or partially unfavorable to a party, but only to correct [a] clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made;

(9) It finds that you are entitled to monthly benefits or to a lump sum death payment based on the earnings of a deceased person, and it is later established that:

(i) You were convicted of a felony or an act in the nature of a felony for intentionally causing that person's death; or

(ii) If you were subject to the juvenile justice system, you were found by a court of competent jurisdiction to have intentionally caused that person's death by committing an act which, if committed by an adult, would have been considered a felony or an act in the nature of a felony;

(10) It either —

(i) Denies the person on whose earnings record your claim is based deemed wages for internment during World War II because of an erroneous finding that a benefit based upon the internment has been determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(ii) Awards the person on whose earnings record your claim is based deemed wages for internment during World War II and a benefit based upon the internment is determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(11) It is incorrect because —

(i) You were convicted of a crime that affected your right to receive benefits or your entitlement to a period of disability; or

(ii) Your conviction of a crime that affected your right to receive benefits or your entitlement to a period of disability is overturned.

37. 20 C.F.R. § 404.987 (1988).

ate reopening when it describes the process to the claimant. Two courts found the use of the word "however" to be particularly important; its use "appears to indicate that the 'may be opened' clause refers to an action on a motion by 'you,' the claimant."³⁸ Thus, courts could reasonably interpret the language of the regulation as allowing only the claimant to initiate reopening.

If ambiguity exists in the regulation that grants the power to reopen, the other regulations concerning reopening do not eliminate the confusion. Section 404.988 enumerates the conditions for reopening, but it does not create an independent basis for reopening, and its language does not help determine who may initiate proceedings if the claim satisfies the criteria for reopening.³⁹ Section 404.989 defines "good cause," which is a necessary condition for reopening after one year, but it does not add that the Appeals Council might reopen on its own initiative.⁴⁰ None of the three reopening regulations explicitly mentions that the Appeals Council has the ability to initiate reopening of a claim. If the Appeals Council has the power to reopen *sua sponte*, that power must be inferred from the regulations.

The lack of an explicit grant of authority to reopen takes on added importance when the regulations concerning reopening are compared to the regulations governing review. The SSA claims that the Appeals Council has similar powers to initiate review and reopening. The Appeals Council has the right to initiate own-motion review,⁴¹ and the regulation that gives the Appeals Council this power explicitly names the Appeals Council as the body that may initiate the review.⁴² If the SSA really intended the two sections to create parallel powers for the Appeals Council, then it would have used similar language in each of the two sections.⁴³ The differences in the language of the two sections suggest that the regulations do not give the Appeals Council identical powers with respect to review and reopening.

Alternatively, the language of the regulations can be interpreted to allow the Appeals Council to reopen *sua sponte*. Although the regulations do not explicitly authorize the Appeals Council to reopen *sua*

38. *McQuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 169 n.5 (1st Cir. 1987) (discussing *DeLong v. Heckler*, 771 F.2d 266 (7th Cir. 1985)). The Court of Appeals for the Seventh Circuit, in *DeLong*, stated that the drafters' choice of "however" was "particularly suggestive that reopening [was] intended to be for the benefit of the disappointed applicant only." 771 F.2d at 268. This was dicta, however, and the court did not decide the issue. 771 F.2d at 268.

39. See 20 C.F.R. § 404.988 (1988); see also *supra* text accompanying note 37.

40. See 20 C.F.R. § 404.989 (1988).

41. 20 C.F.R. § 404.969 (1988).

42. Section 404.969 states that "the Appeals Council itself may decide to review the action [the hearing decision or dismissal] that was taken." 20 C.F.R. § 404.969 (1988).

43. Compare 20 C.F.R. § 404.987 (1988) ("You may ask that a determination . . . be revised.") with 20 C.F.R. § 404.969 (1988) ("[T]he Appeals Council itself may decide to review the action.").

sponte, neither do they explicitly limit reopening to claimants or preclude reopening by the SSA. In 1980, the Department rewrote the regulations to address the claimant in the second person in an attempt to make the regulations easier for claimants to understand.⁴⁴ As well as addressing the claimant directly, the SSA's regulations also refer to the SSA in the first person.⁴⁵ Thus, the use of "you" in section 404.987 need not indicate a desire by the Department to limit reopening to claimants, but might be its attempt to tailor the regulations to the claimant's perspective. This argument makes particular sense because before 1980, the Appeals Council had the explicit power to reopen claims *sua sponte*.⁴⁶ The SSA emphasizes that the 1980 rewriting was not intended to make any substantive changes in the regulations; it was intended only to make them easier for claimants to understand.⁴⁷

Examining the plain meaning of the words of the reopening regulations merely highlights the ambiguity of the language. Both an interpretation allowing only the claimant to reopen and an interpretation allowing the claimant *and* the Appeals Council to reopen can be colorably inferred from the regulations, and both interpretations create inconsistencies within the language of the regulations.

II. REOPENING REGULATIONS: FOUR INTERPRETATIONS

Six courts of appeals have directly addressed the issue of whether the Appeals Council has the power to reopen a claim *sua sponte*.⁴⁸ Four different interpretations have been considered at the appellate level. This section briefly describes the facts and logic of a case that typifies the reasoning of each of these interpretations, then shows why each interpretation renders some provision of the regulations moot.

44. See *supra* notes 2-3 and accompanying text.

45. The regulations state that "[w]e," "us," or "our" refers to the [SSA]." 20 C.F.R. § 404.901 (1988).

46. See 20 C.F.R. § 404.957 (1978) ("An initial, revised, or reconsidered determination of the Administration . . . which is otherwise final . . . may be reopened . . ."); see also *Butterworth v. Bowen*, 796 F.2d 1379, 1384 (11th Cir. 1986) (The Secretary argues that there exists a "long-standing history" of the reopening regulations under which the Secretary could reopen claims *sua sponte*.).

47. See *supra* note 3 and accompanying text.

48. *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987) (Appeals Council has the ability to reopen *sua sponte*); *Cieutat v. Bowen*, 824 F.2d 348 (5th Cir. 1987) (same); *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986) (creating a components analysis to decide when the Appeals Council has the ability to reopen *sua sponte*); *McCuin v. Secretary of Health & Human Servs.*, 634 F. Supp. 431 (D.N.H. 1985) (only claimants, and not the Appeals Council, may initiate reopening), *modified*, 817 F.2d 161 (1st Cir. 1987); *Zimmermann v. Heckler*, 774 F.2d 615 (4th Cir. 1985) (Appeals Council has the ability to reopen *sua sponte*); *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983) (same).

A. Cieutat: *Allowing Sua Sponte Appeals Council Reopening*

Four courts of appeals have adopted the Secretary's interpretation of the reopening regulations and have held that the Appeals Council may initiate the reopening of a claim.⁴⁹ In *Cieutat v. Bowen*,⁵⁰ the Appeals Council reopened claimant Cieutat's disability claim and revoked a grant of benefits, finding him not disabled.⁵¹ The Council based its reopening of the ALJ's favorable decision upon a Work Activity Report, received after the deadline for review had passed, that showed that Cieutat had worked for six months as an electrician/truck driver during the period of his alleged disability.⁵² Cieutat filed suit challenging this revocation, claiming that the Appeals Council lacked the authority to reopen his case on its own motion.⁵³

The court of appeals began its opinion by noting that its "review of an agency's regulations is circumscribed."⁵⁴ Because of the deference due an agency's interpretation of its own regulations, a reviewing court may reject the interpretation advocated by the Secretary only if it is "plainly inconsistent with the language of the regulations."⁵⁵ Within this limited scope of review, the court accepted the Secretary's interpretation allowing the Appeals Council, as well as the claimant, to initiate the reopening process.⁵⁶

The Fifth Circuit rejected Cieutat's argument that allowing the Appeals Council to reopen within twelve months for any reason and within four years for good cause renders the sixty-day time limit on review meaningless.⁵⁷ The Secretary maintained that both procedures

49. These are the Courts of Appeals for the Fourth, Fifth, Sixth, and Eighth Circuits. See *supra* note 16.

50. 824 F.2d 348 (5th Cir. 1987).

51. Cieutat initially filed for SSI disability benefits in 1982 because of a back injury that he had suffered as the result of a fall at work five years previously. Beginning in 1980, the pain had worsened to the point where he could sit comfortably for only about ten minutes at a time. Cieutat had also been treated for depression and addiction to his pain killers. After having his benefits denied at both the initial determination and the reconsideration stages, an ALJ found him disabled in 1983. 824 F.2d at 350-51.

52. The Work Activity Report had been submitted to the ODO on behalf of Cieutat and the ODO had sent the SSA a memo informing it of the report. The SSA had also received an employer report from the company that had employed Cieutat. 824 F.2d at 351.

53. Besides deciding the issue of whether the Appeals Council could reopen *sua sponte*, the court also reviewed the record to determine if the Appeals Council had good cause, as defined by 20 C.F.R. § 404.989 (1988), to reopen Cieutat's case. 824 F.2d at 357-58. See *supra* note 35 for a discussion of good cause.

54. 824 F.2d at 352.

55. 824 F.2d at 352. See *infra* notes 60-63 and accompanying text for a full discussion of the deference due an agency's interpretation of its own regulation.

56. 824 F.2d at 360.

57. 824 F.2d at 354-56. Section 404.969 limits Appeals Council own-motion review to 60 days after the date of the Appeals Council decision. 20 C.F.R. § 404.969 (1988). Cieutat argued that if the Appeals Council may initiate reopening for one year for any reason and for four years with "good cause," the Council may effectively ignore the 60-day limit on review by simply "reopening" any claim for which the 60-day limit has expired, effectively using the two proce-

remain effective because the time periods for the two begin running at different times. The time period for review begins on the date of the ALJ's decision, while the time period for reopening begins on the date when the claimant is sent notice of the initial determination.⁵⁸ With these different beginning times, a situation could arise in which the twelve-month limitation on reopening expires before the sixty-day limitation on review; given such a possibility, the separate sixty-day time limit on review is not inherently superfluous.⁵⁹ The court deferred to the Secretary's interpretation because the Secretary created a hypothetical situation where the reopening regulations did not moot the review regulations.

In reviewing a regulation, courts supposedly give "great deference" to an agency's interpretation of its own regulation.⁶⁰ Although the

dures interchangeably, and rendering the time limit on review moot. *See also infra* note 64 and accompanying text.

58. 824 F.2d at 355; 20 C.F.R. §§ 404.968(a)(1), 404.988(a), 404.988(b) (1988). The Secretary also observed that the two provisions have distinct subheadings in the regulations and that while own-motion review is available to only the Appeals Council, any component of the SSA may reopen a claim. 824 F.2d at 355 n.9. These differences, the Secretary argued, suggest that reopening and review are two separate and distinct procedures.

59. *See infra* notes 64-65 and accompanying text.

60. 824 F.2d at 352. This general rule, however, is subject to some limitations:

The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions [of a regulation]. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Decided in 1945, *Bowles* "has been the unquestioned law ever since." 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:22 at 105 (2d ed. 1979).

Thus, in order for an agency's interpretation of a regulation to be upheld, the construction must (1) comport with the Constitution; (2) comply with the intentions of Congress; and (3) not be "plainly inconsistent" with the language of the regulation. The only constitutional challenge to these regulations was the due process argument raised by the First Circuit, which is refuted in this Note. *See infra* Part II.B.1. There is no question that these regulations fulfill congressional intent. Congress vested the Secretary with broad powers, "on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for administration of this subchapter." 42 U.S.C. § 405(b)(1) (1982). Furthermore, he "is authorized to delegate to any member, officer, or employee . . . any of the powers conferred upon him by this section . . ." 42 U.S.C. § 405(l) (1982). The remaining criterion, then, is to test whether the interpretation is plainly inconsistent with the language of the regulation.

Confusion exists over the degree of deference that courts actually give to administrative interpretations. The test is not uniformly applied or interpreted. The Supreme Court applies the rule only when it is convenient; otherwise, the Court ignores it. *Weaver, Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 591-95 (1984) [hereinafter *Weaver, The Deference Rule*].

When courts defer to an administrative agency's interpretation of its own regulation, the courts often explain the deference in terms of the agency's expertise. In areas where the agency genuinely has a special expertise, this deference is justified; the agency has a better grasp of both the issue and the ramifications within the agency of different interpretations. *See Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 63-64 (1st Cir. 1985); *Southern Mutual Help Assn. v. Califano*, 574 F.2d 518, 526 (D.C. Cir. 1977). *See generally* K. DAVIS, *supra*, at § 7:22; *Weaver, Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 726 (1984). However, there are competing considerations. In some cases, although an agency may have more complete knowledge concerning the regulation, its interpretation may also have a greater likelihood of being influenced by considerations outside the legitimate realm of the regu-

standard can be enunciated in several ways,⁶¹ the meaning of the rule remains the same: when a court finds the language of a regulation ambiguous, it must accept the agency's interpretation unless that interpretation is plainly inconsistent with the wording of the regulations. A reviewing court cannot replace an agency's interpretation of a regulation with one of its own simply because its interpretation appears more plausible than the agency's.⁶² If an agency's interpretation is reasonable, it must be accepted by a reviewing court.⁶³ By holding that the SSA's interpretation is not plainly inconsistent with the language of the regulations and that a situation could exist where the review regulations would apply while the reopening regulations would not, the court was bound to accept the Secretary's interpretation. A closer examination of the regulatory framework as a whole, however, suggests that the Secretary's argument is not particularly persuasive, and that allowing *sua sponte* reopening does indeed render the review regulations moot.

1. *The Reopening and Review Regulations Overlap in Time*

The Secretary claims that reopening and review are separate and distinct procedures not only because the time limitation on reopening could expire before the limitation on review, but also because the time limitations for the two provisions begin to run at different points in the appeals process. The time limit for Appeals Council review begins to run on the date of the ALJ's decision, while the time period for reopening begins running when the SSA notifies the claimant of the initial determination.⁶⁴ The Secretary hypothesizes that claims may arise where the one-year limitation on reopening for any reason has expired while the sixty-day limit on Appeals Council review has not.⁶⁵ Thus,

lation. Weaver, *The Deference Rule*, *supra*, at 612-13. Some commentators believe that courts have lost faith in the SSA and no longer defer to its regulatory interpretation for this reason. See Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 786-87. Another reason courts need not defer to the SSA in this instance is that these regulations control how claims will be adjudicated and how to deal with questions of law and fact — an area with which courts are more familiar than is the SSA. See, e.g., *Jicarilla Apache Tribe v. Federal Energy Regulatory Commn.*, 578 F.2d 289, 292-93 (10th Cir. 1978).

61. The Supreme Court has also phrased the test as whether the "interpretation is supported by the wording of the regulations and is consistent with prior agency decisions." *Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League*, 423 U.S. 12 (1975) (*per curiam*).

62. See *United States v. Larionoff*, 431 U.S. 864 (1977). Although the regulations in *Larionoff* contained several ambiguities, the Court held that it "need not tarry . . . over the various ambiguous terms and complex interrelations of the regulations." 431 U.S. at 872. The Court proceeded to give a cursory analysis, upholding the government's interpretation.

63. *Larionoff*, 431 U.S. at 872.

64. *Cieutat v. Bowen*, 824 F.2d 348, 355 (5th Cir. 1987). Compare 20 C.F.R. § 404.969 (1988) with 20 C.F.R. § 404.988 (1988).

65. The Secretary hypothesizes a case where

a claimant received an initial determination denying him benefits . . . on January 1, 1987. This determination triggers the limitations periods on the SSA's ability to reopen the case

the review regulation could be used in instances where the reopening regulation could not be, and therefore is not unnecessary.

While this situation could possibly arise, that possibility does not alleviate the tension between these two sections. The conflict remains, in part because the hypothesized difference is illusory — situations where this would occur are almost nonexistent — and in part because the Appeals Council can reopen a claim for good cause for four years. The criteria for good-cause reopening also overlap with the criteria for review. *Sua sponte* reopening for good cause may be used to moot the sixty-day limitation on review as easily as the one-year limitation on reopening without cause. Even the Secretary has not suggested that the four-year period for reopening with good cause might run before the sixty-day period for review. The likelihood that the one-year limit for reopening without cause might expire before the sixty-day period for review is remote, though not entirely implausible; it is simply infeasible, however, that the four-year period for good-cause reopening might expire before the sixty-day period for review.

2. *The Reopening and Review Regulations Serve an Identical Purpose Within the SSA*

The reopening regulations also render the sixty-day limitation on review moot because the Appeals Council may reopen a claim for the same reasons that the Appeals Council must review a claim. Certainly, reopening for “any reason” overlaps with the four enumerated instances where the Appeals Council must review. Reopening for four years for “good cause” also overlaps to some extent with the review regulations: both allow the Appeals Council to act for errors of law. The sixty-day limit on review is circumvented because reopening

sua sponte, so that the Appeals Council (or, presumably the ALJ) may reopen without cause through January 1, 1988 and with cause through January 1, 1991. In the meantime, since the claimant was denied benefits, he will probably seek reconsideration. Assuming he waits until the end of the sixty-day period that he has to do so, and that reconsideration occurs within thirty days after that, the claimant may be expected to receive notice of the agency's decision upon reconsideration on about April 1, 1987. The claimant then has another sixty days within which to request a hearing before an ALJ. Assuming he makes such a request sixty days after receiving notice of the state agency's decision upon reconsideration, the SSA would get the request on about June 1, 1987. If the hearing before the ALJ is held six months later, and the ALJ issues his decision only a month after the hearing, the ALJ's hearing decision could be expected to be released by January 1, 1988. From that date, the Appeals Council has sixty days, until approximately March 1, 1988, to review the case on its own motion. Thus, under this hypothetical scenario, the Appeals Council could *reopen* without cause only through January 1, 1988, but could initiate *review* through March 1, 1988.

Cieutat, 824 F.2d at 355 n.11 (emphasis in original). However, in 1978, the mean processing time for a two-person review team was 45 days. Commentary, *supra* note 22, at 562. The reconsideration procedure is identical to that for the initial determination. *Id.* For review by an ALJ, a claimant must wait, on average, 248 days from the day she files the request until the day the ALJ issues a decision. *Id.* at 564. Finally, the average length of time for Appeals Council review is 108 days. *Id.* An average claim takes more than 350 days to go through the four adjudicative levels. *Id.* at 565.

serves the same function, but the regulations do not limit it to sixty days.

The Secretary insisted in *Cieutat* that, aside from having different invocation requirements, the two provisions are different because they serve separate functions within the adjudicatory process.⁶⁶ If this is true, then the reopening regulations do not render the review regulation moot even though they serve no distinct purpose from a claimant's viewpoint. These separate functions are illustrated, according to the SSA, by the way the regulations are organized. The SSA uses the fact that the reopening and review regulations are found under different headings in the Code of Federal Regulations ("CFR") to illustrate the difference between the two processes.⁶⁷ The review regulations follow chronologically within the other four steps of adjudication of a claim.⁶⁸ The reopening regulations, however, are located in the regulations after the entire adjudicatory process has been described, suggesting that it is not a normal step in adjudication, but an extraordinary one.⁶⁹ The SSA points to their different locations in the CFR as evidence that reopening and review are not designed to accomplish the same goals.⁷⁰ This argument convinced the Fifth Circuit that there are hypothetical cases where reopening and review do not overlap completely. However, closer scrutiny of this argument reveals its flaws.

The argument that the two measures serve different functions might be plausible if the Appeals Council reopened claims under different criteria than it reviewed claims. But the agency has admitted that the criteria it uses to reopen "for any reason," whether initiated by the claimant or the Appeals Council, are the very ones enumerated in section 404.970, the regulation that outlines the criteria for mandatory own-motion review.⁷¹ During the first year following an initial determination date, the SSA mandates that the Appeals Council reopen a claim using the review standards. Thus, the two procedures are used in the same, not separate, situations.

The Secretary emphasizes that review and reopening of claims were created to play different roles in the appeals process.⁷² The review process allows the Appeals Council to ensure consistency among ALJs.⁷³ In 1980, the SSA instituted a program for randomly review-

66. *Cieutat v. Bowen*, 824 F.2d 348, 354-56 (5th Cir. 1987); see also *Butterworth v. Bowen*, 796 F.2d 1379, 1384 (11th Cir. 1986).

67. Compare 20 C.F.R. §§ 404.967-.970 (1988) with 20 C.F.R. §§ 404.987-.989 (1988).

68. See 20 C.F.R. §§ 404.900-.983 (1988).

69. See 20 C.F.R. §§ 404.987-.989 (1988).

70. Brief for Appellant at 4-5, *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161 (1st Cir. 1987) (No. 86-1732).

71. *McCuin*, 817 F.2d at 170 n.6.

72. *Butterworth v. Bowen*, 796 F.2d 1379, 1384-85 (11th Cir. 1986).

73. See *infra* notes 156-59 and accompanying text.

ing ALJ decisions for consistency.⁷⁴ Ten to fifteen percent of ALJ decisions are now reviewed as a matter of course to promote uniformity among ALJs.⁷⁵ In contrast with reviewing, the Secretary considers reopening to be an extraordinary measure,⁷⁶ available only under more stringent procedural safeguards.⁷⁷ The SSA's internal manual defines reopening as giving the SSA a chance "to take another look."⁷⁸ This second look occurs when extraordinary factors arise more than sixty days after the ALJ's decision.

Apparently, however, even the Appeals Council confuses the two measures. In *Butterworth v. Bowen*, the decision of the Appeals Council began with the statement that "[t]his case is before the Appeals Council on its own motion to review the decision of the administrative law judge,"⁷⁹ when, in fact, the Appeals Council had *reopened* the claim (the time for review had expired). The cover page of the Appeals Council's decision was also marked "Bellmon case."⁸⁰ This was a reference to the Bellmon Amendments, which provided a statutory mandate requiring the SSA to create a review procedure to begin overseeing ALJ decisions to increase uniformity.⁸¹ In *Butterworth*, the Appeals Council thought it was reviewing when, in fact, the time limit for own-motion review had expired. Moreover, the Appeals Council admits that it has, in the past, used the reopening provisions to review claims in situations where the sixty-day limit for own-motion review has passed.⁸² When the Appeals Council uses the two different provisions interchangeably, the argument that they serve different functions has little credibility.

B. McCuin: Sua Sponte Appeals Council Reopening Violates Due Process

The Court of Appeals for the First Circuit, in *McCuin v. Secretary*

74. SOCIAL SECURITY RULINGS 64 (Cum. ed. 1982).

75. See *infra* note 158 and accompanying text.

76. *Cieutat v. Bowen*, 824 F.2d 348, 355 n.9 (5th Cir. 1987); see also *Bloodsworth v. Heckler*, 703 F.2d 1233, 1238 (11th Cir. 1983) ("reopening of a case is an extraordinary measure").

77. As the regulatory time period for reopening grows longer, the criteria for reopening grow more stringent. The Appeals Council may review a claim for any reason within 60 days. 20 C.F.R. § 404.969 (1988). The Secretary insists that he reopens claims "for any reason" under section 404.988(a) only if the claims satisfy the conditions of section 404.970, which defines the conditions for review. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 171 n.6. (1st Cir. 1987). After the first year, the Secretary may reopen only if he has "good cause," 20 C.F.R. § 404.988(b) (1988), and after four years he may reopen only if he can fulfill one of the specified criteria. 20 C.F.R. § 404.988(c) (1988).

78. *Fox v. Heckler*, [Social Security Transfer Binder 29] Unempl. Ins. Rep. ¶ 16,958 (N.D. Ohio 1986) (quoting the Department's internal manual, the Program Operation Manual System).

79. *Butterworth*, 796 F.2d at 1382.

80. 796 F.2d at 1389 n.9.

81. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(c), 94 Stat. 455 (1980).

82. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 724 n.268.

of Health and Human Services,⁸³ disagreed with the Fifth Circuit's determination that the Secretary's interpretation is consistent with the language of the regulations. It held instead that "no reading . . . would not stretch the language of the regulations to a considerable extent."⁸⁴ The court rejected the Secretary's interpretation on a theory not raised in the *Cieutat* case, holding that *sua sponte* Appeals Council reopening violated claimants' due process rights.⁸⁵

McCuin sought reimbursement from Medicare for hospital expenses.⁸⁶ After an ALJ decision granted her benefits, the Appeals Council reopened and revised a portion of the decision.⁸⁷ McCuin brought suit solely on the issue of the propriety of the Appeals Council's *sua sponte* reopening.⁸⁸

The district court found that the Secretary's interpretation violated the claimant's due process rights.⁸⁹ The court of appeals agreed, holding that "[t]he reopening power claimed by the Secretary takes away

83. 817 F.2d 161 (1st Cir. 1987).

84. 817 F.2d at 171 (emphasis in original).

85. *Cieutat* did not make a due process argument, thus the Fifth Circuit did not address whether the fourteenth amendment's due process clause might restrict reopening by the Appeals Council. *Cieutat v. Bowen*, 824 F.2d 348, 356 n.12 (5th Cir. 1987).

86. At the first hearing, the ALJ decided against McCuin. She sought Appeals Council review and the Appeals Council remanded the claim. The second ALJ decision granted McCuin coverage for the hospital bills and waived her liability for the cost of the services not covered by Medicare. 817 F.2d at 163. In McCuin's case, when the Appeals Council reversed the ALJ's decision, she became liable for paying the uncovered bill because what was reversed was a waiver of liability. In a Title II case, this situation would not arise. Claimants either stop getting the benefits or, in extreme cases, may be required to repay past overpayments. Once the Appeals Council reopens a claim and denies previously granted benefits, those benefits are considered overpayments — "a payment in excess of the amount due under Title II." 20 C.F.R. § 404.501(a) (1988). The claimant must repay those benefits only in limited circumstances. As long as the individual is "without fault" and the adjustment would defeat the purpose of Title II or be against "equity and good conscience," the claimant will not be required to repay the SSA. 20 C.F.R. § 404.506 (1988).

The SSA defines fault as:

- (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
- (b) Failure to furnish information which he knew or should have known to be material; or
- (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

20 C.F.R. § 404.507 (1988). Thus, unless the Appeals Council is reopening because of fraud or similar fault on the part of the claimant under section 404.988(c), the SSA would not request that the claimant repay the money. It is probably not the claimant's "fault" unless he has committed some type of fraud on the SSA.

87. The Appeals Council reopened the claim eight months after the second ALJ decision. It revised the portion of the decision dealing with the waiver of liability for the uncovered services, holding that the ALJ had committed an error of law. 817 F.2d at 163.

88. In other parts of its ruling, the court rejected the Secretary's claim that the court had no jurisdiction to hear the case, 817 F.2d at 163-66, and remanded the claim to the district court so that the suit could be certified as a class action. 817 F.2d at 166-67.

89. "The reopening . . . deprived [the claimant] of fair notice of the Secretary's intentions, stripped away the protective cloak of due process, and destroyed the surety which a final, binding decision should guarantee." *McCuin v. Bowen*, 634 F. Supp. 431, 433 (D.N.H. 1985) (quoting *Dion v. Secretary of Health & Human Servs.*, Civil No. 83-442-D at 4 (D.N.H. Apr. 25, 1984)).

the finality that adjudication normally affords.”⁹⁰ In reaching this conclusion, the court acknowledged that little precedent existed to support this argument.⁹¹ Despite the lack of support, the court held that reopening by the Appeals Council violated substantive due process because it deprived a claimant of finality.⁹² The court reasoned that if the Appeals Council were allowed to reopen *sua sponte* for a four-year period, a claimant could not rely upon the decision until that four-year period had ended. At any time before then, a claimant’s “favorable” decision could be reopened and changed to an “unfavorable” decision. A favorable outcome would be tenuous, dependent upon the Appeals Council’s decision not to reopen.⁹³

The First Circuit’s analysis depended upon the substantive due process problem of finality “spawning” a procedural due process problem of lack of fair notice.⁹⁴ The court held that the notice sent by the SSA to successful claimants does not adequately inform them of the possibility that the Appeals Council may reopen their claims.⁹⁵ The SSA could not tell the claimant it was “awarding” benefits because there was no finality and the benefits might be taken away at any time. Furthermore, the court held that the regulations make it impossible to formulate a notice that adequately describes the claimant’s position without highlighting the total absurdity of the situation; to satisfy the notice requirement, the Appeals Council would have to announce that it had made a decision, but simultaneously announce that it could change its mind within four years.⁹⁶ The court believed that an accurate notice would read:

The Appeals Council reserves the right to reopen your case within a year for any reason and within four years for good cause. “Good cause” includes errors of fact or law that we may have made in processing your claim. You should be aware that if we discover that we made such an error, the benefits we grant you today will be taken away from you at that time.⁹⁷

90. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 172 (1st Cir. 1987).

91. *McCuin* contended that the reason for the lack of precedent for her due process challenge was that “finality of judgment is basic to every adjudicatory system and is seldom, if ever, circumvented in this way.” 817 F.2d at 172. The court started with the presumption that finality is a basic precept to adjudication. It then adapted this principle to the administrative context, analogizing to other instances where the Supreme Court has drawn from common law principles and applied them to administrative proceedings. 817 F.2d at 172-73.

92. 817 F.2d at 174.

93. 817 F.2d at 172.

94. 817 F.2d at 172.

95. See *infra* note 99. The formulation of the notice is misleading for several reasons. It does not resolve the question of who may reopen a claim, and it also omits the fact that the claimant may initiate reopening. 817 F.2d at 173.

96. The court concluded that no other tribunal would allow such a notice to be sent. *McCuin*, 817 F.2d at 173.

97. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 173 (1st Cir. 1987).

However, although an accurate notice could be formulated, it does not eliminate the finality problem.

1. *Sua Sponte Reopening Does Not Violate Due Process*

Because disability benefits are protected property interests within the meaning of the fifth amendment,⁹⁸ the SSA must fulfill certain requirements defined by the due process clause of the Constitution before it can deprive a claimant of benefits previously awarded. The First Circuit's due process objection rests primarily on the lack of finality *sua sponte* reopening affords the claimant. The court appears to demand a level of finality comparable to the level found in a court proceeding. But because the Constitution does not require an administrative agency to provide the same degree of finality as a court proceeding, the constitutional impediments to the Secretary's interpretation are more illusory than real.

The SSA does not provide the same level of finality to claimants as a court provides to litigants, and it is not required to do so. Finality, as embodied in the concept of *res judicata*, is a "fundamental precept of common law adjudication"⁹⁹ which applies to both administrative and judicial proceedings.¹⁰⁰ However, it applies to administrative proceedings only in a modified form.¹⁰¹ An agency may create proceed-

98. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (The Secretary "recognizes, as has been implicit in our prior decisions, that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment.") (citations omitted).

99. *McCuin*, 817 F.2d at 172 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). As the *McCuin* court acknowledged, finality is not often discussed explicitly in cases. Instead, discussion often revolves around the applicability of *res judicata*.

Res judicata and finality are not the same principle. *Res judicata* is a much broader principle, and reasons other than finality, such as trying to achieve judicial economy and to avoid inconsistent results, exist and account for the application of *res judicata* to a particular situation. 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4403 (1981). However, the main reason to apply *res judicata* to a decision is to create a final decision. This is because "[t]he deepest interest underlying the conclusive effect of prior adjudication draws from the purpose to provide a means of finally ending private disputes." *Id.* at 15. In many cases, then, *res judicata* can be used as an effective tool to examine finality.

100. "[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court." *RESTATEMENT (SECOND) OF JUDGMENTS* § 83(1) (1982). Note, however, that for this to be true, the determination must have all the essential elements of adjudication: adequate notice, the right to present evidence and the opportunity to rebut it, a statement of the issues of law and fact, and a rule of finality. *RESTATEMENT (SECOND) OF JUDGMENTS* § 83(2) (1982). The less an adjudication looks like a court proceeding, the less the need for finality governs. In the adjudication of SSA disability claims, *res judicata* applies because of a statutory mandate, 42 U.S.C. § 405(h) (1982), despite the differences between a court proceeding and a disability hearing. See 4 K. DAVIS, *supra* note 60, at § 21:3. Indeed, the fact that *res judicata* applies does not mean a high degree of finality is necessary. The differences between the court system and an SSA hearing still counsel against requiring the same level of finality of each.

101. See *Coulter v. Weinberger*, 527 F.2d 224, 228 (3d Cir. 1975). The law is confused about when *res judicata* could and should apply to administrative proceedings. See 4 K. DAVIS, *supra* note 60, at § 21:3.

ings in which the degree of finality does not equal that attained in the court system.¹⁰² The purposes for a strict rule of finality are less important in an administrative setting than in a trial-like setting.¹⁰³ The less like a trial a hearing looks, the less the need for a high level of finality. The purposes and procedures of an ALJ hearing and a judicial proceeding are very different. Because of these differences, the SSA can provide claimants with a lower level of finality and still not violate their due process rights.

The different purposes of a trial and an SSA hearing lead to the different needs for finality.¹⁰⁴ The court system provides a forum for dispute resolution. It gives private citizens a way to settle their differences in a fair manner. Unlike the court system, the SSA hearing provides the place for the "systematic and affirmative implementation of certain prescribed legislative policies."¹⁰⁵ The SSA uses its hearing process to ensure that it pays benefits to qualified claimants. It is not a question of one party being more "correct" than another. Instead, claimants are either disabled, which qualifies them for benefits, or not disabled, in which case they do not get benefits. "The adjudication of claims in social welfare programs is an outgrowth of a positive legislative program to insure or protect qualified claimants against certain economic hazards."¹⁰⁶ Furthermore, parties to a trial have the option of resolving their disputes privately, outside the court system, through methods such as negotiation or arbitration. In contrast, claimants lack the option of going outside the adjudication system set up by the SSA. In order to get benefits, a claimant must file with the SSA and use its procedures.

The different procedures of a trial and a disability hearing reflect the different purposes of the two proceedings. The court system is adversarial. In its ideal form, two adversaries vie to win a dispute, with the truth becoming evident as the proceeding progresses.¹⁰⁷ Sim-

102. It appears that the Court allows an administrative agency wide latitude in satisfying due process requirements. "[T]he Court seems to have adopted a posture for due process review that asks in broad terms whether challenged procedures represent a responsible attempt by the agency . . . to preserve the values of accuracy, fairness, and timeliness, given the social and economic context within which those procedures operate." J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS* 10 (1978) [hereinafter *HEARINGS AND APPEALS*].

103. See e.g., C. WRIGHT, A. MILLER & E. COOPER, *supra* note 99, at 15 ("The central role of *adversary* litigation in our society is to provide binding answers.") (emphasis added).

104. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

105. *Id.* at 780.

106. *Id.* at 779. Mashaw argues that one reflection of the "affirmative implementation" of the legislative policies is the fact that the hearings are nonadversarial and informal. *Id.* at 780.

107. "The object of a lawsuit is to get at the truth and arrive at the right result. This is the sole objective of the judge . . ." Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975) (quoting D. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9

ilarly, in a disability hearing, the presiding adjudicator (an ALJ) is concerned principally with discovering the truth; he uses the hearing as a forum to gather enough information to make an informed decision concerning the claimant's disability claim. An ALJ, unlike a judge, however, must do more than act as a passive adjudicator making a decision based upon the information presented to him; the ALJ has an affirmative duty to bring out information regardless of whom it favors.¹⁰⁸ Disability hearings are inquisitorial, not adversarial. The SSA is not pitted against the claimant,¹⁰⁹ for no one represents the SSA at ALJ hearings.¹¹⁰ In fact, in many cases, no one represents the claimant either.¹¹¹

Furthermore, a disability claim determination is not final in the same sense as a court judgment, even apart from possible reopening. As a claimant's condition changes, so does his ability to receive disability benefits. Continuing disability reviews are scheduled on a regular basis to ensure that claimants on the disability rolls remain "disabled" and that their conditions have not changed.¹¹² Although termination decisions are final in the respect that the decision of the

(1954) (13th Annual Benjamin N. Cardozo Lecture)). "Whether or not the judge generally achieves or maintains neutrality, it is his assigned task to be nonpartisan and to promote through the trial an objective search for the truth." *Id.* at 1035.

108. Many commentators have said that ALJs wear "three hats" when referring to their multifaceted role in a hearing. An ALJ described his three roles:

We put on the first hat, and we represent the claimant, we present all the testimony on his behalf, and drag it out of him by questioning. We then represent the government, the Social Security Administration, and search the law — that's the second hat. We search our minds, and we search whatever other records are available, we search the evidence, and we present the best case the government has. Then we turn around and put on the third hat, and we decide which evidence is the most favorable, and in whose behalf.

Popkin, *The Effect of Representation in Nonadversary Proceedings — A Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 991-92 (1977) (quoting *Rausch v. Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967)); see also R. DIXON, *supra* note 19, at 37. The ALJ has an affirmative duty to bring out information regardless of whom it favors. H. MCCORMICK, *SOCIAL SECURITY CLAIMS AND PROCEDURES* § 566 (3d ed. 1989 Supp.) ("An Administrative Law Judge . . . has [a] duty to elicit both favorable and unfavorable facts and circumstances.").

109. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 670 n.128.

110. See *supra* note 108.

111. ALJs have a special responsibility to help an unrepresented claimant. *Heckler v. Campbell*, 461 U.S. 458, 471 (1983) (Brennan, J., concurring). In recent years, representation by counsel has increased in frequency. Davis reported that claimants were unrepresented at more than 70% of the ALJ hearings. 4 K. DAVIS, *supra* note 100, at § 21:3. In 1986, 64% of the claimants had legal representation, while 16% had nonlegal representation. *Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 82 (1986) (Statement of F. Smith, Assoc. Commr. for Hearings and Appeals, SSA) [hereinafter *Ways and Means Hearings 1986*].

112. See 20 C.F.R. §§ 404.1588-.1599 (1988). The SSA must evaluate a disabled claimant from "time to time" to determine if the claimant is still disabled. This evaluation is called a "continuing disability review" ("CDR"). 20 C.F.R. § 404.1589 (1988). The frequency of the reviews depends upon the type of disability. If the impairment is expected to improve, review will occur within six to 18 months after the latest decision. 20 C.F.R. § 404.1590(d) (1988). If the duration of the disability cannot be estimated, review will occur at least once every three years, and if a claimant is diagnosed as permanently disabled, reviews will take place every five to seven years. 20 C.F.R. § 404.1590(d) (1988).

SSA does not change, a claimant cannot "rely" upon benefits continuing because he cannot, in many cases, rely upon his disability continuing.¹¹³

Thus an ALJ decision, even if it is susceptible to *sua sponte* Appeals Council reopening, does afford a claimant an adequate measure of finality. This eliminates both of the due process problems noted by the First Circuit. Without a finality problem, no notice problem is "spawned." Claimants receive adequate notice of their situation. The form that informs claimants of a favorable decision states:

*The Appeals Council, may, on its own motion, within 60 days from the date shown below, review the decision, which could possibly result in a change in the decision (20 CFR 404.969 and 416.1469). After the sixty-day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based (20 CFR 404.988; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.*¹¹⁴

Thus, under the SSA's own regulations, the claimant knows of the possibility of reopening and the conditions under which SSA usually reopens. As further notice, when the Appeals Council reopens the claim, it sends a notice to the claimant stating that the claim is being reopened, and that the claimant may present new evidence and request a hearing.¹¹⁵

The due process protections afforded claimants — even if the Appeals Council reopens *sua sponte* — comport with the standards for evaluating due process established by the Supreme Court. *Mathews v. Eldridge*¹¹⁶ is the paradigm for analyzing whether the procedural protections given to a claimant comport with due process. In *Mathews*, the Court created a three-pronged balancing test for determining when procedural protections are adequate. A reviewing court must weigh:

[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures

113. Termination proceedings differ drastically from reopening. When the SSA terminates a claimant after a continuing disability review ("CDR"), his condition has changed. Usually, however, the condition of the claimant has not changed in the time between the ALJ decision and the Appeals Council reopening. Yet, the two procedures demonstrate the sharp distinction between the finality of the court system and the finality afforded a disability claimant. Even if a tort victim's condition improves dramatically more than predicted in court, the victim need not return part of his judgment. The damages represent a final award; no change in condition will necessitate returning the money. The difference in finality can be explained by the difference in the two systems. Disability benefits are inextricably linked to a claimant's condition. In that sense, they are never final like a court judgment.

114. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 173 (1st Cir. 1987) (quoting Appeals Council Notice) (emphasis in original).

115. 20 C.F.R. § 404.992(b) (1988); *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987).

116. 424 U.S. 319 (1976).

used and the probable value . . . of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹⁷

In *Mathews*, the Court held that an agency does not have to hold an evidentiary hearing as a prerequisite to the termination of disability benefits. *Mathews* demonstrates that an administrative process need not parallel the process demanded of the court system by the fifth amendment if, when viewed functionally, the procedures are reasonable.¹¹⁸

The SSA's procedures afford claimants a level of finality; claimants do not receive the same degree of finality that accompanies a court's decision, but they do receive enough to pass constitutional muster. The uncertainty that claimants feel because of the possibility of Appeals Council reopening lasts a maximum of four years, after which the Appeals Council may reopen only for conditions such as fraud or similar fault. Furthermore, the notice sent to claimants adequately informs them of the possibility of *sua sponte* reopening. Hence, no due process problems exist.

2. *The McCuin Court's Interpretation Renders Part of the Regulations Meaningless*

The due process clause does not require a court to adopt an interpretation allowing only claimants to reopen. Once the constitutional mandate is eliminated, this interpretation can be rejected because it renders a provision of the regulations meaningless. Although allowing only claimants to utilize the reopening procedure avoids a conflict between the reopening and the review regulations,¹¹⁹ it deprives another of the reopening regulations of any content. Section 404.988(c) allows reopening, at any time, in situations where a decisionmaker finds "fraud or similar fault."¹²⁰ Most of the criteria in this section deal

117. 424 U.S. at 335.

118. In applying the balancing test, the *Mathews* Court described the plaintiff's interest as the interest in uninterrupted benefits. If he ultimately prevails, his benefits are awarded retroactively and he will not lose any money. Because disability claims are not based upon need, temporary interruption of payments does not, at least in theory, harm the plaintiff. The Court then considered the "fairness and reliability" of the procedures. It looked at the process to see the risk of error inherent in the truth-finding process. In *Mathews*, the potential risk of error was not great, and because the decision in a disability case turns on "routine, standard and unbiased medical reports," an oral presentation is not measurably better than a written submission. Finally, the Court examined the increased costs and additional burdens associated with requiring a pretermination hearing. These costs would not be "insubstantial," and when coupled with the knowledge that judicial-type proceedings are not necessary to ensure fairness, counsel against imposing pretermination hearings as a requirement. In short, as long as the parties can present a "meaningful case," the procedures comply with the due process clause.

119. See *supra* notes 57-59 and accompanying text. Under this interpretation, because the Appeals Council may initiate review, but not reopening, the reopening regulations do not moot the review regulations.

120. 20 C.F.R. § 404.988(c) (1988).

with benefits wrongfully obtained, not wrongfully denied. No claimant would invoke these provisions in order to reopen a claim; such a reopening would only lead to having his benefits taken away. Only the SSA or a second claimant to the same benefits would utilize these provisions.¹²¹ Thus, the "claimant only" interpretation renders those portions effectively meaningless and is inconsistent with the language of the regulations.

C. Butterworth: *The "Components Analysis"*

Like *Cieutat* and *McCuin*, *Butterworth v. Bowen*¹²² involved a claim in which the Appeals Council reopened *sua sponte* an ALJ decision favorable to the claimant.¹²³ Unlike the other two courts, however, the Court of Appeals for the Eleventh Circuit did not adopt a position advocated by either party to the suit. Instead, it adopted an approach to reopening which it considered "the only alternative consistent with the overall regulatory framework."¹²⁴

Mindful of the deferential standard of review accorded to an agency's interpretation of its own regulations, the court first decided that the Secretary's interpretation of sections 404.987 and 404.988 is reasonable and that the two sections "establish conditions under which the Secretary as well as the claimant is authorized to initiate the reopening of a case."¹²⁵ However, the court held that in order to reopen a claim, the SSA must satisfy a second condition. In addition to meeting the criteria of section 404.988, the case must be properly before that particular "component level."¹²⁶ The court found that a case is properly before the Appeals Council when it has taken jurisdiction by reviewing the claim, either on own-motion review or at the request of the claimant. Because the Appeals Council did not exercise its option to review Butterworth's claim within sixty days, and because Butterworth did not appeal the decision of the ALJ, the Council did not have the jurisdiction to reopen his claim on its own initiative. Only the ALJ could have reopened the claim; only the ALJ had juris-

121. The reasons for allowing reopening are events such as fraud on the SSA. One claimant tried to explain these regulations as provisions to allow people other than the claimant who have an interest in the benefits to reopen. Under other provisions if multiple claimants apply for the same fixed amount of benefits, the benefits to each individual claimant may be decreased. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 170 (1st Cir. 1987). There may be situations where this hypothetical arises, but even the First Circuit admits that this strains the language of the regulation. 817 F.2d at 170.

122. 796 F.2d 1379 (11th Cir. 1986).

123. Butterworth suffered from emphysema. His claim was denied, both in the initial determination and the reconsideration that followed. An ALJ found Butterworth disabled, holding that he could no longer work at his old job. Six months later, the Appeals Council sent Butterworth a letter telling him it was reopening his claim. 796 F.2d at 1380-82.

124. 796 F.2d at 1389.

125. 796 F.2d at 1385.

126. 796 F.2d at 1386-89.

diction over the claim at that time.¹²⁷

1. *The "Components Analysis" Creates Artificial Distinctions*

The components analysis, although reconciling the reopening and review regulations, relies upon distinctions not articulated in the regulations.¹²⁸ It analogizes to the court system to determine when the Appeals Council may initiate reopening. The *Butterworth* court held that the Appeals Council must first have jurisdiction over a claim, much in the same way that a court must have jurisdiction over a case. But analogizing to the judicial system, while tempting, is not always appropriate.¹²⁹ As Justice Frankfurter wisely noted, administrative agencies have a different origin and function than do courts, and this difference "preclude[s] wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."¹³⁰ The purpose and implementation of legislative policy in disability hearings is different from that of the court system.¹³¹ The Eleventh Circuit's interpretation is deficient because it relies upon distinctions which, although relevant in a judicial context, simply do not exist in the regulations.

D. *The Errors Of Fact/Errors of Law Distinction*

The final interpretation, although accepted by several district courts, has not been accepted by any court of appeals. As articulated by the district courts, this fourth interpretation differentiates between errors of law and errors of fact. In *Fox v. Heckler*,¹³² Fox applied for

127. 796 F.2d at 1388-89.

128. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 171 (1st Cir. 1987) (The *Butterworth* interpretation, "while ingenious, suffers from the defect of relying on many detailed distinctions of which the regulations make no mention.").

129. Judge Friendly has observed that despite many commentators' grave reservations, Americans have "gone mad" in their tendency to judicialize administrative procedure. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1269 (1975). Judge Friendly agrees with Professor Davis' comment that "[t]he best answer to the overall question of whether we want more judicialization or less is probably that we need more in some contexts and less in other contexts." *Id.* at 1270 (footnote omitted).

130. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

131. See *supra* notes 104-11 and accompanying text.

132. [Social Security Transfer Binder 29] Unempl. Ins. Rep. (CCH) ¶ 16,458 (N.D. Ohio Mar. 15, 1986), *revd. sub nom.* *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987). This interpretation of the regulations has been espoused in two other district court cases. In *Russell v. Califano*, [1979 Social Security Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 16,227 (N.D. Ohio Sept. 19, 1978), the court held that the Appeals Council did not have the power to reopen the claim. Because the status of an illegitimate child under Ohio law was a question of law, the court remanded the claim for reinstatement of benefits.

In *Marsh v. Heckler*, [Sept. 84-Apr. 85 Social Security Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,697 (E.D. Cal. 1984) (unpublished opinion), *affd in part, revd in part*, 779 F.2d 56 (9th Cir. 1985), the court held that to allow the Appeals Council to reopen would "essentially extend the sixty (60) day review period to four (4) years." *Marsh*, [Sept. 84-Apr. 85 Social Security Transfer Binder] Unempl. Ins. Rep. at ¶ 2251.

disability benefits because of a visual impairment due to a car accident. After the state denied Fox's claim at both the initial consideration and reconsideration stages, an ALJ determined that Fox was eligible for benefits. The Office of Disability Operations disagreed, however, and approximately five months after the ALJ decision — well beyond the sixty-day review time limit — the Appeals Council reopened the ALJ decision.¹³³ The district court held that the Appeals Council could reopen *sua sponte* only for errors of fact. To reach this conclusion, the court relied upon one of the criteria for reopening for good cause — when evidence “clearly shows on its face that an error was made.”¹³⁴ Including errors of law as well as errors of fact in the definition of errors would render moot the explicit regulatory mandate for the Appeals Council to review claims that show errors of law.¹³⁵ Thus, the limitation adopted by this district court avoided an open inconsistency between the review and reopening regulations.

1. *The Fact/Law Distinction Does Not Eliminate the Inconsistencies in the Language of the Regulations*

The Court of Appeals for the Sixth Circuit, however, rejected this interpretation¹³⁶ when it held that the regulations do not expressly preclude reopening based on an error of law.¹³⁷ It reasoned that although the Appeals Council cannot reopen when the sole reason is a “change in legal interpretation,”¹³⁸ an error of law is also an error that is, as the regulation states, clear from the face of the evidence and cannot be excluded as a reason for good faith reopening.¹³⁹

The fact/law distinction also suffers from several other flaws. Like the Secretary's interpretation, it does not eliminate the inconsistency between reopening without cause for one year and reviewing for sixty days; the Appeals Council can reopen a claim for any reason within one year but it can review a claim only if it acts within sixty days.¹⁴⁰ Furthermore, even if courts restrict reopening under section 404.989 to errors of law, the Appeals Council can still both reopen for errors of fact for four years and review for errors of fact for sixty days. The

133. *Fox*, [Social Security Transfer Binder 29] Unempl. Ins. Rep. at ¶¶ 2048-49.

134. 20 C.F.R. § 404.989(a)(3) (1988).

135. 20 C.F.R. § 404.970 (1988).

136. *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987), *revg.* *Fox v. Heckler*, [Social Security Transfer Binder 29] Unempl. Ins. Rep. (CCH) ¶ 16,458 (N.D. Ohio Mar. 15, 1986).

137. *Fox*, 835 F.2d at 1163.

138. *See* 20 C.F.R. § 404.989(b) (1988).

139. The *Fox* court noted that a change in interpretation is not an error that shows clearly on the face of the evidence. 835 F.2d at 1163-64. The court also noted that the internal SSA manual speaks of reopening as proper when there has been an error of law. In fact, one of the examples the manual uses to illustrate reopening for clear errors on the face of the evidence is an error of law. *See* 835 F.2d at 1164.

140. *See supra* note 71 and accompanying text.

District Court's interpretation does not affect this overlap in the regulations. Thus, this interpretation only eliminated one conflict in the language of the regulations — the overlap for errors of law. It does not wholly reconcile the review and reopening provisions.

In summary, the arguments made by these courts are perhaps the best illustration of the true ambiguity of the regulations. All of the courts' readings of the regulatory language are equally implausible. The regulations do not clearly state who may reopen a claim, nor does placing the reopening regulations in their larger context resolve the ambiguity. Courts that rely solely upon the SSA's interpretation of the reopening regulations defer too readily to the agency. The Secretary's interpretation, in this instance, is plainly inconsistent with the language of the regulations. This frees courts to try to interpret the regulations in a way that would give a harmonious reading to all of the provisions.¹⁴¹ Unfortunately, no court has espoused such an interpretation. These regulations are so poorly constructed that no obvious reading exists that allows all the regulations to retain full meaning. Because the language of the regulations compels no particular interpretation, a court must look to the policies the SSA meant the regulations to implement.

III. PARTIALLY LIMITING *SUA SPONTE* REOPENING BEST FULFILLS THE POLICIES OF THE SSA AND RECONCILES THE LANGUAGE OF THE REGULATIONS

The regulations governing reopening are poorly drafted. Even the SSA has acknowledged this and is contemplating rewriting them.¹⁴²

141. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

142. The SSA has at the proposed rule stage of rulemaking a proposed change that would explicitly allow the Appeals Council to reopen a final decision *sua sponte*. 52 Fed. Reg. 14,296 (1987). However, a legal assistant at the SSA stated that this would probably not move beyond the proposed rule stage because the SSA was considering more major changes to the Appeals Council. Telephone interview with Phil Berge, Legal Assistant, Department of Health and Human Services, Social Security Administration (Aug. 23, 1988). Recently, the SSA drafted new rules that would have restricted the right to appeal denials of disability benefits. *U.S. Drafts Rules Limiting Appeals on Social Security*, N.Y. Times, Nov. 16, 1988, at A1, col. 1. These rules would have formalized the adjudication process by barring the admission of new evidence and limiting the issues a claimant could appeal. *Id.* This measure was rejected by the SSA Commissioner, however, after a storm of protest. 46 CONG. Q. WEEKLY REP. 3484 (1988).

The Administrative Conference of the United States also recommended changes to the Appeals Council. Limiting reopening in the manner suggested in this Note is consistent with these recommendations.

The Administrative Conference recommended that the Appeals Council change its focus. *Recommendation 87-7: A New Role for the Social Security Appeals Council*, in 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1987, at 32-42 (1988). At this time, the Appeals Council members see too many files to give more than a cursory glance at any of them. Instead of concentrating heavily on individual cases, it should begin to play more of a "systems reform" role. As the body in the SSA that is in an overview position, the Appeals Council is well suited to become more policy oriented. Under this new direction, the Appeals Council would still look at a significant number of cases, but the review could be limited to cases that reflect new issues in disability, problem areas, or random review. Koch & Koplou,

Barring the possibility of interpreting the regulations to allow each provision to have full force, courts should choose an interpretation that best effectuates the policies the regulations were created to implement.¹⁴³ To reconcile the language of the various regulations so as not to moot any provision while also fulfilling the goals of the SSA, this Part concludes that the Appeals Council should not be permitted to reopen claims *sua sponte* under the provisions allowing reopening for one year without cause and for four years with good cause. In these two cases, reopening moots the review regulations and hinders the achievement of the SSA's goals. *Sua sponte* reopening should still be available, however, for those extraordinary cases, such as fraud or similar fault, in which the Appeals Council can reopen indefinitely under section 404.988(c).¹⁴⁴

This Part first demonstrates that the interpretation of the regulations proposed by this Note eliminates many of the inconsistencies between the language of various sections of the regulations. This Part next describes the overall objectives of the SSA and identifies which of these goals own-motion review and *sua sponte* reopening serve. It then shows that limiting reopening in the way suggested here will not hinder the SSA in achieving its goals. Finally, this Part demonstrates that limiting reopening will improve the treatment that claimants receive, an important goal of the SSA. Limiting *sua sponte* reopening to cases of fraud or similar fault will increase the acceptability of the adjudicative process by treating claimants in a more open and fair manner.

A. *Limiting Sua Sponte Reopening Reconciles the Language of the Regulations*

There are several reasons to draw a distinction between the regulatory provision allowing indefinite reopening in limited circumstances and the provisions allowing reopening without cause within one year and with cause within four years. This distinction, while appearing arbitrary,¹⁴⁵ resolves the conflict in the language of the regulations.

The Fourth Bite at the Apple, *supra* note 26, at 800-08. The Administrative Conference's suggestion acknowledges that the Appeals Council is a political body, not an impartial decisionmaker and, as such, should play a larger role in guiding the SSA and a smaller role in correcting individual decisions.

143. *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161, 171 (1st Cir. 1987).

144. 20 C.F.R. § 404.988(c) (1988).

145. This distinction could be subject to one of the objections raised in response to the components analysis interpretation — it relies on distinctions not explicitly drawn in the regulations. *See supra* note 128 and accompanying text. However, there are several differences between the two. This interpretation draws a line between two regulations where one has not been explicitly drawn; but this distinction, unlike the components analysis, is based on the structure of the regulations. Nor is this interpretation devoid of analogous support elsewhere in the regulations. This demarcation is based upon the length of time reopening is allowed and the specificity with which the conditions for reopening are allowed. A similar line is drawn by the SSA in distinguishing between claimants from whom the SSA might demand reimbursement for repayment and those from whom it will not. *See supra* note 86.

The standards for reopening a claim within one year and within four years cause the overlap with the language of the review regulations; they moot the review regulations because the Appeals Council reopens a claim for the same reasons it reviews one, and yet the regulations allow it to do so for a longer period of time.¹⁴⁶ Limiting *sua sponte* reopening to the truly exceptional circumstances of section 404.988(c) — the provisions for reopening for fraud or similar fault¹⁴⁷ — would eliminate this confusion. In contrast to the provisions for reopening within one year or four years, *sua sponte* reopening under section 404.988(c) does not invalidate the review regulations; the regulation enumerates criteria for reopening that only the Appeals Council would use.¹⁴⁸ Here, there has not been a misinterpretation of the evidence or an error of fact or law on the part of the SSA — the usual reasons for own-motion review.¹⁴⁹ Under this interpretation, all the portions of the regulations retain meaning; disallowing all reopening by the Appeals Council would render meaningless the several portions of section 404.988(c) directed expressly toward the Appeals Council, and allowing *sua sponte* reopening in all situations would render parts of the review regulations moot.¹⁵⁰ Furthermore, this interpretation advances the goals of the SSA.

B. *The Goals of the SSA*

Congress intended disability insurance to provide benefits to only those claimants who are unable to work.¹⁵¹ The SSA pursues this aim by making quality decisions. Commentators suggest that this involves creating a procedure that, *inter alia*, produces accurate, consistent, and timely decisions that are made in a manner acceptable to those affected by the process.¹⁵² The SSA's main objective has been "to

146. See *supra* notes 57 and 71 and accompanying text.

147. 20 C.F.R. § 404.988(c) (1988).

148. The one real exception to this generalization allows indefinite reopening when a decision was "wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made." 20 C.F.R. § 404.988(c)(8) (1988). Several criteria might be utilized by the claimant, such as if the earnings record were calculated incorrectly, see 20 C.F.R. §§ 404.988(c)(6), (7), (10) (1988), but a claimant would never be aware of most of these. The rest of the criteria are ones that a claimant would not use. Aside from fraud or similar fault, 20 C.F.R. § 404.988(c)(1) (1988), the criteria include a claimant's conviction of a crime affecting his right to receive benefits, 20 C.F.R. § 404.988(c)(11) (1988); a claimant's conviction for a felony for intentionally causing the insured's death, 20 C.F.R. § 404.988(c)(9) (1988); and another person filing a claim on the same earnings record as the claimant, 20 C.F.R. § 404.988(c)(2) (1988).

149. See *supra* note 29.

150. Allowing only claimants to reopen would render meaningless all the provisions that involve situations where only the SSA would want to reopen. It is unlikely, for example, that a claimant would reopen his claim to have his benefits taken away because he committed fraud. Allowing *sua sponte* Appeals Council reopening would moot the 60-day limit on own-motion review.

151. See 42 U.S.C. § 423(d) (1988).

152. HEARINGS AND APPEALS, *supra* note 102, at xix-xxv, 116-20; Koch & Koplow, *The*

make fair and correct decisions."¹⁵³ To increase accuracy, it must prevent both false negatives — the situation where qualified claimants are denied benefits — and false positives — the situation where unqualified claimants are granted benefits. To the extent, however, that accuracy cannot be achieved in the context of the type of subjective decisions ALJs must make regarding disability, the SSA must increase the consistency of decisions — having the same outcome occur regardless of who the decisionmaker is — independent of improving accuracy.¹⁵⁴ Furthermore, the SSA tries to make these decisions in a timely and acceptable fashion. Making timely decisions helps to increase claimants' acceptance of the program. A high level of acceptability — a feeling that the process is treating claimants fairly — leads to a high level of support for the SSA and helps it perform its primary goals.¹⁵⁵ Maintaining the public's trust and good will remains an important consideration in any process used to decide disability claims.

1. *Appeals Council Own-Motion Review and the Goals It Fulfills*

Own-motion review by the Appeals Council fulfills two of these goals: (1) it increases the accuracy of decisions; and (2) it increases the consistency of decisions. Accuracy is increased through review much like it is through *sua sponte* reopening. No matter which procedure is used, the Appeals Council corrects mistakes made by ALJs, thereby increasing the number of "correct" decisions. The SSA also uses Appeals Council own-motion review to help increase consistency. Congress, during the funding crisis of the 1970s,¹⁵⁶ mentioned two types of inconsistency: (1) inconsistency between determinations made at the

Fourth Bite at the Apple, *supra* note 26, at 748. "The American people whose lives we touch deserve prompt, courteous and efficient service, and fair and dignified treatment." *Condition of State Agencies that Determine Disability Under Social Security: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 163 (1987) (statement of Dorcas Hardy, Commissioner of Social Security). Accuracy, in this context, has been defined as "the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts." Mashaw, *supra* note 104, at 772, 774. Mashaw claims that the SSA "perceives fairness not as a perfect opportunity to participate or to contest, but rather as an opportunity to have one's claim decided on the basis of all the relevant information." *Id.* at 797.

153. *Ways and Means Hearings 1986*, *supra* note 111, at 62.

154. It is conceivable that decisions could be completely inaccurate, yet if every ALJ made the same incorrect decisions, the system would be consistent.

155. *HEARINGS AND APPEALS*, *supra* note 102, at xxii. Acceptability, in this context, is the "perceived fairness" of the decision process. *Id.* at xxiii. There is, of course, a variety of people to whom the process can, or must, be acceptable. They include Congress, society, and the claimants. *Id.* at xxiii.

156. The crisis of the mid-1970s in the disability program was caused by an increase in the number of claims filed, an increase in the number of claims appealed through the system, a decrease in the percentage of claims allowed at the state level, and an increase in the number of claims allowed at the ALJ level. Chassman & Rolston, *Social Security Disability Hearing: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801, 807 (1980). See generally *HEARINGS AND APPEALS*, *supra* note 102, at 2-4; *Social Security Disability Reviews: The Role of the Administrative Law Judge*, *Hearing Before the Subcomm. on Government Man-*

state level and ALJ determinations, demonstrated by the high percentage of claims allowed by ALJs at the hearing level; and (2) inconsistency among ALJs, demonstrated by varying allowance rates.¹⁵⁷ As part of a congressional mandate under the Bellmon Amendments to eliminate these inconsistencies, the Appeals Council reviews between ten and fifteen percent of all ALJ decisions "involving the issue of disability, particularly those allowing previously denied claims."¹⁵⁸ Focusing on decisions in which benefits were granted combats inconsistency in allowances between ALJs and the state examiners because it highlights cases where the two decisionmakers have reached different results. Taking a random sample of these claims allows the agency to identify typical errors made by ALJs, and then to push for greater uniformity among ALJs.¹⁵⁹

2. *Appeals Council Sua Sponte Reopening and the Goals It Fulfills*

The SSA claims that *sua sponte* reopening similarly ensures accuracy in ALJ decisions. The Appeals Council purportedly uses reopening in "extraordinary" circumstances to correct clear errors in individual cases.¹⁶⁰ However, in reality, the Appeals Council uses the same standards to reopen claims that it uses to review claims,¹⁶¹ and it corrects the same decisions that it would normally correct through own-motion review. This increases the accuracy of decisions by correcting individual ALJ mistakes and, therefore, decreasing the number of false positives and false negatives. The only difference is that in reopening claims, the Appeals Council can correct decisions for a longer period of time than it can in reviewing claims.¹⁶²

agement of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 14-41 (1983) (statement of Louis Hays, Asst. Commr., Hearings and Appeals, SSA).

157. H.R. CONF. REP. NO. 265, 96th Cong., 2d Sess. 57-58, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1405-06. The 1980 (Bellmon) Amendments tried to address the problems of, *inter alia*, "improving accountability and uniformity in the administration of the programs." S. REP. NO. 408, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1312. Congress was also worried about uniformity in disability determinations in different states. By giving the Secretary, instead of the states, the authority to establish standards for adjudication procedures, Congress tried to increase the equity and uniformity of disability determinations in the different states. S. REP. NO. 408, 96th Cong., 2d Sess. 55, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1333.

158. SOCIAL SECURITY RULINGS, *supra* note 74, at 64.

159. The Appeals Council, after the Bellmon Amendments, used own-motion review to track the progress of certain targeted ALJs. An ALJ could be targeted either for awarding a high number of claims or for having unusually low productivity. This policy was discontinued when the ALJs sued the SSA. The ALJs contended that these targeted reviews threatened their independent status. *See Association of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

160. Brief for Appellant at 35, *McCuin v. Secretary of Health & Human Servs.*, 817 F. 2d 161 (1st Cir. 1987) (No. 86-1732).

161. *See supra* note 71 and accompanying text.

162. Reopening is allowed for one year for any reason and for four years for good cause, while review is limited to 60 days. 20 C.F.R. §§ 404.969, 404.988 (1988).

C. *Limiting Sua Sponte Reopening Would Not Hinder the SSA's Ability To Achieve Its Stated Goals*

1. *Limiting Sua Sponte Reopening Would Not Hinder the Quest for Accuracy*

Achieving accuracy in claim determinations is an important goal, which both review and reopening attempt to accomplish. Yet, there is no guarantee that changing the decisions of ALJs by reviewing or reopening claims actually leads to more correct decisions. Accuracy is an elusive concept, difficult to define and impossible to achieve completely. Furthermore, as this section will argue, even if the SSA could ensure that all its determinations are "correct," the cost of identifying and undertaking all the many necessary corrections would outweigh the social costs of allowing them to remain incorrect. Finally, unlimited *sua sponte* reopening may actually *decrease* the number of correct decisions. This section concludes by arguing that, if the accuracy of decisions is not affected significantly by *sua sponte* reopening, then accuracy, while important, cannot dictate which interpretation of the regulations should be adopted.

Reopening or review may not lead to more accurate decisions. The very nature of disability claims makes it impossible to single out "incorrect" decisions. Determinations turn on amorphous criteria such as pain and ability to work as well as easily verified information such as age and education level.¹⁶³ Ultimately, in many cases, the final determination of disability rests on a subjective decision by an examiner.¹⁶⁴ Different decisionmakers can legitimately arrive at different conclusions in deciding whether a claimant is disabled without either one being wrong. This is one reason for the great divergence in ALJ allowance rates.¹⁶⁵ Presently, the SSA defines the Appeals Council decision as the "correct" one, but this is more the result of administrative fiat than of any empirically valid or principled justification for relying on the judgment of the Appeals Council over that of the ALJs.¹⁶⁶

Even if the Appeals Council does increase the accuracy of decisions, the savings in costs associated with these decisions may be so minimal that the SSA spends more money locating the errors and cor-

163. 20 C.F.R. § 404.1520 (1988). These standards are better defined now than in the past, but still lead to subjective determinations. See generally 20 C.F.R. §§ 404.1520-.1529, pt. 404, Subpt. P, app. 1 (1988).

164. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 682-83.

165. See *supra* text accompanying notes 156-57.

166. Just because that decision constitutes the last decision made by the agency does not mean that the outcome reached is necessarily the correct one, as members of the bureaucracy admit. HEARINGS AND APPEALS, *supra* note 102, at xx (There is a constant controversy among the ALJs and other decisionmaking levels, and among the ALJs themselves, about what constitutes a "correct" decision.). See generally Chassman & Rolston, *supra* note 156, at 810-14 (only the Appeals Council has the authority to call an ALJ decision an error).

recting them than it would letting them remain. Although the statute forces decisionmakers to make bipolar decisions — either a claimant is disabled or not disabled — disability is better conceptualized as a continuum that stretches from the clearly able to the completely disabled. The social costs associated with, for example, a determination that a completely healthy claimant is disabled are much greater than the social costs associated with a determination that a claimant is disabled when he falls just short of meeting the statutory definition.¹⁶⁷ Cases that are susceptible to different interpretations by different levels of

167. Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823, 825 (1980). "These costs include lost productivity when people leave the work force to receive disability payments, and the demoralization that taxpayers experience when forced to contribute to the support of others." *Id.* at 826. The cost of the person not working is greater the less disabled the person is. The value of a disability determination obviously grows as a claimant is more disabled. The more disabled the claimant, the harder it would be for him to work and the greater frustration he would feel trying to work. *Id.* The costs and benefits can be combined into one chart:

Id.

To the right of the point where the Act defines a person as disabled, the benefits of making payments exceed the costs. To the left, the costs exceed the benefits, and the Act classifies the claimant as not disabled.

If a claimant falls on the continuum of disabled/not disabled at point A, but a determination finds him to be at point B, a net social loss results — OX. Under the same analysis, if a claimant falls on the continuum at point B, but a decisionmaker classifies him as being at point A, the net social loss is OY. These lost benefits are greater than if the claimant were "really" at point C on the continuum, where the social loss would be OZ. *Id.* at 826-27.

review — *i.e.*, claims that one ALJ can believe are meritorious and that the Appeals Council can disallow — are usually borderline cases, where the costs to society of an incorrect outcome are negligible.¹⁶⁸ The costs of pursuing these claims in the name of accuracy may be greater than the social benefits of allowing untrammelled reopening.¹⁶⁹

Furthermore, *sua sponte* reopening may actually contravene, not further, the goal of increased accuracy. Although the SSA has problems defining accuracy in the context of disability claims, there are reasons to suspect that an Appeals Council decision may be even less “correct” than decisions produced at lower levels of the SSA structure, and in particular by ALJs. In contrast to ALJs, the Appeals Council members are political decisionmakers and the Appeals Council members do not see claimants face-to-face. The Appeals Council is not independent of the SSA.¹⁷⁰ As a branch of the SSA, it can be swayed by the goals of the agency. For this reason, many ALJs do not respect the Appeals Council’s decisions. Also, Appeals Council members rarely ask a claimant to appear for a hearing.¹⁷¹ The Appeals Council’s decision, then, is based upon a short perusal of a claimant’s file, whereas the ALJ bases his decision upon a face-to-face hearing. The Council’s members do not have the chance to observe the intangible evidence that comes from seeing the disabled claimant. This is particularly true of those cases that make it to an ALJ hearing: they are likely to be the borderline cases where a claimant is not clearly either disabled or not disabled.¹⁷² In these cases, the decisionmaker’s observations are of critical importance.¹⁷³ Thus, while the Appeals Council might define reopening claims as correcting ALJ errors because it has the “final word,” this provides no guarantee that the decision is actually any more accurate than the ALJ’s decision. In fact, there is a good chance the decision is less correct. If this is true, then limiting reopening, far from decreasing accuracy, may actually in-

168. This is the comparison of an incorrect decision concerning claimant *A* and claimant *C*. See chart, *supra* note 167. Comparing the costs, *OY* and *OZ*, it is clear there are fewer costs to society involved with an incorrect decision involving claimant *C*. Professor Mashaw argues that errors in the close cases are not very costly, and that the costs of detecting them may be greater than the costs associated with the “incorrect” decision. Mashaw, *supra* note 167, at 827-28. Further, he suggests that these close decisions may actually be considered accurate ones, no matter what the outcome.

169. Notice that this discussion does not include claims that are egregiously erroneous.

170. See *supra* note 26.

171. Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 730.

172. Chassman & Rolston, *supra* note 156, at 812 (“[Subjectivity] is typically most troublesome in the borderline cases . . .”).

173. The importance of seeing the claimant has been acknowledged. Congress, in emphasizing the importance of a meeting between the decisionmaker and the claimant, said that it allows a decisionmaker to “better assess the individual’s residual functional capacity.” H.R. REP. NO. 618, 98th Cong., 2d Sess. 17, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3054.

crease it.¹⁷⁴

Thus, concerns about accuracy, although important, do not constitute a reason for the SSA to allow the Appeals Council to reopen *sua sponte* in most situations. Accuracy is an elusive ideal in the context of disability claims and absolute accuracy remains unattainable. Because review and reopening increase the number of accurate decisions in the same way, the Appeals Council can still increase accuracy even without *sua sponte* reopening by using own-motion review. Furthermore, once the time limit for review has passed, the SSA has other procedures available to eliminate these incorrect decisions.

a. *Methods other than reopening are available to increase accuracy.* Limiting *sua sponte* reopening to cases falling within the conditions outlined in section 404.988(c) will not leave the SSA helpless to change ALJ determinations. Even after the time for review has ended, the SSA has two methods to eliminate false positives and false negatives; these methods serve the same policies of the SSA as *sua sponte* reopening and yet also treat the claimant in a more honest and fair way. The first, claimant-initiated reopening, adequately addresses the problem of false negatives. The claimant, although not as knowledgeable about the system as an SSA staff worker, has the greatest interest in having the Appeals Council look at an incorrect unfavorable ALJ decision. Claimant-initiated reopening can then mitigate the harsh results of *res judicata*.¹⁷⁵

The second method, termination proceedings, can correct the problem of false positives. The SSA periodically re-evaluates claims to ensure that the claimants are still disabled.¹⁷⁶ This type of review is

174. In limited circumstances, the Appeals Council is dealing with evidence separate from whether a claimant has qualified for benefits.

175. For example, a claimant cannot file a new claim for the same time period for which a claim has already been denied; the second claim would be barred by *res judicata*. *Purter v. Heckler*, 771 F.2d 682, 691 (3d Cir. 1985). Rigid application of *res judicata* could result in inequitable outcomes. The SSA has regulations that allow it "to refuse to apply [res judicata] where it would be inequitable to do so." 771 F.2d at 691. The SSA argues that reopening can help the Appeals Council modify or set aside a judgment when fairness or accuracy would suffer otherwise, thus circumventing the harsh rule of *res judicata*. Claimants who do not request review are barred from bringing their claim a second time. See 20 C.F.R. § 404.900(b) (1988). Reopening allows the claim to be reheard and allows the Appeals Council to correct an earlier, inequitable outcome. One commentator uses *McGowan v. Harris*, 666 F.2d 60 (4th Cir. 1981), as an example of a case where a strict adherence to *res judicata* led to an inequitable result. See 4 K. DAVIS, *supra* note 60, at § 21:4 ("[f]ailure . . . might well be deemed inconsistent with the Social Security Act's basic purpose"). In *McGowan*, the claimant's second attempt to obtain benefits was denied on *res judicata* grounds even though the claimant had evidence in writing for the second application that had been just oral evidence in the first application. (The regulations required written proof, not oral verification in order for the claimant to be eligible for benefits.) See *id.* at § 21:4; *McGowan*, 666 F.2d at 63; see also *Califano v. Sanders*, 430 U.S. 99, 102-03 (1977) (when claimant filed a second claim that was based on the same bases for eligibility, the ALJ treated it as a request to reopen because the new application was barred by *res judicata*). Note, however, that the SSA argument hypothesizes a situation where the claimants' position has changed. New evidence creates a situation where *res judicata* does not apply.

176. 20 C.F.R. § 404.1589 (1988).

called a continuing disability review. The SSA performs these reviews at least once every eighteen months if the claimant's condition is expected to improve, once every three years if medical improvement cannot be accurately predicted, and once every five to seven years after the initial award if the disability is thought to be permanent.¹⁷⁷ During a continuing disability review, if the SSA finds that a claimant's impairment has improved and the claimant can now work, it may terminate the claimant's benefits. The SSA may also terminate benefits if "[s]ubstantial evidence demonstrates that any prior disability decision was in error."¹⁷⁸ Thus, once the SSA identifies an unqualified beneficiary, the state may begin termination proceedings. These proceedings provide the same result as *sua sponte* reopening — achieving more accurate results — yet provide claimants with a full array of protective procedures.¹⁷⁹ In order to terminate a claimant, the SSA sends the claim back to the initial determination level.¹⁸⁰

Not only do termination proceedings provide more procedural protections, they also are more likely to produce accurate results, because a termination proceeding provides a forum for a complete review of the facts. The determination of disability is a factual one; each new piece of evidence can change the overall picture of disability in a very different way. Having the claimant go through the procedures anew, instead of having the Appeals Council simply decide the effect of the new evidence, can lead to more accurate decisions.¹⁸¹

2. *Limiting Sua Sponte Reopening does not Inhibit the SSA's Quest for Consistency*

The SSA also tries to make consistent decisions. The Appeals Council achieves greater consistency through own-motion review, not *sua sponte* reopening. Reopening merely corrects individual determi-

177. 20 C.F.R. § 404.1590(d)(4) (1988).

178. 20 C.F.R. § 404.1594 (1988). This exception to the general standard of showing a change in the claimant's condition will apply retroactively only if the conditions for reopening in section 404.988 have been met.

179. See 20 C.F.R. §§ 404.1589-.1599 (1988). A termination proceeding follows the same adjudication procedure as the original decision. The claimant has an initial determination and may request a reconsideration, ALJ hearing, and Appeals Council review.

Although the administrative costs associated with these different procedures may be slightly higher than the cost of reopening, they are still virtually *de minimus* when compared to the cost of paying a claim. Mashaw estimates that a disability claim is worth approximately \$30,000, yet the cost of deciding a claim is less than \$500. J. MASHAW, BUREAUCRATIC JUSTICE 81 (1983). Even if the costs of using termination proceedings are higher than the costs of reopening a claim, they remain small compared to the \$30,000 average cost of paying benefits on a claim.

180. The rules on stopping disability benefits suggest that the result of a continuing disability review could be "a determination . . . that you are no longer under a disability." 20 C.F.R. § 404.1589 (1988). The regulations describe as an initial determination the "[t]ermination of your benefits." 20 C.F.R. § 404.902(h) (1988).

181. If the Appeals Council makes less accurate decisions than the ALJs, it is better to have decisions made at lower levels by nonpolitical decisionmakers who actually see the claimant. See *supra* note 173 and accompanying text.

nations, it does not try to pinpoint and to correct system-wide discrepancies among ALJs. Many times the Appeals Council will reopen and change a decision without remanding to the ALJ who made the original decision.¹⁸² There is no guarantee that the ALJ will know that the Appeals Council changed a decision, or will incorporate that change into his future decisions.¹⁸³ In that situation, the Appeals Council has corrected just one decision, not effected a lasting change in the overall system. In a system as large as the disability program, if the Appeals Council wants to increase consistency measurably, it must do more than just change individual decisions. Own-motion review, on the other hand, is deliberately engineered to work broader changes. The Appeals Council randomly reviews claims to find the areas in which ALJs disagree in their decisions.¹⁸⁴ This quality control system provides more feedback than does *sua sponte* reopening and is tailored to improve consistency. Hence, limiting *sua sponte* reopening and forcing the Appeals Council to use own-motion review does not affect the review process or its goal of achieving consistent decisions.

D. *Limiting Appeals Council Sua Sponte Reopening Better Fulfills the Goals of the SSA*

Most of the goals articulated by the SSA can be analyzed in terms of the "acceptability" of the program. Slow decisions understandably enrage claimants and lower their faith in the program.¹⁸⁵ Accurate decisions lead claimants to feel that they have been treated fairly because the "correct" decision has been reached. Consistent determinations create an equitable process in which the system treats everyone in the same manner. When the outcome of a claim depends on which ALJ hears the appeal, two similarly situated claimants are treated differently and claimants perceive the system as arbitrary and unfair. When a crisis of faith like this occurs, the SSA has failed in its func-

182. One rationale for not remanding is that the ALJs might protest remands for what could be termed "judgment errors." Chassman & Rolston, *supra* note 156, at 816. One suggestion to counter the remand dilemma is to issue instructional bulletins and reports isolating specific causes of errors. *Id.* at 816-17. This method works for the quality reviews the Appeals Council undertakes, but is not likely to be effective in reopening, which is not done in a systematic manner, and works on a more individual basis.

183. It is important to have the decisionmaker know about the errors she makes. Mashaw recognizes the value of having errors brought to the attention of the decisionmaker. In sketching the outlines of a quality review system, he wants information about who made the decision to be available. Mashaw, *supra* note 104, at 800.

184. Limiting reopening does not decrease the accuracy and consistency of decisions. Furthermore, it will not prevent the SSA from locating and excluding claimants who are not qualified to receive benefits. If the claimant tries to "free ride" on the disability system by lying, the claim may still be reopened under this interpretation because the claimant has obtained benefits through fraud or similar fault. If, however, the claimant is just unqualified, the SSA can use review within 60 days, and termination proceedings after that, to remove the claimant from the disability rolls.

185. See *supra* note 155 and accompanying text.

tion of distributing funds to the qualified.¹⁸⁶

a. *Limiting Appeals Council sua sponte reopening makes the process more acceptable.* One important aspect of an acceptable process is treating claimants in a dignified manner — openly and fairly. While the SSA cannot satisfy every claimant, claimants can, and do, distinguish between having their claim denied and being treated unfairly.¹⁸⁷ An adjudicatory process that treats claimants fairly will prove more acceptable to claimants than one that confuses and misleads them. When the SSA treats claims in a way different from the way it promises to treat them, it only further confuses an already complex system. In addition, claimants feel that they have been treated unjustly, and perceive the system as arbitrary and unfair. The openness and comprehensibility of a system plays an important role in treating claimants with the dignity and respect they deserve.¹⁸⁸

In the past, the Appeals Council has used *sua sponte* reopening in place of own-motion review simply because it has missed the sixty-day limit.¹⁸⁹ If the Appeals Council reopens *sua sponte* in these situations, reopening is not an "extraordinary" measure, used sparingly in rare cases, as claimed by the SSA. The Appeals Council, in effect, is substituting reopening for review without informing claimants. The Appeals Council acts disingenuously by reopening under the same substantive standards it uses to review claims, without making that explicitly clear in the language of the regulations. The confusion this practice engenders demeans claimants and leads them to feel they are being treated unfairly. Eliminating this form of reopening means that claimants will receive more respectful treatment. Furthermore, holding the SSA to the time limit set for review will result in determinations being made in a more timely manner because the Appeals Council will have to act within sixty days if it wants to review a claim

186. HEARINGS AND APPEALS, *supra* note 102, at xx-xxiv. For example, one reason Congress passed the Bellmon Amendments and forced the SSA to begin a quality assurance program was to combat a crisis of faith in the system. *See supra* note 156.

187. *Cf.* J. MASHAW, *DUE PROCESS IN AN ADMINISTRATIVE STATE* 163 (1985). One commentator referred to preserving the dignity of claimants as "civic friendship" — an individual sees himself "as belonging to a community that shares certain values and counts its members as worthy of care and concern." Huff, *Protecting Due Process and Civic Friendship in the Administrative State*, 42 MONT. L. REV. 1, 16 (1981). This atmosphere of respect is hard to maintain in the modern welfare state, where "decent treatment of those who ostensibly benefit from . . . [programs] has been forgotten." *Id.* at 17.

188. J. MASHAW, *supra* note 179, at 90-91.

189.

[T]he Appeals Council has . . . come to rely upon the reopening provisions to consider a case that would have been selected for conventional own-motion review, but the bureaucracy has moved so slowly that the sixty-day period has already elapsed. In this context, the reopening provisions greatly enlarge the Appeals Council's opportunity to reverse an ALJ's award and delay the finality of the administrative process.

Koch & Koplow, *The Fourth Bite at the Apple*, *supra* note 26, at 726; *see also supra* notes 81-82 and accompanying text.

on its own motion. This, also, will create a process more acceptable to claimants.

In cases where the sixty-day limit has not expired, own-motion review provides a ready substitute for *sua sponte* reopening. It provides equally consistent decisions while treating claimants in a more dignified manner. If the review deadline has passed, other procedures exist to replace reopening. These procedures treat claimants with greater respect than when the Appeals Council reopens *sua sponte*. Reopening initiated by the claimant allows him to decide whether to seek further agency action, leading him to have a greater feeling of control. Termination proceedings allow the claimant to use the full array of procedures a second time. The claimant then has the opportunity to appeal in the typical fashion through the four levels of the adjudicative process.¹⁹⁰ This ensures that the claimant has a full opportunity to be heard, and thereby diminishes the probability that a claimant will feel like the victim of arbitrary action by a faceless bureaucracy.

However, some situations do exist where the SSA has decided not to treat claimants with the level of respect usually accorded them or where *sua sponte* reopening is beneficial — notably those articulated in section 404.988(c). In these instances, the Appeals Council should be able to reopen *sua sponte*.

b. *Limiting reopening allows the Appeals Council to reopen in cases where factors other than claimants' dignitary rights dominate.* Under the current regulations, the situations where the Appeals Council can reopen *sua sponte* are enumerated in section 404.988(c), which identifies situations, such as fraud or similar fault, where only the SSA would have an interest in reopening.¹⁹¹ In the case where the claimant has done something illegal, such as caused the death of the person upon whose earnings the claimant is receiving benefits,¹⁹² it is only fitting that the SSA have an extraordinary measure available to stop payments immediately without using time-consuming termination proceedings. The SSA has decided that the claimant in such cases is not worthy of the same level of respect and dignity ordinarily accorded claimants. The other types of cases covered by this provision are ones where evidence concerning the validity of a benefits award has just become available — for instance, where a person thought dead is later found to be alive.¹⁹³ Here, the claimant has already proved his

190. See *supra* note 180 and accompanying text.

191. See *supra* note 36.

192. This category includes cases of fraud or similar fault, 20 C.F.R. § 404.988(c)(1) (1988); where the claimant is convicted of a felony for intentionally causing the death of the insured, 20 C.F.R. § 404.988(c)(9) (1988); or where the claimant is convicted of a crime that affects his right to receive benefits, 20 C.F.R. § 404.988(c)(11) (1988).

193. This category includes claims where the death of the insured person is finally established, 20 C.F.R. § 404.988(c)(4) (1988); the insured person is thought to be dead but later is found to be alive, 20 C.F.R. § 404.988(c)(3) (1988); the claimant is receiving duplicate benefits

case, and the SSA must just make this final administrative conclusion before a claimant can begin receiving benefits.¹⁹⁴ In this situation, there is little danger of abuse of discretion by the Appeals Council, and the claimant is treated justly. Allowing *sua sponte* reopening under this provision retains meaning for section 404.988(c) — a claimant would not initiate reopening to inform the Appeals Council he had committed fraud — without hindering the goals of the SSA.

CONCLUSION

The language of the reopening regulations is ambiguous; it can be read either to allow or to disallow the Appeals Council *sua sponte* reopening. Viewing the regulations in the broader context of the adjudication system for disability claims only enhances the confusion. Unlimited *sua sponte* reopening by the Appeals Council moots the strict time limit established for review of claims — the Appeals Council uses the same criteria to reopen as to review but can reopen for a longer time period. However, allowing only claimants to initiate reopening renders meaningless portions of the reopening regulations which would only be used by the Appeals Council. Limiting reopening to the special circumstances outlined in section 404.988(c) resolves this difficulty. It retains the full force of the regulations in the circumstances in which only the Appeals Council would utilize reopening, yet does not moot the review regulations; the criteria articulated in section 404.988(c) — fraud or similar fault — are much narrower than the criteria for review.

This interpretation also best effectuates the goals of the SSA — making consistent, accurate decisions in a timely fashion while according claimants the respect and dignity they deserve. The Appeals Council can use review instead of reopening to ensure consistency and accuracy. For those cases in which the sixty-day time limit for review passes, termination proceedings are always available to cut undeserving claimants from the disability rolls. These two procedures are also more likely to lead to more consistent and accurate decisions than *sua sponte* reopening. Furthermore, this interpretation eliminates any disingenuous use of reopening; the Appeals Council can no longer use reopening to effectively “review” a case when the time period for review has lapsed. The claimant knows exactly when reopening will occur, and under what conditions. Claimants thus feel that the SSA is treating them in an honest, respectful way, which increases the pub-

from the Railroad Retirement Board, 20 C.F.R. § 404.988(c)(5) (1988); or the SSA has calculated a claimant's earning record incorrectly for a variety of possible reasons, 20 C.F.R. § 404.988(c)(6), (7), (10) (1988).

194. See *supra* note 36.

lic's satisfaction with, and belief in the integrity of, the system as a whole.

— *Elizabeth S. Ferguson*