The Times They Are a Changin’: A New Jurisprudence for Social Security

Jeffrey S. Wolfe

Follow this and additional works at: https://digitalcommons.pepperdine.edu/naalj

Part of the Administrative Law Commons, and the Disability Law Commons

Recommended Citation
Available at: https://digitalcommons.pepperdine.edu/naalj/vol29/iss2/4

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu.
The Times They Are a Changin': A New Jurisprudence for Social Security

By Jeffrey S. Wolfe*

Table of Contents

I. INTRODUCTION .......................................................................................................................... 516
II. THE DISABILITY BACKLOG – NOTHING NEW ...................................................................... 521
III. RETROSPECTIVE OVERVIEW OF THE CURRENT JURISPRUDENCE ..................................... 528
IV. A RENEWED JURISPRUDENCE – A 21ST CENTURY JURISPRUDENCE ................................ 539
    Figure 1. Neutral and Passive Judge .................................................................................... 553
    Figure 2. SSA: ALL MUST PASS THROUGH THIS GATE! ..................................................... 556
    Figure 3. Agency-Centric Procedures .................................................................................... 557
    A. A Dispute .......................................................................................................................... 559
    B. A Government Representative ......................................................................................... 559
    C. Dissolution of the Three-Hat Paradigm .......................................................................... 559
    D. The Administrative Law Judge as a Neutral and Passive Decision-Maker .................. 560
    E. Social Security Disability Appeals are Adversarial ......................................................... 560
    F. A New Jurisprudence Encourages Agreed-Upon and Negotiated Decisions................ 561
    G. Full or Abbreviated Hearings are Held only in Cases Genuinely Disputed .................. 561
    H. Abolish the Current Pay-for-Delay Attorney’s Fee System ............................................. 561
V. CONCLUSION ............................................................................................................................ 563
    Figure 4. A GRAPHIC REPRESENTATION OF THE CURRENT JURISPRUDENCE .................. 570
    Figure 5. A GRAPHIC REPRESENTATION OF THE NEW JURISPRUDENCE ...................... 571
Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone.
If your time to you
Is worth savin'
Then you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'.
Bob Dylan, “The Times They Are a Changin” 1st Stanza.

I. INTRODUCTION

Bob Dylan’s immortal words echo the evolutionary times within which we live. To paraphrase: If our time is worth ‘savin’ then we better start swimming. The Social Security Administration (SSA) is wading in waters knee deep and fast rising when it comes to what is described in repeated news stories as a rising tide of backlogged Social Security disability appeals.¹ A change in the essential

---

¹Jeffrey S. Wolfe is a graduate of the University of California, San Diego, (A.B., Psychology 1973); California Western School of Law (Juris Doctor, 1976); and the University of San Diego School of Law (Master of Laws, cum laude, 1991). He serves as a U.S. Administrative Law Judge appointed to the Office of Disability Adjudication and Review, Social Security Administration. He is formerly U.S. Magistrate Judge, U.S. District Court, Northern District, Oklahoma. He teaches as a member of the adjunct faculty at the University of Tulsa, College of Law, teaching Social Security Disability Law and Arbitration Law. He has also taught Introduction to Alternative Dispute Resolution, Mediation, Introduction to Appellate Advocacy, Advanced Moot Court Competition (Health Law), Trial Practice and Criminal Law at the University of Tulsa. He has taught as a member of the full-time faculty at California Western School of Law (1984-85); and Texas Wesleyan University School of Law (1995), teaching, respectively, Legal Skills and Federal Civil Procedure. He served as assistant to the founding dean of the O.W. Coburn School of Law at Oral Roberts University and as Director of the University graduate and professional interdisciplinary “cross pollination” project. He is a member of the California and Oklahoma Bar Associations.

This article is entirely the work of the author and does not represent the position or views of the United States government or the Social Security Administration. The ideas expressed are solely those of the author and not those of the Social Security Administration or any component thereof.
jurisprudence underlying hearings afforded to those appealing an administrative denial of Social Security disability benefits is necessary to remedy the single most pressing issue in the hearings and appeals process--the hue and cry over the pending backlog of such cases.

The Social Security disability backlog draws political fire, raises questions about the efficiencies of public service, and substantively undermines the public purposes upon which Social Security benefits are premised. The backlog has become a critical internal, as well as public, measure of the success of the Social Security hearings and appeals process. The backlog of such appeals is a direct function of the efficacy of the Social Security global decision-making process. At bottom, however, even a global change must manifest itself as a function of individual decisions and, where appropriate, individual hearings. For the individual claimant, timeliness in decision-making is, apart from the decision itself, the singular critical measure of the efficacy of the adjudicatory system. It is a measure which recounts a tale of increasing workloads and resulting delay in an adjudicatory system which annually addresses more appeals than the combined federal courts.

That this is so is evident in the questions the current system now raises. If the decision-making process becomes so delayed in its outworking, does it not erode the very purposes for which the program was begun for those who must wait? Hence, the outcry against the disability appeals backlog. The answer necessarily gives rise to another question—a challenge to think outside the box: is the backlog able to be resolved by changing the jurisprudence which defines the hearings and appeals process? Will a change in the fundamental global decision-making paradigm effect a systematic infrastructure change? That is, will a paradigm change reduce and eventually eliminate the backlog?2


2. A famous Albert Einstein quote comes to mind: “Insanity is doing the same thing over and over again, expecting different results.” ThinkExist.com, http://thinkexist.com/quotation/insanity-
The answer is, unabashedly, yes. A fundamental sea change in the jurisprudence upon which the decision-making process is founded will operate over time to eliminate the backlog.

It is time to critically conclude that the jurisprudence underlying appeals from the SSA, i.e., the way things have been done when deciding appeals from SSA denials of disability and other benefits, cannot meet the demands of a system whose call is to serve the American people in a meaningful and timely manner as originally intended by the framers of the Social Security Act. “The decision model proposed by the Social Security Board was designed to make an enormously complex program work at low cost and with substantial public satisfaction.” In fact, as discussed here below, the present SSA appeals system is under fire for precisely these reasons – it can no longer provide timely decisions. It is literally plagued with significant systemic delay resulting in widespread public dissatisfaction.

The solution? A new, or, perhaps more aptly, a renewed, claimant-centric jurisprudence to replace the now overburdened, overwhelmed and plainly dysfunctional agency-centric jurisprudence. A claimant-centric jurisprudence bears unique hallmarks, distinguishing it from the Social Security hearings and appeals jurisprudence of the past:

- A claimant-centric jurisprudence empowers the claimant by recognizing that a genuine dispute exists between the claimant and the Government. It restores to the hearings and appeals process a true Governmental presence in the form of an advocate representing the Government, and by so doing sanctions the claimant’s status by conferring upon the claimant equality with the Government who is also now a party to the proceeding. This enhanced status effectively opens a channel through which the claimant may directly negotiate with the Government in an attempt to resolve the dispute prior to hearing.

• A **claimant-centric** jurisprudence strips away the three-hat fiction by which the so-called non-adversarial Social Security hearings process is defined, restoring the administrative law judge to the status of a true neutral, one unburdened of the duty to develop the administrative record, a duty which now requires the Judge to act as something other than a neutral. Instead, the administrative law judge acts as a decision-maker required to actively search for evidence beneficial first to the claimant and then on behalf of the otherwise absent Government.

• A **claimant-centric** jurisprudence reverses the current attorney-representative-pay-for-delay incentive by which the interests of the claimant and the attorney directly conflict. Under the current disability appeals system, attorney's fees are calculated as a percentage of “back-due” benefits. The interests of the claimant thus diverge from his or her attorney. The more quickly an appeal is favorably resolved, the lower the attorney's fee. The greater the delay, the greater the back-due benefit and the greater the attorney's fee. A claimant-centric jurisprudence rewards timely, not delayed, resolution of appeals.

• A **claimant-centric** jurisprudence restores the Government (in the form and presence of an advocate for the SSA) to party status in the hearing before the administrative law judge. This places upon the Government, not the judge, the duty to develop the administrative record, thus restoring balance to the jurisprudential paradigm.

• A **claimant-centric** jurisprudence envisions a paradigm shift away from the **agency-centric** jurisprudence, which is the legacy of the framers of the Social Security Act. The rationale for this paradigm shift is fundamental. It is the Government which took action to create a dispute (whether by denial of benefits or otherwise); and it is the Government that should be required to execute a duty to develop the administrative record in aid of resolution of the dispute. This is particularly true in disability appeals when the claimant is unable to afford the resources necessary to obtain medical care or treatment. By

---

5. *Id.*
remaining present in the dispute through the appeals process, the Government retains the ability to correct or modify its decision, creating in its continuing presence a vehicle by and through which the claimant may continue a dialogue with what is essentially an opposing party. No such mechanism currently exists, apart from screening procedures implemented by various hearing offices to identify cases suitable for early review because of the claimant’s age, severity of the impairment, or other dire circumstances.  

- A claimant-centric jurisprudence is adversarial, adopting the hallmarks of adversarial interaction, including negotiation of disputes in advance of hearing in an effort to avoid the delay and expense of a full hearing. The current agency-centric paradigm forecloses such communication, removing the Government from the decisional paradigm and leaving the claimant only able to communicate with a neutral decision-maker who must, under current doctrine, hold hearings in every case to reach a decision. In short, the current agency-centric jurisprudence forecloses on-going communication between the

7. For example, engaging in early review of all cases in which the claimant is over 50.
8. For example, undertaking early review of cases in which the primary diagnosis is cancer.
9. Such screening mechanisms, such as the Agency’s current “compassionate allowance” project (see https://www.socialsecurity.gov/compassionateallowances/) cannot, however, fill the gap left by an absent Government representative. No mechanism currently exists for a claimant to “advocate” his or her case apart from doing so in a hearing before the assigned administrative law judge and therein lies the heart of the problem. If, for example, by reason of early pre-hearing screening a case is identified as one likely to be able to be favorably decided, absent a full hearing, what must the representative do if he or she disagrees with the date a judge might, upon pre-hearing review, believe the claimant is disabled? Negotiate with the assigned judge? How can a judge negotiate with a party without effectively also becoming a party? Furthermore, if the decision-maker is a party, is not the fundamental premise of the Administrative Procedure Act (APA) thus violated? These issues were raised by the petitioner in Richardson v. Perales, see source cited infra note 20, but the Court found no infringement upon the APA in 1971. The question now arises in a vastly different legal climate, rife with endemic delay and replete with literal horror stories of claimants deprived of essential needs as a result. The bottom line is that there is no advocate for the Government in the current jurisprudential equation, and lacking such an individual, the judge may not so act as doing so contravenes his or her essential neutrality.
SSA and the claimant during the appeals process, provides virtually no alternative pathway for resolution of the dispute, and thereby all but ensures that the overwhelming majority of Social Security appeals are decided only after hearing. In such resolution, the current jurisprudence all but ensures a continuing backlog of unresolved cases whose decision will take years to resolve.

In addressing the need for a fundamental paradigm shift in Social Security hearings and appeals jurisprudence, this article explores the present disability appeals backlog and documents its origins and persistence in Section 2 ("The Disability Backlog – Nothing New"). It then examines the jurisprudential underpinnings of the Social Security hearings and appeals process in Section 3 ("Retrospective Overview of the Current Jurisprudence") and proposes a departure from the old jurisprudence in Section 4, ("A Renewed Jurisprudence - A 21st Century Jurisprudence"), asking whether a new paradigm can succeed in Section 5 (Conclusion).

II. THE DISABILITY BACKLOG – NOTHING NEW

To understand the import of the need for a new jurisprudence, one must first understand and appreciate the nature of the backlog. A backlog in the hearings and appeals context is an accumulation of unresolved appeals, which, having aged beyond a certain point, are no longer current and thus become a part of a pending backlog of unresolved cases.

By definition, then, not all pending cases are part of the backlog, for there will always be cases pending appeal. Rather, the question becomes at what point does a case become backlogged? That question appears to be answered by the SSA when an appeal is pending for more than twelve months. That is, the question of whether the optimal number of pending cases has been reached is assessed each year. This is because the SSA defines a backlog as cases pending beyond an optimal projected number at the end of a given fiscal year. The Government Accountability Office (GAO) describes the SSA's definition of a backlogged case as follows:

SSA measures its claims processing performance at each level of the process in terms of the number of claims pending each year and the time it takes to issue a decision. Since 1999, the agency has used a relative measure to determine the backlog by considering how
many cases should optimally be pending at year-end. This relative measure is referred to as “target pending” and is set for each level of the disability process with the exception of the reconsideration level. SSA’s target pending is 400,000 for claims at the initial stage and 300,000 and 40,000 for the hearings and Appeals Council stages, respectively. The number of pending claims at year-end that exceed these numbers represents the backlog.\(^\text{10}\)

Thus, one might argue that the existence of a Social Security disability appeals backlog is not so much an objective assessment as it is a subjective determination dependent upon the optimal target number selected by the SSA.\(^\text{11}\) From one perspective, the hue and cry over aged and backlogged appeals may be a valid assessment of

---


According to SSA, the 400,000 target pending was an estimate of an optimal pipeline of claims. However, this target pending level was never communicated to the DDSs nor were they held accountable for reaching this optimum pending level. Also according to SSA, in recent years DDSs have been funded to maintain a pending level of 577,000 and have met this target.

\(^{11}\) \textit{Id.} at n. 7.

\textit{Id.}; see also source cited \textit{supra} note 9. Appendix I explains how the backlog is calculated. \textit{See} GAO REPORT TO CONGRESSIONAL REQUESTERS. What is not said, however, is how Social Security reached the estimate of the number of cases that should optimally be pending at year end. The GAO report stated:

SSA’s estimate of the number of cases that should optimally be pending at year-end. SSA provided estimates of the targeted number of pending cases for fiscal years 1999 to 2006 for each level of adjudication except for the DDS reconsideration level. For DDS initial claims, SSA estimated the targeted number of pending claims was 400,000. For the hearings level, the targeted number of pending cases was 300,000; and for the Appeals Council level, the targeted number of pending cases was 40,000. SSA used these same estimates for each fiscal year from 1999 to 2006.

To calculate the number of backlogged claims at the end of each fiscal year for each level of adjudication, we compared the targeted number of pending cases at that level of adjudication to the actual number of pending cases. If the actual number of pending cases exceeds the targeted number of pending cases, then the difference is the backlog.

\textit{Id.} at 58.
appeals whose shelf life has extended beyond a politically acceptable
time to disposition framework. On the other hand, it may be that the
furor surrounding the large number of pending claims is, itself, an
artificial crisis, made so by the drawing of an arbitrary line and that
simply moving the line will end the backlog. That is, acceptance of
the fact that increased delay is a natural and expected result of vastly
increased filings and appeals upon a system conceptually little
different now than it was at its inception. Reality, of course, lies
somewhere in between.

For the average American, dealing with a Social Security appeal
becomes a personal issue, best phrased in terms of how long he or
she has waited for a hearing and/or decision. Court administrators
refer to this as the “time to disposition,” while the SSA refers to the
time required to decide a case as “processing time.” At what point
should a claimant reasonably expect a decision on his or her appeal?
Sixty days? Ninety? One hundred and eighty days?

In fact, the present time to disposition exceeds these numbers by
more than a factor of two. At the same time, the statistical evidence
is plain. Current dispositions of cases on appeal by Social Security
administrative law judges exceed all prior levels – judges are
disposing of (hearing and deciding) more cases than ever before.
And yet, the numbers of backlogged cases continue to persist. In
part, this can be explained by a literal meteoric rise in claims coupled
with a lack of key personnel at the hearings and appeals level.

12. See id. at 22 for a discussion of the statistical history as recounted by the

GAO:

Although SSA was able to reduce average processing times at the
hearings level in some years, by the end of fiscal year 2006, the
time required to reach a decision had increased dramatically. In
fiscal year 2000, SSA’s average processing time was 274 days.
However, by fiscal year 2006, this average had increased to 481
days, with many cases taking much longer. For example, 30 percent
(about 170,000) of the decisions issued in fiscal year 2006 took 600
days or more; about 2 percent (12,000) took over 1,000 days. See
figure 10. Recently, SSA concentrated on reducing the number of
cases pending over 1,000 days. From September 2006 to the close
of fiscal year 2007, SSA reduced the number of these cases from
63,770 to 108.

Id.
The current backlog, then, does not represent a phenomenon able to be remedied by working harder, raising goals or adding more judges and staff. Neither can it be resolved by tweaking the current jurisprudence. Adding decision-makers other than judges, improving the process, or like fixes avoids fundamental jurisprudential issues which underlie the backlog. These remedial measures have been tried and have failed. As the GAO points out:

Finally, management weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA’s ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the “Hearings Process Improvement” initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.13

The accumulated backlog, extending well beyond the GAO’s ten-year snapshot14 belies the ability of any fix absent a fundamental change in the underlying jurisprudence governing the decision-making process.

That this is so is readily evident given that the backlog is not a recent phenomenon. Instead, the backlog is endemic, making its appearance as early as thirty years ago in 1978. For example, the Report of the Committee on Governmental Affairs on H.R. 6975 on the “Increase in Number of Administrative Law Judge Positions,” dated February 6, 1978, is plain in its description of the need to address the backlog:

The urgency of the need for extending the present limit of 240 GS-16 ALJ positions to 340 has been stated in letters to the committee from the Chairman of the National Labor Relations Board and the Under Secretary of the Interior, as well as in communications from other agencies which employ ALJ’s. They cite

13. Id. at 3-4.
14. See id. at n. 2.
growing case backlogs and the anticipated increase in complexity of cases to be heard under newly assigned responsibilities in justification.\textsuperscript{15}

In 1974 Robert H. Trachtenberg was appointed as Director of the Bureau of Hearings and Appeals, as ODAR was then known. He took over from H. Dale Cook, an Oklahoma attorney who was nominated to the federal bench in Oklahoma by then Senator Henry Belmon. In a 1979 affidavit before the Subcommittee on Social Security of the House Committee on Ways and Means, Director Trachtenberg wrote: “I viewed my role as being responsible for eliminating the backlog, stabilizing the workload, reducing processing times, all the while maintaining a system of administrative justice which afforded claimants due process and assured quality decision.”\textsuperscript{16}

Professor Victor Rosenblum, a noted administrative law scholar, echoes Director Trachtenberg’s assessment, commenting:

We realize, of course, that when Mr. Trachtenberg came to BHA the backlog of cases was at an all-time high and there were many demands from Congress for speedier disposition of cases. Moreover, the pressure from HEW has been almost exclusively in terms of faster disposition of cases rather than case quality . . \textsuperscript{17}

Almost 20 years later the backlog continues. In a hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives on July 26, 1995, the Honorable Tom Beville, House Representative from the State of Alabama stated:

Mr. Chairman, I don’t know of much that I could add to what the Chief Justice has just stated, but you, and the members of the distinguished panel are very much aware of this situation and I think it is one that is

\textsuperscript{15} “COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., REPORT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS ON H.R. 6975 ON THE INCREASE IN NUMBER OF ADMINISTRATIVE LAW JUDGE POSITIONS, at 3 (1978).


\textsuperscript{17} Id. at 5.
critical. I think it is one that this panel, I’m sure is going to streamline and improve. We see these Social Security cases each of us as Members of Congress, when we’re in our office, we see all of these people coming in, the disability claims, for example where they’ve been trying to get their disability for 3 to 5 years. I don’t guess I ever have visited in any of my three offices in Alabama, congressional offices, that I don’t see people that have paid their Social Security, and the system is kind of bogged down when they have to wait 3 to 5 years to get disability Social Security.\textsuperscript{18}

History and the GAO assessment notwithstanding, the backlog does not represent a failure by any group or indeed by the SSA itself. The backlog is a creature of its own making, a byproduct of a jurisprudential system whose function was well-served when emplaced in the 1950s, but which has became incrementally overwhelmed as the number of pending appeals increased in the 1970s and since.\textsuperscript{19}


\textsuperscript{19} In recounting its history, the SSA states:

In the later 1950's and early 1960's, the scope and complexity of the social security programs had grown considerably. Social Security coverage was extended to employees of State and local governments through individually negotiated agreements. A disability insurance program was initiated, providing for the determination of disability by the States under contract to the Social Security Administration. \textit{Both of these developments placed some strain on organization structure}, since they required extensive contact and negotiation by field personnel with the States, \textit{and they introduced into what had been a relatively simple program a number of highly technical functions and work processes. These new responsibilities were incorporated without serious dysfunction}, however, \textit{so that no major change in the organization of the Administration was deemed necessary.}

While the SSA declares on its website that "the scope and complexity of social security programs had grown considerably," and that no "serious dysfunction" resulted, hence, "no major change in the organization" was deemed necessary; in 1979 its BHA director was decrying the backlog and resolving to eliminate it — a proclamation made by virtually every director and commissioner since that time. This is a classic illustration of jurisprudential inertia: for in all the years since the word "backlog" was first uttered, the underlying jurisprudence has remained unchanged and still, the backlog is targeted for elimination.

Arguably, the essential problem lies in the jurisprudential structure of the current non-adversarial adjudicative system. The current system will backlog (as it has over the past thirty years) if it is tasked with handling even a fraction of the number of current pending appeals, because the inherent infrastructure of the system fails to seek and employ maximal utility of its most critical players. It is not surprising that the system fails to timely dispose of pending cases, allowing more recent claims to stagnate in a growing backlog, for this system does not routinely allow resolution of appeals without a hearing. There is no mechanism akin to settlement in the courts which allow lawyers to resolve the dispute without significant intervention of the assigned judge.

Instead, the current jurisprudential system was designed following passage of the 1935 Social Security Act to ensure that each claimant had an opportunity to tell his or her story to a decision-

20. Id.
22. Of significance, however, is the Social Security Administration Representation Project (SSARP) initiated in 1982 and closed down in 1986. A complete history of the SSARP is ably set forth by Frank Bloch, Jeffrey Lubbers and Paul Verkuil in their 2002 report submitted to the Social Security Advisory Board, Introducing Nonadversarial Government Representatives To Improve The Record For Decision In Social Security Disability Adjudications, which is available at http://www.scribd.com/doc/1958851/Social-Security-BlochLubbersVerkuil. This report is also discussed in the following section. Note also, the Initiatives to Eliminate the Social Security Administration Backlog as of March 28, 2008, available at http://www.docstoc.com/docs/806978/Initiatives-to-Eliminate-the-Social-Security-Administration-Hearing-Backlog, which acknowledges the continued backlog and a literal host of diverse efforts to address the issue; none of which fundamentally addresses the underlying jurisprudence.
maker whose charge was not only to ensure a full, fair and complete hearing, but to act proactively on behalf of the claimant, assisting him or her in the presentation of his or her case as necessary. The decision-maker was, and is today, tasked with not only deciding the case, but ensuring that the claimant has adequately prepared his or her claim – a job normally reserved to a party and his or her lawyer. In an era when few claimants were represented and the number of pending appeals numbered nationally in the five figures, the system worked. The underlying philosophy was to aid those who were perceived as less able due to their age or infirmity. The jurisprudence of the day, a mid-twentieth century adjudicatory system, worked well throughout the twentieth century.

Today, in a vastly different legal and social climate, this twentieth century construct has faltered and will continue to fail unless the inertia of history can be overcome and a new twenty-first century jurisprudence is enacted.

III. RETROSPECTIVE OVERVIEW OF THE CURRENT JURISPRUDENCE

It is well settled that the Administrative Procedure Act (APA) does not contemplate a single jurisprudence. “The focus of the APA was not on judicialization but on fairness and impartiality in welding administrative skills and responsibilities.” But such a simple statement belies the significance of the radical philosophical underpinnings of the adjudicatory system crafted by the progenitors of SSA’s adjudicatory system. Indeed, once the underlying philosophical foundation is understood, it is not difficult to understand why the Social Security adjudicatory system has persisted.

23. See Richardson v. Perales, 402 U.S. 389, 406, 410 (1971), wherein the Court notes: “With over 20,000 disability claim hearings annually . . . It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.” With 20,000 annual appeals in 1971, the high Court described the system as “working well.” See id. Today, it is not.

so stubbornly over time despite literally decades of evidence that it
does not function as originally intended.

With apologies for the length of the quote, I repeat here Dean and
Professor of Law Paul Verkuil's able summary of the emergence of
the new administrative philosophies adopted following the passage of
the 1935 Social Security Act:

It would be a mistake to assume that the New Deal
period was characterized by administrative
arbitrariness, as the 1939 ABA report incident might
lead skeptics to contend. But the procedural
innovations explored then were in some ways as
dramatic as the substantive. For one thing, the New
Deal introduced the concept of the administrator as
benign inquisitor. The Social Security Act of 1935
established what would be the most extensive and
enduring social program of the entire New Deal. In
addition to its substantive mandate, the Act created the
Social Security Board, which undertook to define new
forms of administrative procedure. As guidelines for
the legion of social security decisionmakers who had
to adjudicate eligibility and entitlement to the old-age
and survivors insurance program (and as time went
on, the disability program), the Social Security Board
offered a new rationale for the role of the
decisionmaker in the hearing process. In a 1940
statement, the Board discussed the values to be
achieved in an administrative hearing in terms of
'simplicity and informality' as well as 'accuracy and
fairness.' It referred to a social security
decisionmaker as a 'referee' or 'social agent.'

25. Paul R. Verkuil, The Emerging Concept of Administrative Procedure, 78
COLUM L. REV. 258, 270-71 (1978). In the original, the footnote is note 55, which
reads: See, Social Security Board 1940 Report, reprinted, in MONOGRAPH OF THE
ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Pt. 3, S.
emerges with a role that is independent of the judicial one.

The decision model proposed by the Social Security Board was designed to make an enormously complex program work at low cost and with substantial public satisfaction.\textsuperscript{26} The scope of the inquisitorial solution was not intended to be carried over to the civil or criminal process. But it did signal the kind of innovative thinking about administrative procedure that would ultimately lead to the emergence of an independent procedural model for administrative law.\textsuperscript{27}

The jurisprudential foundation underpinning this new administrative procedure called for a decision-maker who was to make decisions designed to implement programmatic policy instead of one whose role was to administer justice, as that term is recognized in traditional Anglo-American jurisprudence. The original SSA concept of this decision-maker, then, was not as an independent judge free of outside influence, but rather of a decision-maker effectively tethered to the agency by the overarching constraint that he or she follows programmatic agency policy, as opposed to overseeing an adjudicatory resolution premised on an ability to interpret law and policy. It is this philosophy which still, today, colors SSA’s view of administrative law judges and the decision-making process. It is this cultural milieu which persists and seemingly insists on maintaining the current jurisprudence despite all objective evidence that it has failed to produce the originally intended public satisfaction, or to operate at low cost.

Before exploring the functional resolution of a new Social Security jurisprudence, it is important to note the views of commentators and judges who attempt to distinguish administrative

\textsuperscript{26} \textit{Id.} In the original, the footnote is note 57, which reads: “The connection between the inquisitorial and social program decisionmaking is not one that is synonymous with procedural tyranny. That model functions in societies with democratic traditions similar to our own and its use has long been advocated by administrative experts in this country.” \textit{See, e.g.,} B. Schwartz, \textsc{Administrative Law} § 91 (1976). \textit{Id.}

\textsuperscript{27} \textit{Id.} (emphasis added).
adjudications from those before the courts. At issue is a perceived fundamental distinction between the courts and administrative adjudications. This perception expresses itself in a deferential judicial attitude toward agency decision-making, assuming, in effect, that “mother knows best.”

The problem with this view is now evident. The phrase “mother knows best” is commonly accepted not as simply deferential, but as a corrective admonition in the face of behavior soon to lead to disaster. So, while the Court has framed a policy of agency deference, the policy has itself created a seeming inertia within the ranks of the agency, chilling fundamental review of jurisprudential procedure even in the face of literally decades of declared backlogs. That is, the SSA seems to have accepted the Court’s view that “it (the SSA) knows best.” But as we now know, change is necessary because even if resolution of the backlog were a question of working harder or more efficiently the surge in numbers of claims has demonstrated that even the most prodigious efforts, as have been taken, will not succeed under the current paradigm.

28. See, e.g., The Phrase Finder website, http://www.phrases.org.uk/bulletin_board/35/messages/269.html (last visited Oct. 5, 2009). The Phrase Finder posts the following commentary on this culturally accepted phrase:

This is a fairly common phrase in the UK. It's a portent of crisis to come. So, perhaps someone at a party is drunkenly singing ABBA songs while his/her spouse looks on with disgust. The phrase would apply then. Any ideas about its origin? We don't seem to have it on the site at all.

No idea as to origin, but very similarly ominous is the expression ‘it's all good fun until someone gets their eye poked out,’ also in humorous usage here in the UK.

My grandmother applied a similar expression once to a pillow fight. We thought this was silly, so we waited until she was out of sight and carried on. Then in some sort of bizarre cosmic twist I was badly scratched in the eye by the corner of a pillow. It just goes to show...

It seems to me that my grandmother had an expression like that. If you were laughing, she'd say, "You'll cry before breakfast."

Id.

29. The super parent is no more evident than in Dean Robert Viles’ reference to the 1967 Senate Report concerning attorney’s fees in Social Security disability cases:
The genesis of the view sustaining the current jurisprudence finds its roots in a time before the passage of the APA. In a case decided in 1940, Justice Felix Frankfurter in *FCC v. Pottsville Broadcasting Co.*, commented:

Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. *These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.*

Justice Frankfurter draws a distinction between the courts and administrative adjudications in that “in administrative matters, the public has a stake in the outcome; that society’s role is not merely to provide a neutral forum for two civil litigants.” He further adds that “administrative agencies must employ procedures that facilitate

---

The most important justification for fee limitations is that the claimant is in some respects incompetent . . . The incompetency rationale is plain to see in the history of veterans’ and Indian legislation. The veterans . . . were early the victims of enterprising claims agents. Indians exemplify even better a group which assumedly lacks the understanding to bargain on equal terms with a larger, alien society . . . The argument from expertise . . . assumes that the claimants do not understand their rights in the premises. This is because the situation is at once too complicated and too simple: the law is too complicated to dispense with the need of administrative assistance; and the individual cases are uniform enough to make the application of expertise relatively simple. *Therefore, the claimant can trust the skill and good motives of the government and can dispense with expensive legal advice.*


31. *Id.* at 281.
the effective completion of public agendas; the procedures are part of the public interest calculation that gives increased control over the outcome.\textsuperscript{32} While Professor Verkuil sees this as distinctive from decision-making in the courts,\textsuperscript{33} the two jurisprudential views are not, in fact nor in legal theory so distant. For the Anglo-American theory of jurisprudence relies upon \textit{stare decisis} (the creation of precedent), such that a legal decision has potential to affect not only the disputants, but society at large as well. Nevertheless, key U.S. Supreme Court decisions during the 1970s gave impetus to the notion that the SSA process is working well,\textsuperscript{34} and does not require change when measured against Constitutional principles of due process and fairness.

The affirmation of the present disability adjudicatory system by the U. S. Supreme Court found its beginnings in \textit{Goldberg v. Kelly}. In \textit{Goldberg}, the Supreme Court drew upon the due process clause to require in benefits proceedings procedural rights akin to those in adversary proceedings.\textsuperscript{35} While this might have been seen as heralding a change in the jurisprudence in Social Security appeals, any evolutionary change came to an abrupt halt with the 1971 Supreme Court decision in \textit{Richardson v. Perales}.\textsuperscript{36} The Court distinguished the Social Security appeal as distinct from the benefits termination case in \textit{Goldberg}, at once empowering hearing examiners (now, administrative law judges) in the conduct of such proceedings, while effectively sanctioning the hybrid jurisprudence adopted by the SSA in its 1935-esque conception of its decision-makers as social agents and largely continued as such despite the passage of the APA in 1946.\textsuperscript{37}

\textsuperscript{32} \textit{Id.} at 281-82.
\textsuperscript{34} See source cited \textit{supra} note 6.
\textsuperscript{37} \textit{Id.} The \textit{Perales} Court declines to address the question whether the APA applies to social security disability claims, despite the claimant's challenge to the multiple-hat role required of the (then) hearing examiner:

Claimant complains of the system of processing disability claims. He suggests . . . that the Administrative Procedure Act, rather that the Social Security Act, governs the processing of claims and
Notwithstanding the APA's requirement that there be a separation of functions in administrative agencies, the high Court approved the so-called "three-hat administrative law judge (claimant representative, government representative, and neutral decider), whose conduct has been seen to emulate that of inquisitorial judges in continental countries."\(^3\) This strange-seeming role for the Social Security decision-maker (at first glance, inapposite to the concept of a neutral decision-maker as conceived in Anglo-American jurisprudence) is an outgrowth of the original notion of the Social Security decision-maker as a "social agent." That is, a decision-maker acting at once for the SSA in effectuating policy goals while at the same time acting to assist those presumed to be less capable of acting because of lack of representation, infirmity, age or a combination of all three.\(^9\)

---

specifically provides for cross-examination . . . The claimant goes on to assert that in any event the hearing procedure is invalid on due process grounds. He says the Hearing Examiner has the responsibility for gathering the evidence and to make the Government's case as strong as possible; that naturally he leans toward a decision in favor of the evidence he has gathered; that justice must satisfy the appearance of justice citing Offutt v. United States, 348 U.S. 11, 14 (1954), and In Re Murchison, 349 U.S. 133, 136 (1955); and that an independent hearing examiner such as in the Longshoremen's and Harbor Workers' Compensation Act should be provided.

We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA.

Id. at 408-09 (emphasis added).


39. This being said, there has been no question but that the decisions made and reached under this system satisfy APA requirements. As Professor Verkuil writes: "[M]ore than half of all ALJ's -- those assigned to the Social Security Administration -- decide more than 80 percent of all administrative cases in distinctly non-adversarial fashion. Since these decisions meet APA requirements, they demonstrate that even the definition of formal adjudication is susceptible to radically different interpretations." Id. at 312 (emphasis added).
Here lies the essence of the current jurisprudence. It is an agency-centric model adopting a 1930s worldview powered by a 1950s caretaker mentality in which the role of counsel is minimized in favor of a strong agency decision-maker, empowered to ensure the right result is reached. It evokes an image of the Government reminiscent of the state in juvenile cases – the state as parens patriae, or, super-parent. More cogently, it accepts as a procedural mandate the public policy underlying the Social Security Act, expressed most plainly at Title 20 of the Code of Federal Regulations section 404.508 which deals with waiver of an overpayment where “adjustment or recovery will defeat the purpose of Title II.” That section provides, in-part, that to defeat the purpose of “benefits under this title” means “to deprive a person of income required for ordinary and necessary living expenses.” That is to say, the public policy underlying the Social Security Act is to provide daily maintenance and sustenance for those unable to provide for themselves. The agency becomes the personified intention of the government to provide for those who cannot provide for themselves, in real terms, a “super parent.”

Defining the Social Security decision-maker as one who looks out for the welfare of the claimant by ensuring the record is fully developed by the wearing of “Three Hats” is a direct expression of this unique procedural mandate. In a jurisprudence described as non-adversarial, where the government chooses not to appear and instead imbues the decision-maker with its and the claimant’s responsibilities to present evidence, there can be little doubt but that the intended role of the decision-maker is not so much that of a neutral as it is agency facilitator or super parent. This is a uniquely

40. “The social security appeals procedure which was established in 1939 antedates the Administrative Procedure Act (APA) which was enacted in 1946.” SURVEY AND ISSUE PAPER, supra note 24, at 6.

41. A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf, the parens patriae doctrine has its roots in English common law. TheFreeDictionary.com, http://legal-dictionary.thefreedictionary.com/Parens+Patriae (last visited Oct. 5, 2009). In feudal times, various obligations and powers, collectively referred to as the "royal prerogative," were reserved to the king. Id. The king exercised these functions in his role of father of the country. Id.

42. 20 C.F.R. § 404.508(a) (1999).

43. See infra note 53.
different role from that of judge in the traditional Anglo-American system of jurisprudence.\textsuperscript{44}

In retrospect, the holding in \textit{Perales} arguably did more to perpetuate this jurisprudence than any other. Though the \textit{Perales} Court does not, in fact, require any particular form of proceeding, it endorses the twentieth century hybrid model, breathing life into its processes at a point in time when change should have been the byword. So, while the world of Social Security appeals in 1971 was still manageable it was soon to change with the passage of the Supplemental Security Income (SSI) legislation of 1972.\textsuperscript{45}

The \textit{Perales} decision is bolstered by the Court's later decision in \textit{Mathews v. Eldridge}. In \textit{Eldridge}, a pre-termination proceeding undertaken by the SSA employed a procedure clearly less stringent than required under \textit{Goldberg}.\textsuperscript{46} In revisiting the notion of a "flexible" due process standard for administrative proceedings, the Court stated:

\begin{quote}
But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of
\end{quote}

\textsuperscript{44} Indeed, such roles are not unique to juvenile jurisprudence. As one website points out:

The doctrine of \textit{parens patriae} has been expanded in the United States to permit the attorney general of a state to commence litigation for the benefit of state residents for federal antitrust violations (15 U.S.C.A. § 15e). This authority is intended to further the public trust, safeguard the general and economic welfare of a state's residents, protect residents from illegal practices, and assure that the benefits of federal law are not denied to the general population. States may also invoke \textit{parens patriae} to protect interests such as the health, comfort, and welfare of the people, interstate Water Rights, and the general economy of the state. For a state to have standing to sue under the doctrine, it must be more than a nominal party without a real interest of its own and must articulate an interest apart from the interests of particular private parties.


claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts". . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it". . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard". . . . to insure that they are given a meaningful opportunity to present their case. In assessing what is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.47

In both Perales and Eldridge the Court takes a deferential position towards the SSA, assuming in each case that the adjudicatory undertaking by the SSA is "working well,"48 and that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs."49 These views of the agency have seemingly fueled a kind of jurisprudential inertia, growing not only since the enactment of disability benefits, but from the inception of the Social

47. Id. at 348-49 (emphasis added).
49. Eldridge, 424 U.S. at 319.
Security Act itself. It is an inertia born in-part from the fact that the Act (and to a significant degree, the benefits provided there under) touch literally every American, at minimum in the assignment of a Social Security account number.\(^5\)

In *Eldridge*, the Supreme Court reaffirmed Justice Frankfurter's analysis, extending due process protections not only to regulatory decisions, but to social welfare non-regulatory decisions as well.\(^5\)

With the passage of the APA following World War II in 1946, the new administrative procedures were seen as means to the end of fair implementation of government programs and their efficacy was to be measured by their contributions to that end. This functional view of procedure argued for flexibility and informality along with a recognition of adversary hearings.\(^5\) Subsequent Supreme Court decisions have failed to critically address this system,\(^5\) instead taking

---

50. Not to mention the fact that the Supreme Court, in ducking the question of whether the APA applies to Social Security, reaffirmed the fact that it viewed then (as now) Social Security procedure as virtually identical with APA procedure ("... for the social security procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act." *Perales* 402 U.S. at 408). This assessment cannot but have further reinforced the agency's commitment to its informal procedure, notwithstanding the radical realignment of the hearing process in the decades following the *Perales* decision.


52. Id. at 275. See also Alfred C. Aman, Jr. *Administrative Law for a New Century*, Province of Administrative Law (Margaret Taggart ed., 1997).

53. See, e.g., *Sims v. Apfel*, 530 U.S. 103, 111 (2000) wherein the Court noted with acceptance the hallmarks of the Social Security decision-making jurisprudence:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although "many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking,", the SSA is "perhaps the best example of an agency" that is not, B. Schwartz, *Administrative Law* 469-470 (4th ed. 1994). See id. at 470 ("The most important of [the SSA's modifications of the judicial model] is the replacement of normal adversary procedure by . . . the 'investigatory model'" (quoting Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1290 (1975))). Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits, see Richardson v. *Perales*, 402 U.S. 389, 400-401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971),
a deferential view of a system perceived to be "vast" in its outworking. No later case has critically addressed these issues, leaving the old jurisprudence in place. Over time, however, the result for Social Security has been less than hoped. Rather than a jurisprudential system whose hallmarks are timeliness and low cost with resultant public satisfaction, the current system has produced backlogs accompanied by horror stories of need and even death while awaiting appeals on applications for disability benefits.

No reasonable person can look to the current system and declare it good. A new jurisprudence is necessary – one which recognizes the radical changes in the legal milieu in which disability hearings and appeals now occur. In short, a twenty-first century jurisprudence in which representation is acknowledged and made a central focus of hearings resolution. The cries of the many who now wait leave little room to conclude otherwise.

IV. A RENEWED JURISPRUDENCE – A 21ST CENTURY JURISPRUDENCE

Frank Bloch, Jeffrey Lubbers and Paul Verkuil recommend in their 2002 report to the Social Security Advisory Board that non-attorney Social Security "Counselors" be introduced into the decision-making process with "the express mandate of overseeing and facilitating the development of the evidentiary record for decision." With the greatest respect, in making this recommendation they effectively do nothing fundamentally new, remain fixed on the old paradigm and all but miss a vital opportunity to take advantage of the radical change in the legal environment in

and the Council's review is similarly broad. The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council. See generally Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L. Rev. 1289, 1301-1305, 1325-1329 (1997).

which these hearings now take place. Indeed, their proposal is reminiscent of multiple attempts to tinker with the system while remaining firmly wedded to the old jurisprudence:

55. Frank Bloch, Jeffrey Lubbers and Paul Verkuil propose the inclusion of a "non-adversarial government representative" whom they term a "Counselor" whose primary task is record development:

Instead, both claimant and SSA interests could be served better by introducing a nonadversarial "Counselor" (described more fully below) charged with the responsibility to assure the development of a timely, full, and fair record for decision to the ALJ. We conclude that the best SSA "representative" would be a non-adversary Counselor who could help provide the ALJ with a timely and complete record for decision. 

Id. at 72, 74.

In this, they fail to recognize the issue for what it is – this is no longer simply a claim in an 'entitlement' system, but is, instead, a genuine jurisprudential dispute between the Government and the claimant. The Government has denied benefits and the claimant seeks redress. He or she seeks to be paid. The role of the "Counselor" as described fails to empower the claimant by failing to provide a Government representative able to agree to resolution of the claim short of a hearing. The non-adversarial role, envisioned as one in which the "Counselor" is trained to assist claimant in prosecution of his or her claim, does nothing new to remedy the issues endemic to the backlog. It is the role of retained counsel – the claimant's own lawyer -- to assist the claimant; just as it should be role of a Government representative to assure the right result is reached, even if the right result is a denial. This role is a critical hallmark of a Government Representative, who cannot be simply an extension of Agency policy by which the claim was initially denied. Such was the failing of the first effort by SSA in this area, as is discussed, infra.

Under the non-adversarial "Counselor" proposal, the final decision is again deferred to the Judge who must decide after a full record is developed. At best, the proposal provides another helping hand in securing arguably necessary evidence, but does not alter the fundamental jurisprudence. It does not remove the burden of development from the judge; nor does it recognize the value of a Government representative able to negotiate resolution of the dispute short of a full hearing (whether or not non-adversarial.) It creates instead, an intermediate position aimed at an intermediate goal: records development. And, while records development remains an issue (As Bloch, Lubbers, and Verkuil rightly note, the failure to close the administrative record after the hearing is a significant issue. This failure creates a huge tactical loophole (and temptation) for representatives who are thus encouraged not to submit all records but instead to hold evidence in abeyance as insurance in the event of an unfavorable decision, submitting the same after the hearing in hopes of triggering a remand)), the real issue is timely resolution of appeals.
Management of the disability claims system and particularly of strategies initiated to remedy the backlogs may have also contributed to their growth in some circumstances. In the last decade, a number of initiatives undertaken by SSA to improve the disability process and remedy backlogs have faltered for a variety of reasons, including poor execution. Implementation of these initiatives, therefore, has often slowed case processing. Prior GAO work found that many of the initiatives the agency has undertaken since the late 1990s were poorly planned and implemented and yielded more losses than gains. In some cases, the plans were too large and too complex and fell far short of expectations. In addition, in 2001, the Social Security Advisory Board raised concerns about SSA’s many proposed process changes and about the amount of time

Inclusion of a Government representative should be undertaken with this goal in mind; and not simply to ensure a complete record. More to the point, the claimant’s representative is only paid if the claimant wins. How much more adversarial can it get when viewed from the claimant’s representative’s perspective? Why is a lesser role contemplated for a Government representative? In an era when more than eighty percent of all claimants are represented, the jurisprudential equation should be balanced by inclusion of an opposing Government representative, charged much as a prosecutor is, to ensure that justice is done and the right result achieved through the adversarial process. A prosecutor represents the interests of the people and as such is charged not with winning, but with seeing that justice is done. See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935). In its zeal to create a system designed to ensure the decision-maker is more akin to a social agent than a neutral decision-maker, the Social Security Administration has lost sight of this fundamental characteristic of the American legal system and in so doing has failed to include an actor whose call is not to win, but to ensure that justice is done. Indeed, the only representative in the current system is one whose call is to win. The jurisprudential equation cries out for balance; for inclusion of a Government representative to counter the claimant’s impetus to win (at all costs?). Moreover, this should not be the role of the decision-maker, for justice often times requires compromise and the need to negotiate – not a role for a neutral, but for a “party,” as is the Government in its role in the criminal courts. That being said, the failings of the first SSA attempt, in which Agency representatives routinely appealed favorable decisions, serving as impediments to otherwise just results, cannot be repeated in order for a new jurisprudence to work. The call upon such representatives should be as it is before the courts. No less a higher call should be made here.
and resources the agency had invested in changes that resulted in minimal gains. Some initiatives had the effect of slowing processing times by reducing staff capacity, increasing the number of appeals, or complicating the decision process. Some improved the process, but were too costly and subsequently abandoned. This was the case for several facets of a major 1997 initiative, known as the “Disability Process Redesign,” which sought to streamline and expedite disability decisions for both initial claims and appeals. Various initiatives within this effort became problematic. In addition, implementation of an electronic system enhanced some aspects of the disability claims process, but also caused some delays.56

The old (current) jurisprudence and its attendant assumptions must be shed in favor of a new paradigm. A jurisprudence tailored to the realities of twenty-first century law practice is called for; a high-speed technologically advanced jurisprudence able to meet the needs of a high volume social-welfare system now existing in a vastly different socio-economic-legal climate than existed when the Social Security Act was first passed and disability benefits first offered.57


57. Reference to a “high speed technologically advanced” jurisprudence is intended to mean: the SSA is completing the finishing touches on the launch and implementation of what it terms the e-business process – a bureaucratic description of a comprehensive, top-to-bottom conversion of the disability appeals process to a wholly paperless electronic environment, including development of the processes necessary to bring to fruition an evidentiary hearing of record founded on this paperless, electronic environment. Implementation of the so-called e-business process touches all involved in the process, from the state agencies, the claimant, his or her attorney or representative and each and every member of the hearing office (ODAR) staff and judges who must now receive, review, transmit and act upon complex medical evidence in a paperless world. All well and good, an admirable, if not remarkable achievement, but one which falls short of the ability to accomplish the ultimate goal as originally expressed by the framers of the Social Security Act: implementation of an enormously complex program at low cost and with substantial public satisfaction. The e-business process is but a foundation – a necessary foundation, but nevertheless incomplete, unless it serves to support a true
The United States Supreme Court in *Perales* cited with approval the “advocate-judge-multiple-hat suggestion” stating, it “would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.”

Would the court today hold that delays in decisionmaking of between one and two years violate fundamental due process, if not the public policy underlying these benefits? Would it look to the jurisprudential revolution. To capitalize on this high-tech foundation, the SSA must implement a jurisprudence which is also able to function at a fast-pace; utilizing the positive attributes of electronic files and instantaneous communications as a means to facilitate early decisions not necessarily founded on the current paradigm which calls for hearings in overwhelming percentages of pending appeals.

If *e-business* serves as a foundation for the old jurisprudence, one that sees the vast majority of all appeals before administrative law judges tried in a full hearing, the potential benefits of this vast electronic implementation will be lost. It can be likened to passengers on a high-speed monorail whose destination is 50 miles distant, forced to disembark and walk the final five miles because the high-tech magnetic levitation monorail ended, replaced by 1880s railroad ties and spikes astride a rickety wooden railroad station. The passengers must walk the final miles to their destination despite their earlier high-speed run which they thought was to their destination at the end of the line. The problem: the high-tech line did not end at their destination. To reach their final destination, the passengers must now leave the comforts of the high-tech, mag-lev monorail and trudge the final five miles. All that technology gained is lost with the resulting delay as the passengers proceed on foot, slogging their way across the final five miles. This is the current jurisprudence.

The overwhelming number of cases appealed to administrative law judges must be heard in a full hearing and no mechanism exists by which the appeals may be resolved otherwise. When I refer to a twenty-first century jurisprudence, I speak to a resolution of this dilemma – implementation of a jurisprudence which recognizes that a genuine dispute exists and construction within the channels of the surrounding jurisprudential milieu of a means by which significant numbers of appeals may be resolved by agreement between the disputing parties, rather than proceed in almost each and every case to a full hearing. No other adjudicatory system now in place in the United States defaults to a status wherein overwhelming percentages of pending cases must be tried in full to reach resolution. This is what must change.


60. More cogently, many U.S. courts have adopted Prime Minister Gladstone’s oft-quoted maxim as an expression of due process: “Justice delayed is
“governmental structure of great and growing complexity” of 2010 and still declare that it is “working well?”

In 1971 the high Court noted the “great and growing complexity” of a case load numbering 20,000 cases nationally. By 1988, the number of appeals climbed to more than ten times that number, totaling 289,281. Today that number exceeds 600,000 appeals. In 1989 the number of judges ranged between 677 and 701. Today, despite a more than twofold increase in pending disability appeals, the number of judges has risen to less than 1100. The historical solution repeatedly implemented to address increases in pending appeals has simply been to do more work or increase the number of case dispositions per month per judge. Judges have been asked to decide from twenty-six cases a month (1975), to forty-five cases a month (1983), to thirty-seven cases a month (1989) to between 500 and 700 per year (2008).

Notwithstanding this solution there exists, and has existed, a backlog, even though judges and staff have worked harder and done more. (But, one must ask, if some 600-700 judges in 1988 were unable to handle less than 300,000 pending appeals, how is it that 1100 judges -- less than twice the 1988 number -- can handle more

justice denied.”


62. Id.
64. Soc. Sec. Admin. Plan to Reduce the Hearings Backlog and Improve Public Service at the Social Security Administration, 4 (2007), http://www.ssa.gov/hearingsbacklog.pdf. “Hearing offices have received an average of over 564,000 Titles II and XVI disability hearing requests each year from 2002 through 2006.” Id.
66. See source cited supra, note 41, tbl. 2.1.
than double the number of pending appeals?)\textsuperscript{68} Clearly, the answer under the old jurisprudence is "work harder."

The SSA has long struggled with the problem, attempting to fix it with:

- "Better business processes,"
- "Improved hearing procedures."
- "Increasing adjudicatory capacity;" and
- "Accelerating review of cases likely or certain to be approved."\textsuperscript{69}

The solution, however, lies in a new jurisprudence, not in the old do more work or other attempts to streamline, make more efficient or more effective already existing processes.\textsuperscript{70} Those efforts, no matter how well conceived, planned and executed, have failed. Instead, a new jurisprudence, one founded on a proven record of success should be adopted. In doing so, the old paradigm yields to the new and a fresh jurisprudence founded on the realities of today's legal and social climate emerges.

This conclusion is mandated by the answer to this question: What is the single most significant change in the legal environment, arguably most likely increasing the number of disability appeals and contributing to the backlog?

\textsuperscript{68} See id.


\textsuperscript{70} The Social Security Advisory Board itself acknowledges this, stating in a 2006 report:

The third way to reduce backlogs is to increase production levels. SSA's new electronic disability system has the potential to increase production to some extent, but it is not a solution to the problem of backlogs. The main savings from the new system at the hearing level will come in the form of reduction of time spent on data entry and file arrangement and preparation. In those offices where these functions are causing bottlenecks, the new system will reduce backlogs and processing time. In other offices, the new system will simply move cases more quickly into another queue, where they will wait for available resources.

The answer is not a rise in population, though that certainly plays a role. The answer is not increased societal awareness brought about by new technology, though that, too, can be said to play a role. Neither is the answer a changing economy, fostered by the emergence the information age – though again, a likely contributor. Instead, the single most significant change in this legal system (in the jurisprudence of Social Security appeals) is dramatically increased claimant representation and representative presence throughout the disability claims and appeals process.

In all the reviews, studies, assessments and evaluations of performance, efficiencies and productivity only the Social Security Administration Representation Project (SSARP) arguably attempts to focus on this increasingly prominent reality as affecting growing numbers of appeals. Even then, the focus was not on the value of the interaction between a government representative with a claimant’s representative, but rather on the hope that a government representative would hasten the process. In other words, the addition

71. The-SSARP ended with the U.S. District Court’s decision in Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986). In finding that the Social Security Administration’s implementation violated fundamental tenants of due process under the 5th Amendment to the U.S. Constitution, the court found, in-part:

The situation exemplified here shows jurisprudence at its worst. An ALJ can only conduct an informal hearing; he is not set up to conduct a court trial. He has no power of contempt. He has no way of maintaining order. How is he expected to carry out his function as a judge charged with developing the evidence when the file is in the possession of a person representing the government? When an attorney for the government appears before this court and says that this case does not represent a situation in which an adversary type proceeding has developed, he is refusing to admit what the facts reveal . . .

By giving the file to the SSAR instead of to the ALJ it permits the government a second chance to defeat the claim by new medical evidence without the claimant knowing anything about it. It affords the opportunity for the SSARs to go fishing for additional evidence to support the government's position. In essence, there are persons in the administration who do not trust judges and in particular, do not trust ALJs and who want to destroy their independence, and have used the SSARP and AIP process to aid in their efforts.

Id. at 1067.
of a Government representative was viewed not as embarking on a new jurisprudence, but as a means of streamlining the old, as set forth in the SSA’s own words:

SSA has decided to undertake a limited test using special SSA representatives in connection with disability hearings in selected hearing offices. We wish to determine whether the participation of SSA representatives will sharpen factual issues, improve case record development and contribute to improved quality, consistency and timeliness of case dispositions at the hearing level.

During the prehearing stage, the SSA representative may contact the claimant’s representative to clarify the issues in dispute. In addition, the SSA representative may meet with witnesses who will appear at the hearing. The SSA representative may recommend to the administrative law judge that the issues in dispute, as agreed to by the SSA representative and the claimant’s representative, be considered as the issues at the hearing. The SSA representative may also petition the ALJ to include new issues, or to dismiss the case for jurisdictional reasons or may ask that the administrative law judge disqualify himself or herself when appropriate under the regulations. On the other hand, where the evidence clearly establishes the claimant’s entitlement, the SSA representative may recommend that the administrative law judge issue a favorable decision without the need for a hearing. [Emphasis added.]

Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Final Rule: Project To Improve the Hearing Process Through the Involvement of SSA Representatives, 47 Fed. Reg. 36,117 (Aug. 19, 1982). The regulations were initially
The SSA’s 1930s jurisprudential worldview and its subsequent adoption of non-adversarial hearing procedures, in which the decision-maker carries multiple burdens (wearing the so-called Three Hats) was a radical departure from the Anglo-American adversarial model of dispute resolution. It was a departure that makes sense once placed into context. The SSA did not originally contemplate that claimants’ representatives would even be a part of the system. As noted by Dean and Professor Robert M. Viles in his thorough 1968 Mississippi Law Journal article describing the SSA:

The original Social Security Act of 1935 was silent on the question of representation of claimants for benefits. In 1939, however, §206 was enacted with the following explanation: While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims, the experience of other agencies would indicate that where such services are performed the fees charged therefore should be subject to regulation by the Board [now Administration], and it is so provided. [Emphasis added.] 73

Even thirty years later, so few claimants’ representatives were part of the Social Security disability appeals system in 1968 that one judge, whose comments are set out in Dean Viles’ article, comments that virtually no one is represented, and that, given the Three Hats paradigm, it is his or her duty to represent all interests at the hearing:

Let me say this – maybe I can ease your mind. In 99% of the cases, people come in without any representation. It is my job to represent those people when they come in. It seems strange, but we use the

---

terminology that we ‘wear three hats.’ 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 that the government has. Then we turn around and put on the third hat, and we decide which evidence is most favorable, and in whose behalf. [Emphasis added.]74

Viles takes issue with this paradigm and his criticism is the springboard upon which this new jurisprudence takes form. First, while the SSA and various courts have characterized these proceedings as non-adversarial, there is little doubt but there is a dispute. Lest the term non-adversarial be confused with a lack of dispute, the nature of the dispute is evident: the claimant seeks an award of benefits from the Government, the Government denies the application, the claimant disagrees with the denial, the government believes it has made the correct decision. Either the claimant accepts the decision or a dispute ensues.

Resolution of the dispute depends upon a decision by a supposed neutral decision-maker who, by definition, gathers evidence for the claimant and against the Government, and for the Government and against the claimant. Viles succinctly frames the issue:

The overriding difficulty for the Examiner [Administrative Law Judge] who wears Three Hats seriously is not the immediate and visible function of asking questions in a hearing. It lies instead in the ultimately impossible task of simultaneously or consecutively building the best possible case for the claimant by discovering, interpreting, construing, organizing, and presenting infinitely variable evidence most favorable to his position; of similarly making the best case for the Administration, which has denied the claim; and then of impartially finding a winner.75

74. Id. at 40-41.
75. Id. at 42.
Viles calls into question the obvious: how is a supposed neutral decision-maker able to effortlessly shift gears from one side to the other as representative while at the same time occupying a position of neutrality? More to the point, should the decision-maker embark first upon his or her evidentiary quest for the claimant or for the SSA? There is ample sociological and psychological study (which will not be repeated here) which demonstrates the effect of first impressions and creation of even unknowing bias. No matter which side the administrative law judge seeks to examine initially, has he or she then created a bias either for or against that party, or for the one whose "representation" is undertaken second?

This non-adversarial jurisprudence and its underlying rationale all but collapse in the presence of a claimant’s representative, who:

If the attorney [or representative] for the claimant would earn his fee …should do his work before the hearing. He must read the law; more importantly, he must have discovered, prepared, and ordered the factual evidence into a strategy of proceeding that lays the factual and legal basis for the Examiner’s [Administrative Law Judge’s] opinion supporting a decision for his client.\textsuperscript{76}

When a claimant’s representative appears, says Viles, he or she “has knocked the Three Hats askew and revealed the proceeding for what it really is.”\textsuperscript{77} The hearing is no longer (speaking ideally) a jurisprudentially balanced equation, with the administrative law judge poised at the center, looking with equanimity at the claimant and the SSA, secure in his or her neutrality. It now becomes unbalanced. If the administrative law judge does nothing, balance is lost because only the claimant is represented. If the administrative law judge attempts to re-balance the equation by “representing” the SSA, jurisprudential balance is still lost because neutrality is lost when the decision-maker assumes the role of the SSA representative. How can the administrative law judge act in the presence of counsel and maintain neutrality? As Dean Viles so cogently points out:

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}
[In appearing at the hearing,] the claimant’s attorney has knocked the Three Hats askew and revealed the proceeding for what it really is. Either the Examiner [Administrative Law Judge] responds to his advocacy by treating it as a judicial and adversary process, in which under one fewer Hat he moves to the no less comfortable position of representing the Administration and deciding impartially at the same time, or he retreats into the decision-making framework of the administrative adjudicator, for which the Administration’s rules, regulations, and presumably the assistance which the Bureau[ODAR] affords expressly to him, are designed. 78

The skewed jurisprudential result is evident: treating the hearing as an adversarial process in the face of a represented claimant, “he [the Administrative Law Judge] is likely either to accept or to reject the claimant’s argument, without really setting against it an equally well-advocated SSA case.” 79 Or, by moving to the framework of the “administrative adjudicator” he “simply fails to respond to the advocacy.” 80

As Dean Viles further points out, the consequence of making such a choice changes the law to be applied: “If the issue is the claimant’s disability, the choice is between the courts’ policy-oriented law, which subordinates procedural [i.e., Administrative] rules to the goals of social legislation, and the SSA’s rule-prescriptions, which obscure implicit but inarticulated policy choices underlying them.” 81

An administrative law judge who wears Three Hats is thus presented with a conundrum in the face of claimant’s representation. This dilemma all but disappears where the balance is achieved externally, that is, by the presence of representatives for both the Government and the claimant the judge is restored to his or her Anglo-American role as a passive and neutral decision-maker. Traditional Anglo-American jurisprudence conceives the role of the

78. Id. at 42-43.
79. Id. at 43.
80. Id.
81. Id.
judge as distinct from that of the parties. Where the parties are expected to be non-neutral, each advocating their respective positions, the role of the judge is described as neutral – a non-advocate, whose role is to ensure the integrity of the process and to neutrally decide the dispute based upon the law and the evidence presented.

Critically, the activity of each actor in the Anglo-American system of adversarial jurisprudence is defined by their roles. Because the parties are non-neutral and seek to persuade a neutral decision-maker, they are described as jurisprudentially active; that is, it falls to the parties, who seek to persuade the neutral decision-maker and to present the evidence upon which that decision will be made. The decision-maker, as a neutral, stands apart from the parties and is described as jurisprudentially passive; that is, he or she is the recipient of the evidence, which must be balanced in accord with the law, but he or she is also not a source of the evidence.
**Neutral and Passive Judge**

Representatives Present the Evidence

Representative

Representative

**Representatives are Non-neutral and "Active"**

Figure 1

The Anglo-American jurisprudential model avoids the pitfalls of the inherently flawed non-adversarial single-party hearings model adopted by the SSA. The question becomes why should the Anglo-American model be adopted? The answer is historically obvious. Though the SSA originally envisioned an administrative appeals process without claimants' representatives, claimants' representatives are integrally a part of the extant system and have been for decades.
Despite this, no change has been made to the jurisprudence of the system and it exists essentially as it has from the beginning.

Notwithstanding the judge’s observation in 1968 that in “99% of the cases, people come in without any representation,”82 the actual statistics cited by Dean Viles are that “[b]etween January 1966 and July 1967 claimants were represented by attorneys in about 19% of the cases decided by Hearing Examiners.”83

In fiscal year 2006, a September 2007 report by SSA’s OIG shows that of the 559,000 claims heard by administrative law judges, 439,000 were represented by attorney and non-attorney representatives, representing claimants in almost 80% of all claims appealed.84 Examined another way, the OIG notes, “[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR.”85 In a period of forty years the statistics have virtually become mirror-images of one another. Where 80% of all persons were unrepresented in 1968, by 2006 80% of all persons are represented.

The unique change in the Social Security disability appeals legal environment is the presence of claimant’s representatives in at least 80% of all hearings before Social Security administrative law judges.

It is thus no longer likely that the 1968 administrative law judge will have a claimant before him or her who is unrepresented. Instead, it is far more likely – by a significant percentage – that a claimant will appear with representation.86 And, therein lies Dean Viles’ conundrum.

---

82. See source cited supra note 62.
85. Id. at note 3.
86. That such representation is prevalent is readily obvious in today’s society. For example, entering “social security attorney” in the Google search engine produced 125,000,000 results. Logging onto the National Organization of Social Security Claimant’s Representatives (www.NOSSCR.org) shows a membership of 3,900 attorneys and other advocates with an ‘800’ number by which referrals can be made to members. Numerous television advertisements are aired each month for both local representatives as well as so-called national firms, such as Allsup (www.allsup.com) and Binder & Binder (www.binderandbinder.com), among others.
The present system was clearly designed for 1) far fewer (by orders of magnitude) appeals hearings than now exist; and 2) hearings without representatives.

The present Social Security disability appeals system now looks very much like the legal system, where the overwhelming majority of all persons (on both sides of civil and criminal cases) are represented. It is axiomatic in the judicial system (the so-called “Third Branch”) that all but a small percentage of cases filed are actually tried. Review of disability appeals decisions, show at the hearing level and above, 75.4% of all cases are “allowed – most after hearing.”

Why is it then that in the Social Security disability appeals system, an overwhelming number of cases are decided after a hearing, and given the high percentage of representation, not before? The answer: the persistence of a jurisprudence whose model cannot take advantage of the presence of claimants’ representatives in the hearings process.

A new jurisprudence will model the successful Anglo-American system of jurisprudence where the presence of opposing counsel contributes to resolution of most cases before trial. Resolution of most disability appeals before trial will significantly reduce the backlog.

The old jurisprudence is agency-centric—driven by an agency impetus to intervene as super parent, effectively forcing the claimant, whether or not represented, to a full hearing before a decision is reached. It is the agency, and not the claimant, who sets the time and pace for case resolution. No matter how eager a claimant is to resolve his or her appeal; no matter how diligent a claimant’s representative might be; no matter how deserving; the claimant must board the slow train with all the others, waiting while the SSA plods through the line, oldest case first. This requirement mandates a

89. Russians still tell this joke: A man walks down the street and sees a long line. He asks the people in the back what the line is for. "We don't know," they reply, "but it's sure to be something we need." As recounted on the following
complex pattern of steps leading to a hearing, including case development and scheduling, coordinating the schedules of judges, medical experts, vocational experts, availability of hearing rooms, hearing reporters and other considerations, with an attendant synergistic delay. This results in delay not only by reason of the many steps necessary to bring an individual case to hearing, but also as a result of the burden placed upon otherwise overworked staff members to handle the weight of many such cases.

SSA: ALL MUST PASS THROUGH THIS GATE!

The new jurisprudence is claimant-centric; designed to place the impetus on moving an appeal forward on the claimant. If the claimant’s representative can marshal the evidence and, without the need to invoke the complex processes necessary for a formal hearing, establish a basis for resolution of the case with Government opposing


90. There are, of course, exceptions. “Critical Cases” are described at HALLEX (Hearing Appeals and Litigation Law Manual) I-2-1-40 and include ‘TERI’ cases (“terminal illness”) and ‘CAL’ cases (“compassionate allowances”) among others targeted for expedited handling. HALLEX is the SSA’s interpretation of its own regulations; and is not otherwise binding on the Courts. See Hearings, Appeals and Litigation Law Manual, available at http://www.ssa.gov/OP_Home/hallex/hallex.html.
counsel, the case can be resolved by submission of an agreed order to the assigned judge and all of the intervening steps which now slow the time to disposition all but disappear, as does the backlog.

An agency-centric jurisprudence is imbalanced, lacking government representation. It functions only at the pace established by agency processes and procedures. The current SSA hearing procedure functions in essentially one mode and despite newly implemented electronic business processes, high-speed computers and vast electronic databases, employs a dispute resolution procedure at the hearings level which allows virtually only one path towards resolution – the hearing. As such, it is akin to a racecar on a child’s racetrack, limited in speed by a governor and only able to traverse the track in a pre-determined groove. 91

Agency-Centric Procedures Create an Imbalance Allowing Only a Single Pathway to Decision

Figure 3

91. Of course, there are other paths, but they pale statistically in comparison. Various initiatives have surfaced over the years, including the Quick Disability Determination Process (QDD). See, e.g., Agency Challenges, available at http://www.socialsecurity.gov/finance/2006/Agency_Challenges.pdf.
When faced with similar delays and backlogs, the federal courts turned to alternative measures, recognizing that increasing delays in civil litigation were tantamount to denial of access to the courthouse itself. The Civil Justice Reform Act (CJRA)\textsuperscript{92} was passed in August 1990 "to promote for all citizens, rich or poor, individual or corporation, plaintiff or defendant, the just, speedy and inexpensive resolution of civil disputes in our Nation's Federal courts."\textsuperscript{93} The CJRA led to the eventual passage of the Alternative Dispute Resolution Act of 1998, found at 28 U.S.C. §§651 – 658.

It requires courts to implement their own ADR programs. To 'encourage and promote use of ADR,' the Act directs each district court to 'devise and implement' by local rule 'its own’ program (§651(b)). In effect, courts must establish a structure for providing ADR services, intended by Congress, perhaps, to make access to ADR a practical reality.\textsuperscript{94}

Alternative dispute resolution enactments opened up multiple avenues for dispute resolution, empowering attorneys to resolve disputes without resorting to the formal processes of the courts. Attorneys are free to initiate negotiation, mediation and arbitral remedies in various forms and at various stages of the dispute before a formal lawsuit has been filed and at any point during the pendency of such actions. These processes provide what is lacking in the Social Security appeals mechanism: alternative avenues for resolution of the dispute able to be initiated at the claimant's behest and as he or she desires. Adoption of similar procedures, embracing the reality that what is at issue is, in fact, a dispute, frees the claimant from the rigid hearings procedures now binding the disability appeals process.

\textsuperscript{92} 28 U.S.C.A. §§ 471–482.


A critical attribute of a claimant-centered jurisprudence is revival of the SSARP, albeit in a different form. The following attributes are critical to this new jurisprudence:

A. A Dispute

Recognition that a bona fide dispute exists between the claimant and the Government over the denial of disability benefits, and that dispute resolution procedures should be employed.

B. A Government Representative

A government attorney, empowered to negotiate with claimant’s representative and where appropriate, make a final recommendation and submission for binding resolution of the dispute, provided the recommendation is supported by a preponderance of the evidence and is otherwise in conformity with existing regulation.

C. Dissolution of the Three-Hat Paradigm

A transfer of the obligation to fully look into the case from the administrative law judge to the Government, and specifically to the government attorney, being transformed into a duty to assist the claimant in the development of the record where there is a demonstrated need for such assistance.

This shift recognizes two critical points: 1) the Judge no longer acts on behalf of either the claimant or the government and the appearance of the Judge as a representative is thus ended; and 2) there is no blanket duty upon the Judge to assist in the development of the administrative record; that is, to secure evidence on behalf of the claimant where the claimant is represented absent a demonstrated need for such assistance as in the case before the United States Courts in the instance of a pro se litigant. Nothing then precludes both the Government and claimant’s counsel from agreeing on issuance of a subpoena by the administrative law judge. It is the Government, as a party to the dispute, which bears the burden of ensuring the administrative record is fully developed. Where a dispute arises between the Government and claimant regarding such development, such as when the claimant requests a consultative examination and no agreement can be reached for such examination,
the dispute is submitted to the administrative law judge for decision as a part of the pre-hearing proceedings in the appeal.

The judge then decides as a true neutral, unburdened by a duty which tends to look more like that imposed upon a party than a decision-maker.

D. The Administrative Law Judge as a Neutral and Passive Decision-Maker

Given the foregoing, the demise of the Three Hat jurisprudence, thereby returning the judge to his or her traditional role as a neutral and passive decision-maker.

E. Social Security Disability Appeals are Adversarial

Given recognition of the existence of a true dispute and the demise of the Three Hat jurisprudence, a further recognition that these proceedings are no longer non-adversarial. The significance of such recognition is immediately apparent. The claimant must prove his or her entitlement and must carry forward a burden of persuasion at Steps 1 through 4, and the Government must then carry its burden, by and through its attorney, at Step 5.95 Thus, it is the Government and not judge who calls the vocational expert to testify.96 It is the Government, and not the judge who examines the vocational expert.
and who must then argue his or her case to the judge – as before any neutral – in an attempt to persuade the judge of the efficacy of its legal theory.

F. A New Jurisprudence Encourages Agreed-Upon and Negotiated Decisions

Where the parties have reached agreement on resolution and where the judge finds such resolution appropriate, either the Government or claimant’s representative may prepare the actual decision to be submitted for signature by the judge without need of a hearing.

G. Full or Abbreviated Hearings are Held only in Cases Genuinely Disputed

Where the parties cannot agree on resolution, a hearing may be held wherein all issues are to be decided; or, where the parties cannot agree on a particular issue, the parties may submit a stipulation as to all matters except those in dispute. The judge may then accept the stipulation and conduct a hearing limited to the issue at bar, reducing hearing time generally. This is particularly significant, as under the current jurisprudence each issue must be presented and tried, whether or not there is any genuine dispute – i.e., there is no way in the vast majority of cases to determine in advance of hearing whether there is a genuine dispute. 97

H. Abolish the Current Pay-for-Delay Attorney’s Fee System

Finally, the current representative-centered incentive-for-delay fee mechanism must be set to rights. At present, claimants’ representatives obtain a higher fee the longer a case is delayed. Reversing this negative inducement will encourage counsel to act

97. Some hearing offices have initiated what is termed “OTR [on-the-record] Review” whereby selected cases are reviewed in advance by an attorney or paralegal to determine whether a favorable decision may be reached early on. These procedures are not, however, widespread, nor are they calculated to bring such scrutiny to bear on all pending appeals.
with speed and resolution. For example, on June 22, 2009, the maximum fee allowable under a fee agreement increased to $6,000 – obtainable as the maximum allowed fee applying the rule that fees are limited to 25% of back-due-benefits or $6000 whichever is less. Delay in resolution is thus of benefit to the representative whose fee increases as the claimant’s back-due benefit increases, but is clearly contrary to the desires of the claimant (who obviously seeks as rapid a resolution of his or her claim as is possible).

A realistic system recognizes the public policy and actual need for a speedy resolution and encourages the same. Thus, a resolution within a certain number of days of filing a request for hearing should result in the maximum fee with attendant reductions as delay ensues. Would a claimant willingly agree to have his or her future pay docked to pay such a fee, knowing that benefits were now flowing? The answer is likely a resounding, “yes!” Other variations in fee payments might include the ability of the judge to restore the maximum fee where a hearing results in an award under specified circumstances. At minimum the current system of rewarding claimants’ representatives for delay runs contrary to the very public policy purpose for which the program exists. How is it that delay is negative for the claimant, but positive for the claimants’ representatives? How is it that such fundamental issues run at cross-purposes as between a claimant and his or her attorney/representative?

98. As Dean Viles points out, there was evidence even 40 years ago that representatives encouraged delay in order to maximize fees:

It was not unusual for an attorney purposefully to attempt to manage his client's claim so that it would be denied administratively, authorizing an action for judicial review which, if successful, would permit collection of the fee for which he had obtained his client’s agreement. The necessary delay in pursuing the claim through administrative denials into court would incidentally sweeten the pot of accumulated benefits with which the size of the fee varied.

V. CONCLUSION

Why will such a system work? The answers seem clear. Inclusion of a Government attorney/representative in an adversarial milieu creates a jurisprudential balance, forcing the Government to actively participate in resolution of the dispute which it created by reason of its initial denial, while at the same time empowering the claimant by returning to him or her a channel through which he can communicate directly with the party who initially denied his claim – the Government. The claimant, who is today overwhelmingly represented by counsel, may then seek to negotiate resolution of his or her claim with an opposing attorney/representative and may do so when he or she believes there is sufficient evidence to open those talks.

The claimant will no longer be bound to a hearing schedule jammed with literally hundreds, if not thousands of others also waiting. As noted earlier, statistics show a significant reversal rate at the hearings level now, clearly signifying a positive potential for early resolution. There is no need to recount here the hundreds of news stories now circulating decrying the delay in resolution of claims. Freeing claimants from a single track to resolution and empowering them to pursue resolution in a negotiated fashion holds significant potential for reducing and ultimately ending the backlog.

For those who might decry the adversarial system, believing it will somehow subject claimants to unnecessary cross-examination, one need only turn to today’s system. One representative described it thusly:

When I go into a hearing with my client I feel like I’m running out onto a football field to play the Big Game. My team runs out and the crowd cheers loudly! We eagerly turn and await the opposing team to take the field. The crowd roars as the other team bursts onto the playing field. My stomach drops as I see their uniforms, for each one is dressed in a Referee’s jersey.99

A claimant in today’s system is subject to examination by a lawyer wearing a black robe. Which is worse? What does the claimants’ representative do when he or she feels the ‘other examiner’ has asked an improper question? Object? To whom?

99. Attributed to Mr. Chris Carr, Claimant’s Advocate, Tulsa, Oklahoma.
Returning the Social Security disability appeals system to its Anglo-American roots recognizes that the fundamental premises upon which it was originally conceived are no longer valid. The Social Security Act of 1935 originally made no provision for representation of claimants and its legislative history clearly shows that its framers did not believe legal counsel was necessary. The formulation of a jurisprudence designed around those seeking assistance without benefit of representation was appropriate 40 to 50 years ago when every claimant appealing a denial could be heard in a timely fashion. As the number of claims rose, and as the number of persons represented also rose, the number of appeals rose as well.

By definition, lawyers are skeptics. They are trained in the Langdellian method of legal study: to examine the many sides of a given issue and not accept any premise as true absent evidence. The increase in claimant’s representatives resulted in 1) an increase in claims; 2) an increase in appeals; and ultimately 3) an increase in delay. In 1971, the Supreme Court declared the Social Security disability appeals system to be working well and noted only 20,000 pending claims nationally. Dean Viles points out in his 1968 Mississippi Law Journal article that only 19% of all claimants were then represented. With 80% of 20,000 persons unrepresented, the system worked well.

With an increase in representation came an increase in appeals. Claimants’ representatives, the majority of whom were lawyers, were unwilling to accept the SSA’s determination without an in-person appeal. After all, it is an American truism that ‘everyone deserves their day in court.’ As benefits improved and fees increased, claims

100. Dean Langdell's greatest innovation was his introduction of the case method of instruction. Until 1890, no other U.S. law school used this method, which is now standard. Moreover, the standard first-year curriculum at all American law schools — Contracts, Property, Torts, Criminal Law, and Civil Procedure — stands, mostly unchanged, from the curriculum Langdell instituted. Langdell, who came from a relatively unknown family, was conscious of the fact that students from more privileged backgrounds often received higher grades in their coursework purely because of their family's wealth and social status. Dean Langdell instituted the process of blind grading, now common at U.S. law schools, so that students already known by professors or from esteemed families would have no advantage over others. Wikipedia website, http://en.wikipedia.org/wiki/Christopher_Columbus_Langdell (last visited Oct. 5, 2009).
increased. The presence of claimants' representatives added life to decisions on appeal which in the 1950s and 1960s would have been accepted without any appeal.

The adversarial system, employing advocates on both sides of the jurisprudential equation and placing the judge in his or her traditional role as a neutral decision-maker has been employed in many state workers compensation systems. For example, Oklahoma utilizes just such a system and provides for a "Joint Petition" to resolve the claim once an agreement is reached between the company lawyer and the claimant's lawyer.101 No full formal hearing is held though the judge


A. 1. A record of the terms and conditions of an approved Joint Petition settlement and the claimant's understanding concerning the effect of the settlement must be made and transcribed at the respondent's expense.
2. In no instance shall the total attorney's fee amount exceed the maximum attorney's fee allowable by law.
3. A file-stamped copy of an approved Joint Petition settlement shall be mailed by the Court to all unrepresented parties and attorneys of record.
B. No settlement of a claim on Joint Petition shall be made upon written interrogatory or deposition except in cases where the claimant is currently engaged in the military service of the United States, is outside of the state, is a nonresident of Oklahoma, or in cases of extreme circumstances.
C. No Joint Petition settlement may be presented until competent medical evidence is ready for admission.
D. The transcript of the Joint Petition settlement shall be prepared and provided to the parties within ninety (90) days. If any respondent or insurance carrier prefers to be billed immediately for the transcript, it may request the court reporter to determine the charge at the time the record is made. The court reporter may then contract for services rendered and submit a statement in conformity with the agreement.
E. Medical reports and other exhibits submitted in support of a Joint Petition settlement will not be transcribed unless the parties request otherwise. When said reports or exhibits are not transcribed, the original exhibits or duplicate copies thereof shall be affixed to the original transcript and placed in the Court file.
F. Joint Petition settlements between the claimant and the respondent shall not be deemed an adjudication of the rights between the medical provider and the employer as to charges
approves the final "JP" usually after a statement made on the record. The system works, is not backlogged, and while it has produced anecdotal tales of claimant’s doctors versus company doctors, no such pitfall awaits in the Social Security venue where only public benefits are at issue.

Finally, the presence of adversarial counsel establishes balance in a way not possible with the current Three-Hatted Social Security administrative law judge who cannot, by virtue of his or her position as a neutral, negotiate with claimant’s counsel. Indeed, a ready resource of attorneys able to serve as Government counsel currently exists within ODAR offices nationwide. Senior attorneys have been tasked in various roles in the effort to reduce the backlog. They

incurred by the medical provider prior to the date of the Joint Petition settlement.

G. Within seven (7) days of the date a medical provider provides initial treatment for a work-related accident, the medical provider shall provide notice in writing to the Workers' Compensation Court (but only if a Form 3, 3A or 3B has been filed with the Court) and in all cases shall provide notice in writing to the patient's employer, and if known, the employer's insurance carrier. If the medical provider fails to provide the required notification, the medical provider forfeits any rights to future notification, including those circumstances where a case is joint petitioned, unless said medical provider is actually known to the respondent or is listed by the claimant.

H. At the time of the joint petition, the claimant shall provide to the respondent a list of all medical providers of which the claimant is aware. Within ten (10) days from the date the joint petition is file-stamped by the Court, the respondent shall send notice of the joint petition to all medical providers listed by the claimant, to all medical providers providing written notice to the employer and, if known, the employer's insurance carrier, and to any other medical providers known to the respondent.

I. Once a joint petition is filed, the claimant is responsible for payment of any future medical benefits, and informing any future medical providers that the case has been joint petitioned, and that the respondent shall not be responsible for payment of said medical bills.

102. The Social Security Administration employs attorneys both within the agency generally and within ODAR specifically. See Social Security Administration website, “Legal Careers,” http://www.ssa.gov/careers/legalcareers.htm (last visited Oct. 5, 2009). Both staff attorneys and attorney advisors are employed within ODAR.
have been given in some instances the ability to sign and thereby implement fully favorable decisions – decisions made by review of the evidence absent a hearing.103 It would be a relatively straightforward transition to move these personnel into separate facilities, no longer associated with the judges, but instead to function as Government attorney/representatives able to negotiate with claimants’ counsel, in effect expanding their current role. One can even envision a possible career path which finds attorneys serving for a period as staff attorneys at ODAR before moving over to the more independent role as Government attorney/representatives.104

Finally, in answer to those who would say the presence of Government counsel in disability appeals hearings is in some form or fashion unseemly, subjecting potentially ill or disabled persons to cross-examination by opposing counsel, two points come to mind. First, under current jurisprudential doctrine the judge is charged in an inquisitorial role. In such role he or she routinely questions the claimant. How much more intimidating is the experience when conducted by a judge replete with black robe, from the bench? Better still to be conducted by counsel, subordinate to the direction of an otherwise neutral and passive jurist. Second, and perhaps of paramount import, is the conception of the role of a Government attorney/representative. His or her task is not to win or beat the claimant or claimant attorney/representative. Instead, as a representative of the people – the public – he or she is charged with a higher calling, and it is this charge which imbues his or her role both within and outside the hearing and in all contact and communication with opposing counsel and claimants. The Government attorney is charged to do what is right – to seek the right result – whether it be a determination that the claimant is, or is not disabled.


104. Critically, however, these new actors in the system cannot be subject to the unfettered direction of the SSA, as they were in Salling. Instead, some barrier must be erected to ensure that only truly meritorious appeals be taken of otherwise favorable decisions. Imbuing these new players with the same ethical mandate paced upon members of the Department of Justice or District Attorney’s office is an appropriate starting point – their role is to seek justice – a right result – and not simply win.
Recognizing this calling, the Government attorney should not be feared or thought somehow an inappropriate actor in the jurisprudential equation. Instead, he or she should be embraced as a welcome balance, restoring to each actor within the equation a discernable, predictable role, not muddied by now-antiquated notions that somehow the claimant must be protected as he or she makes her way through the appeals process. The Supreme Court in *Berger v. United States* said it best:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is time, therefore, to set aside old premises and outdated assumptions. Opposing lawyers will not prolong the life of an

105. Equally important, however, the Government attorney should not be viewed as somehow able to bypass the administrative law judge or otherwise engage in misconduct as was observed by the district court in *Salling v. Bowen*, source cited *supra* note 61. Implementation of a new jurisprudence necessarily calls for new procedural regulations such that the perceived deficits of *Salling* do not find new life in this effort, including potential ability of the judge to impose some form of administrative sanction on counsel who fail to comply with appropriate judicial direction. Review of a new regulatory scheme should also include close review of the question, whether to eliminate the Appeals Council, as suggested by the *Salling* court; and as has been suggested in various proposals over the years. Doing so eliminates the potential for further delay occasioned by unnecessary appeals by a government representative who lost before the administrative law judge. Another solution: prohibit such appeals altogether absent some form of judicial misconduct.

appeal. Only a small percentage of cases ever reach court in the court system. Lawyers resolve disputes. After all, as Chief Justice Warren Burger said at the 1983 ABA Mid-Year Meeting:

The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflict . . . Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?\footnote{107}

It is time for a change in the Social Security disability appeals system.

Time for a new jurisprudence.

\begin{verse}
Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside
And it is ragin'.
It'll soon shake your windows
And rattle your walls
For the times they are a-changin'.
\end{verse}

\textit{Bob Dylan, "The Times They Are a Changin" 3\textsuperscript{rd} Stanza.}

\footnote{107. Chief Justice Warren Burger, speaking at the American Bar Association Mid-Year Meeting, February 12, 1984.}
A GRAPHIC REPRESENTATION OF THE CURRENT JURISPRUDENCE

The multi-step process of setting a case for hearing suffers from significant delay with little opportunity for claimant’s representative to interact with the decision maker short of a hearing.

Under current procedures, cases are not assigned to a judge upon the filing of a request for hearing. This practice differs from that in the courts, where a case is assigned immediately upon filing. This yields a defined case load, oftentimes enabling expedited pre-trial handling – something not viable in a system where the assigned judge is unknown until the case is ready for hearing. The procedure does not allow for significant pre-hearing interaction with claimant’s representative who often has no idea who the judge is until notice of hearing is received. Delay is endemic as case after case line-up for hearing.
A GRAPHIC REPRESENTATION OF THE NEW JURISPRUDENCE

Claimant’s representative is able to contact the government representative at any juncture in the process and may effectively bypass the otherwise long hearings process in favor of dispute resolution processes which may include entry of stipulated facts and amended onset dates with decisions routinely reached far before they otherwise would have under the present jurisprudence where claimants are literally forced to wait in long lines and go through hearings, in many cases unnecessary.