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## Civil Justice Reform in Social Security Adjudications

Jeffrey S. Wolfe

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# Civil Justice Reform in Social Security Adjudications

By Jeffrey S. Wolfe\*

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## INTRODUCTION

Across a constitutional divide, Congress and the federal courts share a mutual obligation to ensure that our judicial system offers all Americans justice in civil and criminal matters within a reasonable time and at reasonable expense. Neither branch alone can accomplish this important goal. The federal judiciary cannot adequately solve systemic problems affecting congestion, delay, and costs in the courts without appropriate legislative reform instituted by Congress. Congress, for its part, cannot legislate efficiency in the federal court system without granting federal judges the autonomy, resources, and direction to employ their unique expertise in devising effective procedural reforms.<sup>1</sup>

—Joseph Biden

Such were then-Senator Joseph Biden's words describing the need to empower federal judges in 1994 after the passage of the Civil Justice Reform Act of 1990 (CJRA).<sup>2</sup>

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\* Jeffrey Scott Wolfe serves as a United States Administrative Law Judge with the Social Security Administration Office of Disability Adjudication and Review, previously serving as United States Magistrate Judge, U.S. District Court, Northern District Oklahoma. He is a graduate of the University of California, San Diego (A.B., 1973), California Western School of Law (J.D., 1976), and the University of San Diego School of Law (LL.M., cum laude, 1991). He teaches as an adjunct professor of law at the University of Tulsa College of Law, where he currently teaches Social Security Disability Law and Arbitration Law. He also serves as one of two coaches for the University of Tulsa College of Law National Health Law competition team. He is a member of the California and Oklahoma Bar Associations.

The views, ideas, and opinions expressed herein are solely those of the Author and not the United States Government, the Social Security Administration, or any component thereof. This Article does not reflect the views, policies, or opinions of the United States Government, the Social Security Administration, or any component thereof.

<sup>1</sup> Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 *STAN. L. REV.* 1285, 1285 (1994).

<sup>2</sup> 28 U.S.C. §§471-482 (2006).

The CJRA became the cornerstone of federal judicial reform, designed to combat growing costs and delay in the federal courts--circumstances that held potential for increasingly reduced access to the courts by the American public.<sup>3</sup> These words and the actions they describe are equally true today when considering the Social Security Administration's (SSA's) system of administrative appeals, described as the largest administrative adjudicatory system on the planet.<sup>4</sup>

Some 700,000 administrative appeals are now pending before SSA in a system designed to handle only 400,000. This "backlog" of some 300,000 appeals is not a single-year phenomenon, but has been growing for decades. The salient truths emerging from this backlog are not interesting tidbits for statisticians but stories of human suffering as American citizens wait--in some cases, for more than two years--for their "day in court" after being denied disability benefits.

The hard truth behind this story is that it could have been avoided. In a report released in December 2007, the Government Accountability Office (GAO) stated:

[M]anagement weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA's ability to remedy the

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<sup>3</sup> See, e.g., Carl Tobias, *Extending the Civil Justice Reform Act of 1990*, 64 U. CIN. L. REV. 105 (1995). The author notes:

The Act commanded that by December 31, 1995 the Judicial Conference submit a report on the pilot program, including an analysis of how much the principles and guidelines decreased expense and delay, to the Judiciary Committees of the Senate and of the House of Representatives. The legislation required that the Conference consider these results in light of the effect on cost and delay....

*Id.* at 107 (footnote omitted).

<sup>4</sup> See Information About Social Security's Hearings and Appeals Process, Soc. Sec. Online, <http://www.ssa.gov/appeals> (last modified Jan. 20, 2012) ("The Social Security Administration's (SSA) administrative appeals operation, under the Office of Disability Adjudication and Review (ODAR) is one of the largest administrative judicial systems in the world. SSA issues more than half a million hearing and appeal dispositions each year. Administrative law judges (ALJ) conduct hearings and issue decisions.").

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.<sup>5</sup>

Most recently, the agency has sought and attained appointment of an increased number of administrative law judges (ALJs)—judges appointed under the aegis of the Administrative Procedure Act (APA)<sup>6</sup>—to hear and decide cases in an increased number of hearing offices around the country. As SSA Commissioner Michael J. Astrue has commented, “increasing the number of administrative law judges has resulted in a plateau in the rise of pending cases.”<sup>7</sup> While laudable, the issue framed by the backlog centers not simply on the number of judges but on the way in which they work—especially within the bureaucratic milieu of an executive branch agency such as SSA.

The world's largest administrative judicial system houses some 1,300 federal administrative law judges within the Office of Disability Adjudication and Review (ODAR). These judges are not,

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<sup>5</sup> U.S. Gov't Accountability Office, GAO-08-40, Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs 3-4 (2007) [hereinafter GAO-08-40, Better Planning], <http://www.gao.gov/new.items/d0840.pdf>.

<sup>6</sup> See 5 U.S.C. §3105 (2006), which provides:

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

<sup>7</sup> News Release, Soc. Sec. Admin., Social Security Hearings Backlog Falls to Lowest Level Since 2005 (Mar. 2, 2010), <http://www.ssa.gov/pressoffice/pr/hearings-backlog-0310-pr-alt.pdf>.

however, “independent” as are members of the federal judiciary. Instead, embedded within an executive branch agency, the federal administrative judiciary within ODAR is described as “quasi-independent,” functioning this way as a result of the APA, which provides for independent decisionmaking and quasi-independence in tenure and service.

Given the foregoing, the premise underlying this Article and each of its several sections is straightforward: the task of judging embraces discrete skills that cannot be fully maximized absent a jurisprudential environment in which such skills may be fully exercised. Members of the administrative judiciary, appointed under the APA, exercise a judicial function tempered not by original jurisdiction under the law as in the courts, but, as with all executive branch agencies, by congressional delegation of legislative power and derivative regulation implemented by the agency. It is within this cultural milieu that the issue of effective adjudicatory functioning arises; and it is here that many argue the adjudicatory process has faltered. It is here where it must be rejuvenated.

Part I of this Article explores the actions of the agency over time, both as related directly to the role of the administrative law judge in the case management process and to the agency's management of the backlog crisis generally, examining the cultural environment of bureaucratic management that has, despite the passage of decades, failed to remedy a persistent animus between the agency and its cadre of administrative law judges to the public detriment. Part II next examines the core attributes of the managerial judge and contrasts this in Part III with the agency's handling of the backlog of disability appeals specifically. Part IV examines the alternative of an independent corps of administrative law judges as a viable means to implement needed case management oversight and Part V summarizes the issues. Appendix I highlights selected GAO reports focused on the agency's handling of the backlog; Appendix II lists pertinent GAO reports selected over a twenty-year period from 1989 to 2009.

## I. THE CHALLENGE: THE BACKLOG, THE JUDGES, AND THE AGENCY

A. *The Backlog, the Judges, and the Agency*

As of this writing, some 700,000 appeals<sup>8</sup> are pending before ODAR—most being appeals of the agency's denial of disability claims.<sup>9</sup> This represents almost twice the number of appeals that the agency acknowledges its hearings and appeals system is designed to handle in a timely and effective manner.<sup>10</sup> The resultant delay in hearing and decisionmaking has given rise to numerous reports of human suffering and tragically poignant stories of desperation as Americans seeking much-needed benefits are told to wait.<sup>11</sup>

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<sup>8</sup> See *Eliminating the Social Security Disability Backlog: Joint Hearing Before the Subcomm. on Soc. Sec. and Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means, 111th Cong. 134 (2009)* (statement of Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg50764/pdf/CHRG-111hrg50764.pdf> (“Towering over SSA is a backlog of over 765,000 cases claiming disability benefits under Title II and Title XVI of the Social Security Act.”).

<sup>9</sup> See *infra* note 23 (discussing the administrative hearings and appeals process, in which the Social Security Act provides for a tiered decisionmaking/adjudicative process in disability appeals).

<sup>10</sup> SSA defines a backlog as a set of cases pending beyond an optimal projected number at the end of a given fiscal year. The Government Accountability Office (GAO) describes 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.

GAO-08-40, *Better Planning*, *supra* note 5, at 10.

<sup>11</sup> See, e.g., *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2009: Hearings Before the Subcomm. on*

Whether the framers of the Social Security Act envisioned the future scope and breadth of that which they originally conceived cannot truly be known. Today, SSA oversees the world's largest system of administrative adjudication with some 1,300 administrative law judges sited in 169 hearing offices throughout the United States.<sup>12</sup> At issue are appeals from determinations by the agency under Title II and Title XVI of the Social Security Act,<sup>13</sup> primarily related to determinations of entitlement to disability benefits.

The original intent of the framers of the Social Security Act in their description of administrative decisionmaking—including adjudication—is made clear in a 1940 statement by the Social Security Board in which the Board described the anticipated decisionmaking model under the new Social Security Act “in terms of ‘simplicity and informality’ as well as ‘accuracy and fairness.’”<sup>14</sup> In the words of Paul Verkuil, “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.”<sup>15</sup> The goal identified is transparency in decisionmaking with sustained public approval in meeting the need for clear and timely administrative responses. Unfortunately, the lofty goals of the 1940s—to meet the needs of a nation poised on the brink of a new age—now lie buried, overwhelmed by numbers once not thought possible.

An overview of the decisionmaking and appeals process through which an individual must progress is initially important to understand the context of the Social Security hearings and appeals process. Under the Social Security Act, agency decisions with which a person disagrees proceed through a multistep decision and appeals

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the Dep'ts of Labor, Health & Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations, 110th Cong. 695, 764-66 (2008), available at [http://www.c-c-d.org/task\\_forces/social\\_sec/CCD-House-Approps-testimony2-28-08.pdf](http://www.c-c-d.org/task_forces/social_sec/CCD-House-Approps-testimony2-28-08.pdf) (Marty Ford, Co-Chair, Social Security Task Force Consortium for Citizens with Disabilities, testifying on reducing the backlog at SSA and on SSA's FY 2009 budget overview).

<sup>12</sup> See Hearings and Appeals, Hearing Office Locator, Soc. Sec. Online, [http://www.ssa.gov/appeals/ho\\_locator.html](http://www.ssa.gov/appeals/ho_locator.html) (last visited May 14, 2012).

<sup>13</sup> See 42 U.S.C. §901 (2006) (establishing the current independent executive branch agency we know as the Social Security Administration).

<sup>14</sup> Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 270-71 (1978).

<sup>15</sup> *Id.*



process. The Act establishes an individual right to a hearing in the event of disagreement with an agency decision.<sup>16</sup> Four internal levels comprise the hearings and appeals process. A person aggrieved by an “initial determination” of the agency may seek “reconsideration.”<sup>17</sup> If after reconsideration a grievance yet remains, the individual may file a request for hearing before a federal administrative law judge.<sup>18</sup> The first two steps in this process are generally paper determinations with no personal inquiry or appearance by the claimant. When a request for hearing is made, the individual claimant is given the opportunity to appear before an administrative law judge, who, appointed under the APA,<sup>19</sup> serves as an independent decisionmaker charged with making “findings of fact, and decisions as to the rights of any individual applying for a payment” under the Act.<sup>20</sup> Upon conducting a hearing, the administrative law judge, acting under a delegation of authority from the Commissioner, “shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.”<sup>21</sup>

If the claimant disagrees with the decision of the administrative law judge he or she may file a “request for review” before the Appeals Council—once again, a paper review of the administrative law judge's hearing and findings.<sup>22</sup> Upon review, the Appeals Council may affirm, modify, or reverse the decision of the administrative law judge.<sup>23</sup> By statute, the aggrieved claimant who

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<sup>16</sup> 42 U.S.C. §405(b).

<sup>17</sup> *Id.* §405(b)(3)(A).

<sup>18</sup> *Id.* §405(g).

<sup>19</sup> 5 U.S.C. §3105 (2006).

<sup>20</sup> 42 U.S.C. §405(b)(1).

<sup>21</sup> *Id.*

<sup>22</sup> *See* 20 C.F.R. §404.968 (2011).

<sup>23</sup> *See* Alan G. Skutt, Annotation, Provision of 42 USCS §405(g) Making Secretary of Health and Human Services' Findings of Fact Conclusive If Supported By Substantial Evidence as Applying to Administrative Law Judge or Social Security Appeals Council, 90 A.L.R. Fed. 280, 287, §2(a) (1988) (“[A]n individual seeking benefits from the Social Security Administration will, in the first instance, receive an initial determination by the agency either granting or denying benefits. If the individual is dissatisfied with the initial determination, he or she may request a reconsideration. The next step in the administrative appeal process is for the individual to file a request for a hearing before an administrative law judge (ALJ). Once the ALJ has rendered a decision, the Social Security Appeals Council may

still disagrees with the decision of the agency may then seek judicial review.<sup>24</sup>

At stake now is a crisis of pending appeals before administrative law judges—a backlog that has grown despite the agency's long-standing knowledge of the problem.<sup>25</sup> Repeated unsuccessful attempts by the agency to resolve this crisis have not stilled the cries of the waiting nor salved the pain of those who suffer.<sup>26</sup> The hope of a helping hand has been lost in a system overburdened with bureaucratic initiative, underscored by a growing disenfranchisement of its judges. What was once intended to meet the needs of those who can no longer compete in the workplace has itself become a burden.

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review the decision either on a motion of the individual, or on the motion of the Council itself pursuant to 20 CFR §404.969.” (footnote omitted)).

<sup>24</sup> 42 U.S.C. §405(g).

<sup>25</sup> See GAO-08-40, Better Planning, supra note 5.

Over the last decade, SSA experienced a substantial increase in its backlog of disability claims, with a particularly severe accumulation of claims at the hearing level. From fiscal years 1997 through 2006, the total number of backlogged claims--numbers exceeding the level that should optimally be pending or in the pipeline at year-end--doubled.... In fiscal year 2006, 30 percent of claims processed at the hearings stage alone, took 600 days or more.

*Id.* at 3.

<sup>26</sup> See, for example, the GAO commentary, which in a summary statement effectively describes SSA's repeated unsuccessful attempts to resolve the backlog:

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.

*Id.* at 3-4.

### B. The Judges

Federal administrative law judges have been described as akin to federal district judges in the Judicial Branch.<sup>27</sup> Administrative law judges serving in the Executive Branch derive their authority both from the APA and, by operation of such statute, derivatively from the agency head.<sup>28</sup> As such they serve as neutral decisionmakers, charged with ensuring that appeals from agency action be handled in a fair, impartial, and timely manner. This has been described as the power to hear and decide. Significant debate, however, exists over the jurisprudential reach of an administrative law judge's mandate to hear and decide within ODAR.<sup>29</sup>

At the outset, when considering this question in light of the overall role of judges within SSA, there is little question but that the agency's cadre of administrative law judges plays a vital role in resolving administrative appeals pending before the agency.

In no small measure, however, can the agency's inability to avoid the current crisis—though it has been growing now for many years—be said to be a direct result of the agency's, and derivatively, Congress's, unwillingness to empower its cadre of administrative law judges as was done in the federal courts when the Judicial Branch faced a similar crisis of rising costs and delay.

Unlike the reformation of the federal courts in the 1990s with the enactment of the CJRA,<sup>30</sup> proposals for reform within ODAR, including calls for a Social Security Court similar to that of the Court

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<sup>27</sup> See *infra* note 52.

<sup>28</sup> 5 U.S.C. §556 (2006) provides in part:

- (b) There shall preside at the taking of evidence --
  - (1) the agency;
  - (2) one or more members of the body which comprises the agency; or
  - (3) one or more administrative law judges appointed under section 3105 of this title.

<sup>29</sup> See, e.g., Bernard Schwartz, Adjudication and the Administrative Procedure Act, 32 Tulsa L.J. 203, 212 (1996).

<sup>30</sup> 28 U.S.C. §§471-482 (2006). As the U.S. Senate explained, the purpose of the Civil Justice Reform Act was “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.” S. Rep. No. 101-416, at 1 (1990).

of Appeals for Veterans Claims, have been rejected. Also rejected was legislation designed to remove administrative law judges from the agencies in which they now function, establishing a separate adjudicative agency; arguably, some say, a necessary step to enable administrative law judges to return to the task of judging unhindered by unnecessary agency intervention and political agendas.<sup>31</sup> These

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<sup>31</sup> See, e.g., John Holmes, In Praise of the ALJ System, *Admin. & Reg. L. News*, Summer 1996, at 3, 17. Holmes writes:

A “Corps Bill” to house all ALJs under one roof has again been proposed in Congress but not acted on during the last session. Proponents allege that such a corps would assure independence from agency pressure, provide more efficient handling of caseloads since ALJs could be assigned on a gradual basis to those areas where more work has been generated, and would provide savings and efficiency through elimination of duplication of material and personnel. Opponents contend there would be a loss of expertise, alleged savings would be ephemeral, and that the proposed bill would shift political pressure to Congress. Some feel Social Security interests would eventually dominate such a “corps.”

...

A well trained, experienced cadre of ALJs exists which is well recognized and respected by practitioners for its judicial integrity, independence, and competence. Not all decisions rendered by federal agencies need be subject to ALJ jurisdiction. Indeed, most decisions do not require hearing. Others are amenable to non-judicial determination such as mediation or other alternative dispute resolution. However, when substantive rights of private parties are affected adversely by agency actions and/or controversy arises between private parties because of agency actions, a competent form of independent, impartial, final decisionmaking is required. In my opinion, Congress should mandate and agencies should use more, rather than less, ALJs. The best manner of obtaining a settlement of a dispute is where all parties are aware that they will obtain a fair, impartial hearing and a relatively prompt, analyzed decision on the merits.

I also note earlier referenced attempts at passage of a so-called administrative law judge Corps Bill, as set forth in the 1983 Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. Administrative Law Judge Corps Act: Hearing Before

issues are especially visible within SSA, which utilizes a greater number of administrative law judges than all other federal agencies combined.<sup>32</sup> Despite calls for judicial empowerment, administrative law judges within the agency have found their jurisprudential reach

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the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 98th Cong. (1983). The purpose of that hearing was styled, "A Bill to Establish a Specialized Corps of Judges Necessary for Certain Federal Proceedings Required to be Conducted, and For Other Purposes." *Id.* In a statement before the Subcommittee, Professor Abraham Dash of the University of Maryland School of Law, in endorsing the bill, stated in part:

I am very much for this bill, but I come here with some bewilderment. Bewilderment that the Federal Government in 1983 is still discussing this issue. I know that the files of the committee must have the past record of this issue, but I would like to remind you of that history. Back in 1936, more than 20 years before the APA became law, we had the Norris and the Logan bill, which talked of an administrative court by consolidating our present article I courts with the hearing examiners. This concept failed. Then you have the second Hoover commission of 1955, which recommended a centralized administrative hearing system. I might note that the present bill, under consideration has some of the same principles in it as the Logan bill and Hoover commission report.

The Hoover commission, as I said, in 1955 recommended much the same thing. The Ash Council, in 1971, after another thorough study, talked in terms of an administrative court of appeals, and addressed this issue.

In 1974, the Civil Service Commission report, I think it was known as the LaMacchia Committee, came out for a uniform corps of administrative law judges, after extensive study.

In 1977, the Bork Committee of the Department of Justice came out for the same thing. In other words, I think the record is so replete with these recommendations after extensive studies, that it's amazing we haven't done anything about it at this time.

*Id.* at 98; see also Rhonda McMillion, *Autonomy for ALJs: Bills Would Create Independent Corps of Administrative Law Judges*, A.B.A. J., Aug. 1992, at 103 ("The problems that have beset the system, causing judges to sue their employing agencies, and employing agencies to pressure and threaten judges, are not caused by any one agency; they are the result of the conflict caused by housing judges in the very agency whose decisions they review" (quoting Judge Charles Bono, then-President of the Association of Administrative Law Judges).

<sup>32</sup> See Schwartz, *supra* note 29, at 213 (showing a table of the distribution of administrative law judges across all federal agencies).

going in the other direction.

Instead of empowering judges, the agency has gradually narrowed the judges' case management window, with the latest such action being implementation of regulations potentially curtailing the judge's ability to set the time and place of the hearing. While not applicable to all judges in all circumstances, the regulation focuses on judges who are not functioning as it is perceived they should.<sup>33</sup> This action is unfortunately consistent with a long-standing animus between the agency and its cadre of judges, extending back to the late 1970s when, in 1977, the Association of Administrative Law Judges filed an action before the United States District Court for the Western District of Missouri in response to agency-imposed quotas.<sup>34</sup> While that action was settled with the promise of no future quotas, it did not prevent the agency from pursuing four separate actions against administrative law judges for low productivity in the 1980s.<sup>35</sup>

Suffice it to say, the agency and its judges must find common professional ground. Failure to do so has led to an ineffective long-term resolution of case management issues, which in turn has led to the current backlog. The critical inquiry when examining the history of today's pending administrative caseload is why the agency has not followed the example of the federal courts in the face of a growing backlog. Why has the agency not empowered its judges? A longitudinal view of the issues surrounding pending appeals before the earlier Bureau of Hearings and Appeals (BHA), the former Office of Hearings and Appeals (OHA), and now ODAR, leads an observer to conclude that the agency response to a growing caseload has been to pursue bureaucratic solutions and establish top-down control

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<sup>33</sup> See 20 C.F.R. §404.936(a) (2011), (providing that the agency, as opposed to the administrative law judge, “may” establish the time and place of the hearing: “We may set the time and place for any hearing. We may change the time and place, if it is necessary.”).

<sup>34</sup> Settlement Agreement, *Bono v. Soc. Sec. Admin.*, Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979), reprinted in *Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affairs, 98th Cong. 448* (1983). The Settlement Agreement signed by the parties provides, in part: “[The Office of Hearings and Appeals] will not issue directives or memoranda setting any specific number of dispositions by ALJs as quotas or goals.” *Id.*

<sup>35</sup> For a discussion of the action undertaken under the Bellmon Amendment, see *infra* note 46.

mechanisms with hoped-for control of both outcomes and activity.

The result of such actions—whether intended or not—has been a narrowing of judges' responsibility for case management. For example, as of this writing, despite years of a growing backlog and an increasing number of lawyers and nonlawyers representing claimants in such appeals, no overarching formal rules of procedure govern hearings before Social Security administrative law judges despite calls from the administrative judiciary to implement such rules.<sup>36</sup> Instead, the agency has, over the span of several decades, invoked all manner of administrative “initiatives,” “process improvements,” and disability “re-engineering” efforts, few of which have involved the administrative judiciary, and few of which, as discussed herein, have actually accomplished the intended results.<sup>37</sup> Despite these efforts, the disability appeals backlog has grown to the point that many now suffer as a result of significant delay and unavailability of timely access to de novo appeal procedures before an administrative law judge following an administrative denial.<sup>38</sup> What was intended to be a transparent appeals process with attendant widespread public satisfaction has instead become an opaque, little-understood adjudicatory mechanism whose outworkings have been characterized by at least one national disability law firm as antagonistic and intimidating.<sup>39</sup>

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<sup>36</sup> This is not to say that there are no regulations that govern such hearings. To the contrary, a regulatory structure exists, but effectively fails to accomplish long-identified gaps, such as closing the evidentiary record following close of the hearing. See, e.g., Administrative Law Judge Hearing Procedures--General, 20 C.F.R. §404.944 (2011).

<sup>37</sup> See GAO-08-40, Better Planning, *supra* note 5, at 3-4.

<sup>38</sup> A bevy of news reports abound. See, e.g., Disability Claims Spike, Mire Backlogged System, CBS News (May 18, 2010), <http://www.cbsnews.com/stories/2010/05/11/national/main6471596.shtml>.

<sup>39</sup> The Binder & Binder Newsletter recites, “WE’LL DEAL WITH THE GOVERNMENT, YOU HAVE ENOUGH TO WORRY ABOUT.” Binder & Binder Monthly Newsletter, Binder & Binder, <http://newsletter.binderandbinder.com/> (last visited May 14, 2012). The Binder & Binder Commercial Break further states, “Reminding you that we are, ‘America’s Most Successful Social Security Disability Advocates’ gives you a little sometimes necessary encouragement when you see our commercials...For the same reason, you like being reminded that we, ‘don’t let anybody intimidate you.’” Dick Summer, Commercial Break, Binder & Binder, <http://005623d.netsolhost.com/prints/binder-and-binder-commercial-break.pdf> (last

The single most significant signpost pointing toward this growing opacity in the disability appeals process--with a resultant inability to resolve the backlog--is the long history of conflict between the agency and its administrative law judges. This broken relationship has even drawn the notice of and comment from the blue-ribbon, presidentially-appointed Social Security Advisory Board. As recently as 2006, the Board urged both the agency and its judges to, in effect, bury the hatchet.<sup>40</sup> That a presidential blue-ribbon advisory panel felt compelled to make such a comment is telling. Such notice is not, however, a new phenomenon.

In 1978, the Social Security Administration departed from the

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visited May 14, 2012).

<sup>40</sup> A 2006 report of the Social Security Advisory Board calls for reconciliation between the agency and its administrative law judges:

In our 2001 report on the disability process, we noted a need to change SSA's relationship with its ALJs from one of confrontation to cooperation. There is still a need to improve that relationship. There is a residue of mistrust that goes back at least as far as the late 1970s, when pressures to reduce the number of allowances and increase the number of decisions led to a situation that was described as "an agency at war with itself." Since then, many ALJs have resented what they saw as the agency's failure to consult them about changes that have been made. Lack of consultation on the Hearing Process Improvement initiative implemented in 2000 was a major factor lending support to the formation of the ALJ union. We believe that the SSA-ALJ relationship has improved more recently but still needs attention.

The agency has much to gain from the advice and input of the dedicated professionals in the ALJ corps, at the national, regional, and hearing office levels. The ALJ corps, in turn, needs to acknowledge the agency's legitimate desire to ensure that hearing decisions are made promptly and consistently. There is an understandable and probably inevitable tension between the public's interest in decisional independence and the public's interest in consistency and efficiency, but we believe these interests can be reconciled. We urge SSA and its ALJs to work together to develop reasonable procedures to reconcile them.

Soc. Sec. Advisory Bd., *Improving the Social Security Administration's Hearing Process* 15 (2006) (footnote omitted), <http://ssab.gov/documents/HearingProcess.pdf>.



plan laid down by its former Director of the Bureau of Hearings and Appeals, H. Dale Cook, who was appointed to the federal bench in 1974. In 1975, Robert Trachtenberg assumed office and plotted a new course. During Director Cook's tenure, the agency expressed strong arguments in favor of APA applicability before the Civil Service Commission, specifically advancing the need for administrative law judges. Under Director Trachtenberg, however, new initiatives were put into place, which drove the agency into a twenty-five-year period of tension with its judges. Even the staff of the House Ways and Means Committee commented on the long history of conflict between administrative law judges and SSA management in the years since Director Trachtenberg's tenure:

[T]he staff is concerned by the apparent state of BHA administration at the present time. Lawsuits have been filed by BHA employees concerning administration and a multitude of administrative charges have been instituted by both sides. It is an agency at war with itself. The management and rather substantial numbers of staff are devoting a great deal of their time attacking each other. This time could be better spent serving social security claimants.<sup>41</sup>

The source of this ongoing animus arguably lies in a fundamental difference in worldview. In effect, Director Trachtenberg changed the agency's culture by adopting a bureaucratic worldview and subsuming the judicial perspective. The result has been both dramatic and, over time, detrimental to the agency's mission as first conceived.<sup>42</sup> In considering the effect of this fundamental change, one must necessarily consider the function of those whom we call "bureaucrats." Bureaucrats attempt to manage and control performance and outcomes to achieve politically designated goals. This concept is inherently anathema to the American ideal of a "fair"

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<sup>41</sup> Jeffrey Scott Wolfe, *Are You Willing To Make The Commitment In Writing? The APA, ALJs, and SSA*, 55 Okla. L. Rev. 203, 237-38 n.268 (2002) (alteration in original) (quoting Staff of Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means, 96th Cong., *Social Security Administrative Law Judges: Survey and Issue Paper 3* (Comm. Print 1979)).

<sup>42</sup> See *supra* note 26 and accompanying text.

hearing that affords an individual fundamental due process rights before an independent decisionmaker who is to render an impartial decision and who is not bound by a predetermined political agenda in which value is placed on consistency and predictability.<sup>43</sup>

Bureaucrats are less flexible in their actions with a correspondingly reduced ability to adapt to a changing environment with creativity and innovation.<sup>44</sup> They are perceived as the mirror image of the American ideal of a fair-minded judge who acts not on a political agenda but who seeks the “right” result regardless of political cost. No citation of authority is needed to state that Americans seek a fair shot at overturning a prior unfavorable result. Fair play and due process are fundamental ideals of American culture. Americans are desirous of a fair opportunity to convince a

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<sup>43</sup> See, e.g., Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part I: A Single Policy Task*, 97 AM. ECON. REV. 169 (2007). Alesina and Tabellini note:

A recent principal-agent literature addresses related issues in career-concerns models. Mathias Dewatripont, Ian Jewitt, and Jean Tirole [ ] discuss the foundations of this approach and apply it to study the behavior of government agencies. They focus on some issues related to ours, namely the nature and “fuzziness” of the agencies' mission, but they do not contrast bureaucratic and political accountability. Eric Maskin and Tirole [ ] investigate the attribution of responsibilities between accountable and nonaccountable agents. The latter have intrinsic motivations, while the former seek to please their principals because of implicit rewards (career concerns). In our set up, instead, we neglect the role of intrinsic motivations. Both bureaucrats and politicians need to be kept accountable with implicit incentives, but the implicit incentive schemes can be of two kinds: those that define a politician (striving for reelection), and those that define a bureaucrat (career concerns). Christian Schultz [ ] contrasts direct democracy, representative democracy, and bureaucratic delegation. Like Maskin and Tirole...he views bureaucrats as unaccountable and focuses on the trade-off between ideological polarization and accountability: bureaucrats are less polarized than partisan politicians, but are more inflexible since they are unaccountable and cannot be removed after shocks to the voters' policy preferences.

Id. at 170 (emphasis added).

<sup>44</sup> Id.

neutral decisionmaker of the efficacy of their cause. In such a setting there is no external control or management over the outcome--only the doing of that which Americans cherish--the furthering of the ideals of justice and fair play.<sup>45</sup> The growing tide of such appeals has strained a bureaucratically managed judicial system, a fact evident from the existence of the backlog itself. That the agency has attempted to bureaucratically manage a judicial system while withholding necessary tools from its judges, with singularly poor results, is evident from its actions dating back to the 1980s. In a strange scenario played out in reverse, the agency brought a challenge to its judges' decisionmaking when it implemented the so-called Bellmon review.<sup>46</sup> Judges whose "favorable" decision rate,

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<sup>45</sup> Nowhere is this more significant than in Social Security appeals proceedings. Unlike regulatory agencies, individual decisions by administrative law judges in Social Security cases do not determine agency policy. See Daniel J. Gifford, Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure, 66 NOTRE DAME L. REV. 965 (1991), in which the author notes the inherent difference between regulatory agencies which establish essential agency policy through individual precedential adjudications and mass-justice benefits agencies, such as SSA, where individual adjudications are not policymaking or precedential.

For agencies with extremely large caseloads, typically no individual disposition decisions are salient in themselves. Important issues of policy are resolved in generic rulemaking proceedings which produce standards governing behavior or the disposition of future cases. This type of caseload, accordingly, tends to be centered on the resolution of factual disputes rather than policy issues. For this type of caseload, adjudication of cases by a separate or quasi-separate administrative organ is the best response. Indeed, in the case of large-scale benefit or other programs, the volume of adjudication may be so large as to render ineffective attempts to control policy through the administrative appellate review process.

*Id.* at 998-99.

In the mass-justice agency, rulemaking is the primary policymaking vehicle. Unfortunately, SSA's reluctance to implement comprehensive Rules of Procedure place it in a role more akin to that of a regulatory agency, reserving the right of agency review of individual decisions as if same were precedential; which, of course, they are not, given the sheer number of cases decided.

<sup>46</sup> See U.S. Gov't Accountability Office, GAO/HRD-89-48BR, Results of Required Reviews of Administrative Law Judge Decisions (1989) [hereinafter

that is, whose reversal of underlying administrative denials reached 70%, were targeted for disciplinary action, including “re-education” by the agency. In a series of legal actions challenging the agency's actions, individual administrative law judges argued the agency action violated the APA. The U.S. Court of Appeals for the Second Circuit, in *Nash v. Bowen*,<sup>47</sup> described the agency action toward its administrative law judges as nothing short of coercion:

The point is that the “Bellmon Review Program” is for all intents and purposes the same as the “Quality Assurance System” considered herein, i.e., the targeting and pressuring of ALJs with high allowance of benefit rates (a/k/a “reversal” rates) to fall into line or be subjected to disciplinary action.

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The Secretary's “reversal” rate policy embodied in the “Quality Assurance System,” however, is cause for concern. To coerce ALJs into lowering reversal rates--that is, into deciding more cases against claimants--would, if shown, constitute in the district

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GAO/HRD-89-48BR, Required Reviews]. The Report notes:

Social Security disability claimants whose initial benefit applications are denied may appeal through several layers of administrative and judicial processes. However, the appeal process is very time-consuming. For some claimants, even favorable decisions by administrative law judges (ALJs) are delayed because they are chosen at random for further review by the Social Security Administration's (SSA's) Appeals Council. In many cases the delay is only a month or so, but some cases are delayed several months while subsequent appeals are considered.

This random review process is carried out under the Bellmon Amendment (96-265, sec. 304(g)) passed in 1980. Early reviews under the amendment were directed at ALJs who issued favorable decisions in 70 percent or more of their cases and were so controversial they led to a lawsuit by the Association of ALJs. The controversy and lawsuit resulted in restrictions on the use of Bellmon review data that limited the program's value for quality assurance purposes.

*Id.* at 1.

<sup>47</sup> 869 F.2d 675 (2d Cir. 1989).

court's words "a clear infringement of decisional independence."<sup>48</sup>

Rather than focus upon the issues that have traditionally concerned judicial case management--rising costs and increasing delays--the agency, in implementing the Bellmon review, seemed animated by the political question of whether too many were being granted benefits. The "bureaucratic" concern thus evidenced was improperly placed on the outcome of the case by questioning the substantive performance of the judges rather than modifying the underlying criteria for award of Social Security benefits, with little attendant concern for the growing backlog. This example portrays the agency's misplaced emphasis, especially in a system where individual adjudicative decisions do not affect overall Social Security policy. It is a revealing window into the agency's cultural environment.

To set due process as an overarching goal requires a cogent, well-defined infrastructure, free of political interference. It becomes an even more complex undertaking if burdened by politically driven outcomes. As a matter of practical jurisprudence, due process in American juridical systems occurs within a human system whose defining characteristics embody concepts of justice and fair play tempered by compassion. Considering both the black letter of the law and the otherwise real context of disparate human life, the American ideal of justice necessarily asks, What is the right thing to do? This is a decision often sheltered in gradations of gray. This is especially so in the fact-intensive undertaking made by federal administrative law judges in Social Security disability appeals. These essential American ideals run contrary to the demand for control, political consistency, and predictability inherent in modern notions of a politically-animated bureaucracy. Here lies the impetus, if not the roadblock, to change in Social Security's disability appeals system. What is required is a fundamental cultural change within the agency's worldview, ending the "Trachtenberg Era," whose legacy dates to 1975, and beginning anew an era in which politically independent judges, and not agency managers, administer a judicial system.

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<sup>48</sup> *Id.* at 679, 681.

### C. *The Agency*

Viewed from a wider perspective, the agency's apparent historical animus toward its administrative law judges and the corresponding resistance by judges to the demanded predictability of bureaucratic and politically motivated outcomes appears to rest squarely on inherent tensions that arise in the placement of a judicial system within an executive branch bureaucracy. These tensions are exacerbated by the agency's seeming confusion of roles--treating what are fact-intensive hearings as if such hearings were policymaking--when, as a matter of Executive Branch functioning, such hearings cannot by definition play such a role. The sheer number of such hearings belies such a result.<sup>49</sup>

In advocating such a view, one necessarily embraces the attendant corollary: the goals, worldview, and functioning of bureaucracies fundamentally differ from those of judicial systems. And while one might argue the system of adjudication mandated by the APA<sup>50</sup> necessarily places administrative law judges inside the bounds of executive branch agencies, the sheer size of the modern adjudicatory system of disability appeals exceeds that envisioned in 1946 when the APA was passed--most certainly by several orders of magnitude.<sup>51</sup> The growth of this system of administrative adjudication—populated not primarily by “managers” but by legally trained professionals serving in a role likened to that of the federal judiciary<sup>52</sup>—has fundamentally changed the system as

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<sup>49</sup> See 5 U.S.C. §3105 (2006).

<sup>50</sup> 5 U.S.C. §§554, 556 (2006).

<sup>51</sup> For example, in *Richardson v. Perales*, the Supreme Court first noted that “over 20,000 disability claim hearings [are held] annually.” 402 U.S. 389, 406 (1971). To the Court, this was a “structure of great and growing complexity”: “Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.” *Id.* at 410. Today, more than thirty times as many appeals are pending. One cannot but wonder whether the Court would, today, declare that the disability appeals system is “working well” as it did in 1971.

<sup>52</sup> See *Butz v. Economou*, 438 U.S. 478, 513 (1978) (noting that an administrative law judge performs a “functionally comparable” role to a judge and that “the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before

originally envisioned. Despite this evolutionary change, Social Security “managers” continue to circumscribe the role of the administrative judiciary, seeking greater control over its members as the spiraling backlog continues.<sup>53</sup> Administrative law judges, foreclosed from many of the procedural tools they deem necessary to accomplish the task before them, seek to improve their professional functioning as judges. The result? A clash of worldviews, resulting in

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him, free from pressures by the parties or other officials within the agency.”). A number of lower court decisions have echoed the Butz ruling, reaffirming the Court’s declaration that “the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.” *Id.* at 514.

<sup>53</sup> The situation brings to mind the counter-intuitive lessons in learning to fly, and more particularly, learning to escape a spin. In the words of an Army pilot:

One of the maneuvers that I was taught was how to put the plane into a spin and bring it back to level flight. It was fairly easy to start the spin, we just slowed the plane down and pulled the nose up so that it was not hardly flying and it would begin the spin.

Now came the hard part, getting it back to straight and level flight. This plane was pointed almost straight down at the ground and spinning. The natural inclination was to take the stick and, if the spin was to the right, pull the plane back to the left. But, if we did this, it would begin spinning to the left and in a tighter spin.

The way to get this plane out of the spin and back flying the way it was supposed to fly was to take your feet off of the pedals and let go of the stick. If you did this, it would just fly its self right out of the spin and back to normal flight. If you would fight with the plane, it would continue to spin until it crashed into the ground.

Learning to do that was one of the hardest things that I had to learn in all of flight school. Learning to let go and let it happen.

*See* Stay In the Now, I’ve Got You, Happyness Is a Choice.com, <http://happynessisachoice.com/articles/acceptance/stay>. The lesson illustrates human nature generally, and describes agency behavior as regards the administrative judiciary, specifically. A natural, virtually instinctive response when faced with crisis is to seize control and attempt to do something. It is counter-intuitive to let go. Rather than let go and thereby avoid a crash, agency managers have grasped an even tighter hold, effectively ignoring the solution of letting go (and unleashing the talents of its administrative law judge corps).

ongoing calls from the Social Security Advisory Board, the American Bar Association, and the Association of Administrative Law Judges to resolve these differences. Setting aside the arguments on each side, it is at bottom an animus ill-suited to the task of public service so significantly involving the welfare of the American people.

At this juncture in American history, the situation is straightforward, if not difficult to embrace. The Nation's disability appeals system has grown beyond its founding roots. The evolution of the system of disability benefits began with a fundamental shift in national perspective in 1935 with the passage of the Social Security Act.<sup>54</sup> In the midst of the Great Depression, Americans in a competitive, capitalist society gained an assurance that their contributions as American workers would not go unrewarded, such that a small benefit was made available upon retirement, which today has become a mainstay of millions of Americans in their elder years. In the 1950s, Americans recognized that this same benefit should be extended to those not yet of retirement age but who, because of disabling physical or mental conditions, could no longer compete in order to meet minimum daily needs for sustenance and shelter. This benefit, too, has gained a significant place in American society.<sup>55</sup>

While retirement benefits are generally a function of numerical analysis (quarters paid, amounts earned, etc.), the question of entitlement to disability benefits is far more subjective--embracing legal, vocational, and medical issues--and is often open to varying interpretation. By operation of law, the subjective nature of these determinations warrants an opportunity to be heard--to present evidence and testimony in aid of the claim.

As discussed herein, arguably, the ability of the agency to meet the demands of this due process requirement has been outstripped by the need for greater and greater numbers of such hearings, resulting in a hearings backlog of such duration and extent that it is now a

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<sup>54</sup> For an historical overview of the Social Security Act and history leading to that point in time, *see* Historical Background and Development of Social Security, Soc. Sec. Online. (Dec. 6, 2011), [http:// www.ssa.gov/history/briefhistory3.html](http://www.ssa.gov/history/briefhistory3.html) (last modified Dec. 6, 2011).

<sup>55</sup> *See* A History of the Social Security Disability Programs, Soc. Sec. Online. (1986), <http://www.ssa.gov/history/1986dibhistory.html> (last visited May 14, 2012).



“crisis.”<sup>56</sup> As a result, it is important to recognize the systemic inadequacy of the bureaucratic worldview: the demand by the agency upon its judges for resolution of dramatically increased numbers of pending disability appeals has not resulted in a wider empowerment of administrative law judges by the agency but has instead seen the agency invoke repeated nonjudicial attempts to remedy the situation while simultaneously narrowing the role of the administrative law judge. This is no more plainly illustrated than by the recent change in regulation potentially limiting the ability of the administrative law judge to set his or her own docket.<sup>57</sup>

## II. JUDGING AND THE EFFECTIVE DISPOSITION OF CASES: THE MANAGERIAL JUDGE, THE CJRA, AND THE FRCP

Judging and effective disposition of cases are invariably functions of caseload management--a task historically associated with the professional functioning of judges. In this, the lessons from the federal courthouses are instructive in the current Social Security backlog crisis.

In the late 1970s and '80s, increasing caseloads and resulting delays in the United States courts brought this reality into focus: to be effective, a judge was no longer simply required to hear the evidence in an individual case, ensure justice was done, and make a decision when the parties indicated the case was ripe for decision. Leaving the pace of the litigation to the parties often resulted in unwelcome delay as one party sought--for both tactical and strategic reasons--to

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<sup>56</sup> See, e.g., U.S. Gov't Accountability Office, GAO-02-322, Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention (2002) [hereinafter GAO-02-322, Disappointing Results]. The GAO stated, in part:

This [Hearing Process Improvement] initiative was implemented nationwide in 2000. The initiative has not improved the timeliness of decisions on appeals; rather, it has slowed processing in hearings offices from 318 days to 336 days. As a result, the backlog of cases waiting to be processed has increased substantially and is rapidly approaching crisis levels.

*Id.* at 3.

<sup>57</sup> Compare 20 C.F.R. §404.936 (2010), with 20 C.F.R. §404.936 (2011).

slow the litigation process to the detriment of his opponent. This resulted in a growing perception that the judicial system was unresponsive to societal needs. Calls were made for change from within the system. The role of the effective judicial officer was seen as changing to fulfill the equitable maxim, "Justice delayed is justice denied."<sup>58</sup> Doing so meant learning to engage in proactive pretrial case management in an effort to bring pending cases to a more swift resolution. Then-Chief Judge Robert Peckham, of the U.S. District Court for the Northern District of California, makes the point plainly:

Traditionally, judges have been depicted solely as dispensers of justice, weighing opposing evidence and legal arguments on their finely-calibrated scales to mete out rewards and punishments. Until quite recently the trial judge played virtually no role in a case until counsel for at least one side certified that it was ready for trial. But today's massive volume of litigation and the skyrocketing costs of attorney's fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager.<sup>59</sup>

The judge as pretrial manager views his or her role in the light of increasing caseloads with attendant increases in the cost of access to courts and resultant delay once there. This worldview is both specific to the needs of individual cases as well as societal recognition that delays in individual cases result in system-wide general delay. As one writer observes:

Advocates of managerial judging point to several indications that action is needed. They cite the growing caseload of the federal judiciary. They express concern with the changing nature of civil litigation: new causes of action have expanded the judicial role and challenged the limits of judges to

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<sup>58</sup> The Yale Book of Quotations 312 (Fred R. Shapiro ed., 2006) (quoting William E. Gladstone, British Prime Minister (1868-1894)).

<sup>59</sup> Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770, 770 (1981).

reform institutions and to remedy social ills. More recently, the rising cost of civil litigation has come to the fore as a major justification for managerial judging.

For now, it is not important to debate whether any of the purported justifications for managerial judging are valid. What is more important is to recognize that the advocates of managerial judging are making a fundamental critique of the existing procedural regime. The present structure of civil procedure, they say, necessarily fails to achieve its self-proclaimed goal of “the just, speedy, and inexpensive determination” of controversies if left to its own devices.<sup>60</sup>

Faced with institutional erosion in the form of increasing costs and delays, the courts recognized a critical need to broaden the judicial role to encompass the entire life cycle of a case, from the moment of its filing to its eventual disposition.<sup>61</sup> No longer was the judge to be a passive participant awaiting word from the lawyers that the case was now ready for trial. This was evident in the passage of the CJRA.

The CJRA was enacted “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,”<sup>62</sup> in recognition of a growing concern by federal judges that “a litigation explosion was taking place in the federal courts,

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<sup>60</sup> E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309-10 (1986) (footnotes omitted).

<sup>61</sup> See Carl Tobias, *CIVIL JUSTICE REFORM IN THE FOURTH CIRCUIT*, 50 WASH. & LEE L. REV. 89, 90 (1993) (“Congress passed the Civil Justice Reform Act during 1990 because of mounting concern over abuse in civil litigation, particularly in the discovery process; the growing costs of resolving civil lawsuits; and decreasing federal court access in those cases. For a decade and a half, many federal judges, led by Chief Justice Warren Burger, had contended that the federal judiciary was experiencing a litigation explosion and increasing discovery and litigation abuse.” (footnote omitted)).

<sup>62</sup> S. Rep. No. 101-416, at 1 (1990).

resulting in increased discovery and litigation abuse.”<sup>63</sup>

The legislative history indicates that the central purpose of the Civil Justice Reform Act is to accomplish the often stated but frequently unachieved goal of Rule 1 of the Federal Rules of Civil Procedure: to ensure the “just, speedy, and inexpensive determination” of civil disputes in federal courts. The legislative history notes that “[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers.”<sup>64</sup>

Integral to the implementation of the CJRA are core concepts of managerial judging such that district judges working with required CJRA Advisory Committees within each of the ninety-four federal districts were to devise individual cost and delay reduction plans, to be implemented within the district through “adoption of the specific methods of litigation management and cost and delay reduction.”<sup>65</sup> These concepts of judicial management included:

- “early and ongoing judicial management of cases”
- “management of the discovery process”
- “authorizing judges to explore settlement in complex cases and requiring parties to have attorneys with settlement authority present at conferences”
- “‘systematic [and] differential treatment of civil cases that tailors the level of individualized and case specific management’ to factors including ‘case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.’”<sup>66</sup>

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<sup>63</sup> Carl Tobias, Executive Branch Civil Justice Reform, 42 AM. U. L. REV. 1521, 1524 (1993).

<sup>64</sup> Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 MINN. L. REV. 375, 390 (1992) (alteration in original) (footnote omitted) (quoting S. Rep. No. 101-416, at 1 (1990)).

<sup>65</sup> Patrick Johnston, Civil Justice Reform: Juggling Between Politics and Perfection, 62 FORDHAM L. REV. 833, 843-45 (1994).

<sup>66</sup> Lauren Robel, Fractured Procedure: The Civil Justice Reform Act of 1990,

Review of the original report<sup>67</sup> giving rise to the CJRA captures the essence of the revolution in judicial activism that the Act sought to encourage: CJRA plans “should also recognize that there has not been adequate utilization of available and existing tools to respond to this substantially changed civil litigation system, to control cost and delays.”<sup>68</sup> The legislation thus sought to:

- (1) Build reform from the bottom up;
- (2) Promulgate a national, statutory policy in support of judicial case management;
- (3) Impose greater controls on the discovery process;
- (4) Establish differentiated case management systems;
- (5) Improve motions practice and reduce undue delays associated with decisions on motions; and
- (6) Expand and enhance the use of alternative dispute resolution.<sup>69</sup>

In so acting, Congress sought to encourage proactive judicial involvement in all federal civil actions, adopting a national public policy calling for creative judicial management of civil litigation at an early stage in the proceedings to curb cost and delay. Congress demanded that federal judges abandon a passive stance and no longer leave to counsel the decision to signal when a case is ready for trial. Instead, early hands-on judicial case management was to extend to the case from the moment of its filing, involving the assigned judge at the beginning of the litigation to ensure effective, efficient, and timely case management, and ultimately a less costly disposition without undue delay.

For the agency the question of effective judicial involvement by federal administrative law judges in case management is a question of an expanded judicial role. The nature of the backlog crisis is

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46 STAN. L. REV. 1447, 1456-60 (1994) (footnote omitted) (quoting 28 U.S.C. §473(a)(1) (2006)).

<sup>67</sup> See Brookings Inst. Task Force on Civil Justice Reform, *Justice For All: Reducing Costs and Delay in Civil Litigation* (1989); see also Robel, *supra* note 66, at 1450.

<sup>68</sup> See Robel, *supra* note 66, at 1460.

<sup>69</sup> Mullenix, *supra* note 64, at 391 (quoting S. Rep. No. 101-416, at 15 (1990)).

described by the same problems federal courts confronted and whose resolution was and remains a logical response. Professor Judith Resnik frames the issue in her 1982 seminal article, *Managerial Judges*. Quoting both the Commentary of the Mishnah and the Preface to the *Manual for Complex Litigation*, Professor Resnik offers pithy guidance to the problem of case management, evincing a philosophical notion of the proper judicial role:

Should you be called upon to function as a judge, do not be like the legal advisors who offer to place their juridical knowledge at the service of the litigating parties. . . . [Y]ou must remain silent and abstain from interference in the arguments . . . . Do not by even so much as a gesture seek to influence either prosecution or defense.

And:

There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management.<sup>70</sup>

The traditional judicial role stands out against the emergent judicial role of judge-as-pretrial-case-manager. Professor Resnik observes that the modern judicial role encompasses a view of judicial activity as extending from the filing of the case to its ultimate disposition.<sup>71</sup> She describes this then-new role as “shepherding the case to completion.”<sup>72</sup> Shepherding contemplates greater familiarity with the case at a much earlier time in the life of the litigation. In this, she asserts judicial management is the new form of “judicial activism” but warns that such “judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their decisions.”<sup>73</sup>

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<sup>70</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (alterations in original).

<sup>71</sup> *Id.* at 378.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 380.

She nevertheless acknowledges that the world of judging has, indeed, changed:

Today the unhyphenated “pretrial” is a stage unto itself, no longer a prelude to trial but rather assumed to be the way to end a case without trial. Today's rule brims with details about what judges are supposed to do, including establishing “early and continuing control,” organizing discovery, “facilitating the settlement of the case,” and referring parties in appropriate instances to “special procedures” (such as arbitration or mediation) “to assist in resolving the dispute.” In the contemporary rule, we find the managerial judge, the settlement judge, the dealmaking judge, [and] the judge promoting alternative dispute resolution.<sup>74</sup>

The Federal Rules of Civil Procedure as amended undeniably reflect this proactive approach beginning with Rule 1, which establishes a lens through which the balance of the Rules—and correspondingly, the actions thereunder—are to be viewed: “[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>75</sup> Rule 16, as Professor Resnik notes, provides for detailed management of every civil action, requiring, in part:

In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;

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<sup>74</sup> Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000) (emphasis omitted) (footnote omitted).

<sup>75</sup> Fed. R. Civ. P. 1.

- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating settlement.<sup>76</sup>

Rule 16 further requires entry of a scheduling order “as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”<sup>77</sup> Entry of a scheduling order is thus mandatory. A pretrial conference may then address a variety of matters, including “special procedures for managing potentially difficult or protracted actions” and “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”<sup>78</sup> In the words of one writer,

Rule 16 is explicitly intended to encourage the active judicial management of the case development process and of trial in most civil actions. Rule 16 calls on judges to fix deadlines for completing the major pretrial tasks and encourages judges to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates use of a wide range of case management tools and powers--principally through pretrial conferences. It also authorizes a wide range of sanctions for violations of pretrial orders.<sup>79</sup>

The managerial judge in the federal court is thus equipped with the tools to engage in proactive case management from the outset of litigation, able to reach into his or her quiver and bring forth a variety of arrows in an attempt to resolve the case before trial; or if not, to

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<sup>76</sup> Fed. R. Civ. P. 16.

<sup>77</sup> Fed. R. Civ. P. 16(b)(2).

<sup>78</sup> Fed. R. Civ. P. 16(c)(2), (2)(L), (2)(P).

<sup>79</sup> 3 James Wm. Moore et al., *Moore's Federal Practice* 16-1 (3d ed. 2011); see also Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules--And the Extent of Convergence With Civil-Law Judging*, 36 SW. U. L. REV. 191, 196 (2007).



resolve the case in a timely manner in the courtroom. Effective judging is seen to embrace effective--that is, timely--and just case disposition. Among the options available are various pretrial settlement mechanisms including ENEs (early neutral evaluations), mini-trials, summary jury trials, and settlement conferences. This is further encouraged by the Alternative Dispute Resolution Act of 1998,<sup>80</sup> which provides that every U.S. District Court “shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.”<sup>81</sup>

A principal player behind the codification of judicial management as reflected in the CJRA was then-United States Senator Joseph Biden, who as Chair of the Senate Judiciary Committee commissioned the Brookings Institution in conjunction with the Foundation for Change to form a “task force to ‘develop a set of recommendations to alleviate the problems of excessive cost and delay.’”<sup>82</sup> The findings of the task force became the basis for the CJRA.<sup>83</sup>

In 1994, then-Senator Biden wrote in the *Stanford Law Review*:

For many years, the federal courts were the preferred forum for many litigants, but recently public confidence in the federal courts' ability to provide the “just, inexpensive, and speedy determination of every action” has begun to erode. . . . Court congestion has become pronounced, particularly for civil cases, as crowded dockets and inefficient procedures combine to make litigation expensive and delays lengthy. As a result, economic concerns rather than the merits of a

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<sup>80</sup> 28 U.S.C. §651 (2006).

<sup>81</sup> *Id.* §651(b). Rule 23 also authorizes extensive judicial management procedures in class actions by conferring broad authority to make appropriate orders to determine the course of the proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument, in addition to conferring authority to make appropriate orders to deal with similar procedural matters. Rowe, *supra* note 79, at 196-97.

<sup>82</sup> Johnston, *supra* note 65, at 837 (quoting Brookings Inst. Task Force on Civil Justice Reform, *supra* note 67, at vii).

<sup>83</sup> *Id.*

case too often govern the decision to file a civil suit. In a society where access to justice is implicit in our Bill of Rights, the closing of the courthouse doors to ordinary citizens threatens not only the judicial system's operation, but also the integrity of the democratic system.<sup>84</sup>

Then-Senator Biden thus viewed as critical the need for active and expanded judicial management of civil cases as a means to reverse a growing delay of such magnitude as to effectively close the courthouse doors to the majority of the American people--a virtual collapse of the system of justice if unchecked. The CJRA was necessary to "restore public confidence."<sup>85</sup> Of particular note was the perceived need for congressional action. As with the current crisis confronting SSA, Senator Biden wrote of the federal court system:

These consensus-building efforts would have been futile without the legislature's involvement. Prior to the CJRA's enactment, the federal judiciary's recent history was replete with proposals to reform the civil justice system from groups such as the American Bar Association, the Association of Trial Lawyers of America, and the American Law Institute. Yet despite the warning bells and the calls for change from both inside and outside the judiciary, the rule changes recommended to Congress by the Judicial Conference remained largely ineffectual.<sup>86</sup>

The lessons from the federal courthouse apply equally to the backlog crisis now facing the agency and ultimately, the American people. Those who assess the proactive role of the modern federal judge agree, "If judges did not intervene in the morass that is modern litigation, this would clog dockets, increase litigation costs, and free litigants to use litigation's expense and delay to gain unfair tactical

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<sup>84</sup> Biden, *supra* note 1, at 1285-86 (emphases added) (footnotes omitted).

<sup>85</sup> *Id.* at 1286.

<sup>86</sup> *Id.* at 1291 (emphasis added) (footnote omitted) (noting that the American Bar Association, Association of Trial Lawyers of America, and the American Law Institute all had proposals to reform the civil justice system).

advantages over their adversaries.”<sup>87</sup> Why is it different for the backlog now facing the agency?

In Judge Peckham's words:

Pretrial management of cases has become a necessary device for dealing with our judicial system's bursting calendars. It has proven to be an advantage to litigants and not merely a necessary evil. The scheduling function served by the early status conference has proven to be a particularly effective device for increasing the productivity of courts and minimizing the cost of litigation. Moreover, in the pursuit of efficiency we have discovered a way to improve our trials by making them better organized and, I believe, more comprehensible to the lay juror. . . . Pretrial properly focuses the action on the search for truth rather than on gamesmanship.<sup>88</sup>

The solution adopted by the courts to growing delay and increasing costs (with a resultant lack of public access to and confidence in the federal courts) was to expand the active role of the judge in case management, beginning at the initial filing of the case through to completion. These measures allow the judge to bring his or her full decisionmaking power to bear in the whole of the case--from its inception to completion--enabling greater flexibility and creativity in handling and disposing of cases throughout the litigation. Case resolution is no longer limited simply to disposition by trial, or by prolonged traditional methods employed by counsel, who by definition could not effectively resolve delay caused by a recalcitrant opponent absent court intervention.<sup>89</sup>

These same solutions can and should be applied to the backlog crisis now threatening public confidence in and access to the Nation's

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<sup>87</sup> Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 42 (2003).

<sup>88</sup> Peckham, *supra* note 59, at 804-05.

<sup>89</sup> Delay for the sake of delay often benefits the defendant in an adversarial proceeding, for delay maintains the status quo ante, enables the passage of time, the fading of memory, and the disappearance of evidence and witnesses. *See, e.g.,* Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 918 (Cal. 1997).

system of disability claims and appeals. Effective judging requires effective case management. Administrative law judges, before whom hundreds of thousands of Americans appear each year, should be enabled to apply the full measure of their ability to decide through the life of the case--from the time a request for hearing is filed to entry of a final decision. Effective case management tools should be formulated and rules enacted, enabling members of the administrative judiciary within the agency to take an expanded and proactive role in the life of all cases that they will ultimately decide. The question is, why not empower administrative law judges with effective case management tools from the outset of a case?

### III. ADJUDICATORY INERTIA WITHIN THE AGENCY

To answer the question requires the asking of yet another question. Why has the case management role of the administrative judiciary within the agency narrowed rather than grown in response to a growing backlog? What has prevented the agency from expanding the role of judges in addressing pending hearings? The answers to these questions require an understanding of the adjudicatory inertia that pervades the agency's approach to problem solving.<sup>90</sup>

The crisis now facing the agency finds its genesis in a long history of attempts to redress a growing caseload through management-driven initiatives and process improvements, which did not result in any effective solution to the problem but did serve to further isolate the agency's cadre of administrative law judges from the problem-solving roundtable. The collective results of these various management-driven solutions have served to cement the agency into a pattern of adjudication little changed since the 1970s.

The true measure of the extent of this adjudicatory stasis is seen in the agency's multiple remedial attempts, resulting not in a reduction of the growing backlog but in an escalation of the problem to crisis proportions. Review of these various process improvements and initiatives shows that all are bureaucratic add-ons--programs largely outside the adjudicatory framework, described in their best

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<sup>90</sup> When examining these issues it is also necessary to examine pertinent GAO findings verbatim, and so excerpts from such reports are reproduced here in order to better understand and communicate the context of the findings.

light as parallel attempts to address the pending caseload with little or no judicial involvement in either their inception or implementation.

Succinctly stated, the agency has not sought to change an adjudicatory model that has subsisted in its present form for more than fifty years. Given the failure of management-driven solutions, the present backlog augurs for just such a change. When first devised, the hearings process was conceived as nonadversarial, adopting an inquisitorial jurisprudence akin to that found in judicial systems in continental Europe. Professor Robert M. Viles undertook a comprehensive study of the Social Security disability system in 1968.<sup>91</sup> He describes the hearing procedure in the words of one hearing examiner:

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.<sup>92</sup>

This model remains today despite the fact that the number of pending appeals has grown nationally from 20,000 in 1971<sup>93</sup> to over

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<sup>91</sup> Robert M. Viles, *The Social Security Administration Versus the Lawyers ... And Poor People Too* (pts. 1 & 2), 39 *Miss. L.J.* 371 (1968), 40 *Miss. L.J.* 24 (1968).

<sup>92</sup> 40 *Miss. L.J.* at 40-41 (quoting *Rausch v. Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967)).

<sup>93</sup> *See, e.g., Richardson v. Perales*, 402 U.S. 389, 406 (1971) (“With over 20,000 disability claim hearings annually, the cost of providing live medical testimony at those hearings, where need has not been demonstrated by a request for a subpoena, over and above the cost of the examinations requested by hearing

700,000 today, and the percentage of persons represented by counsel has grown to almost 80%.<sup>94</sup> Hearing examiners are now administrative law judges, but as recently as 2000, the U.S. Supreme Court recognized the inquisitorial nature of the administrative hearing undertaken by Social Security administrative law judges.<sup>95</sup>

The push by administrative law judges for expanded case management authority has sparked a debate over the question of judicial independence under the APA.<sup>96</sup> The agency's view is straightforward. An administrative law judge's role is strictly limited to "decisional-independence," restricting the judge to conducting the hearing and thereby largely reserving to the agency prehearing case management. Under this view, the agency reserves to itself the right to frame a judge's functioning within the larger structure of the agency: "[I]n spite of the ALJ's complete independence of decision, he/she is a part of and is under the administrative direction and control of his employing agency."<sup>97</sup>

In a January 31, 1997, memorandum on SSA hearings titled *Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges*, then-General Counsel Arthur Fried wrote:

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examiners, would be a substantial drain on the trust fund and on the energy of physicians already in short supply.").

<sup>94</sup> A September 2007 report by SSA's Office of Inspector General (OIG) shows that in fiscal year 2006, 439,000 of the 559,000 claims heard by administrative law judges were represented by attorney and nonattorney representatives, representing claimants in almost 80% of all claims appealed. Examined another way, the OIG notes, "[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR." Office of Inspector Gen., Soc. Sec. Admin., A-12-07-17057, *Claimant Representatives Barred From Practicing Before the Social Security Administration* 1 (2007), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf>.

<sup>95</sup> *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (explaining that SSA's adjudication system has replaced the normal adversary procedure with an investigatory model resulting in inquisitorial proceedings).

<sup>96</sup> *See* 5 U.S.C. §§556-557 (2006); see also *supra* Part I.A (discussing the agency intervention and political agenda as hindering the administrative law judges from executing their duty).

<sup>97</sup> *See* Wolfe, *supra* note 41, at 225 (alteration in original) (quoting Memorandum from the Division of Policy and Procedure to the Director, BHA (Dec. 12, 1977) (on file with Author)).

SSA's and the claimant's ability to benefit from the highest quality and most efficient service of the ALJ corps is undermined by the differing and often contradictory understanding in various parts of the Agency of . . . "decisional independence." This confusion exists about both the meaning of "decisional independence," and the extent to which such independence limits the otherwise appropriate authority of the Agency to manage the performance of the ALJ corps.<sup>98</sup>

General Counsel Fried thus framed it this way:

[T]o what extent may SSA manage the performance of the ALJ corps? Inherent in the concept of "management" is "control." During the 1980s, SSA "attempted to exercise control" over ALJs in three respects: (1) it demanded greater ALJ productivity, (2) it demanded greater consistency in ALJ decision making, and (3) it altered the "proportion of cases in which they granted or denied benefits."<sup>99</sup>

The agency focus on control over administrative law judges stands in stark contrast to the CJRA and the efforts of the federal courts to endow judges with broader case and pretrial management authority. Dean and Professor of Law Victor Rosenblum described the January 1997 memorandum as "[a] prototype of myopic perception" of administrative law judges and their duties and further explains that his purpose in writing is "to examine the dysfunctionality of the General Counsel's narrow conception of

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<sup>98</sup> *Id.* at 205-06 (quoting Memorandum from the Division of Policy and Procedure to the Director, BHA (Dec. 12, 1977) (on file with Author)).

<sup>99</sup> *Id.* at 206 (quoting Richard J. Pierce, Political Control Versus Impermissible Bias In Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. CHI. L. REV. 481, 483 (1990)).

impartiality in his memorandum.”<sup>100</sup>

The issue of judicial independence and a correspondingly expanded case management role for judges has not been limited to SSA. Similar issues have plagued administrative adjudications within the Department of Agriculture.

It is common knowledge that an absolute necessary element for the existence of an impartial adjudicator is judicial independence. However, it is of great concern to all of us who believe in the idea of impartiality and fairness that this necessary element of judicial independence is under such intense attack. The attacks emanating from those within the leadership roles of the administrative bureaucracies include the agencies' leaders and the government attorneys (Offices of the General Counsel) in the U.S. Department of Agriculture (USDA) and [SSA].<sup>101</sup>

This restrictive view of the role of administrative law judges within the agency is evident in its earlier actions. While Congress and the federal courts were struggling to combat increasing delay and rising costs in a perceived effort to keep the courthouse doors open in 1989, the agency was withdrawing resources from its administrative law judges. In a 1989 Report to the Subcommittee on Social Security of the House Ways and Means Committee, the GAO noted various actions to restrain administrative law judges, including the withdrawal of individual staff and administrative support, placing staff persons in a shared pool, and, to make matters worse, no longer serving under the direction of individual judges:

OHA began “pooling” resources within some hearing offices as a demonstration project in the late 1970s, and expanded it to additional hearing offices in the early 1980s. Under pooling, ALJs do not have

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<sup>100</sup> Victor G. Rosenblum, *Toward Heightening Impartiality in Social Security Agency Proceedings Involving Administrative Law Judges*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 58, 58 (1998).

<sup>101</sup> Wendell Fennell & Fred Young, *Judicial Independence Under Siege*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 211, 211 (1997) (emphasis omitted).



direct control over their support staff. Some or all support staff previously assigned to individual ALJs are now placed in a common staff pool. OHA began pooling staff to improve efficiency and balance staff workload.

GAO asked ALJs for their views on the pooling of decision writers and staff attorneys in their offices. About two-thirds of the ALJs who responded said such a reconfiguration had a negative effect on hearing office operations.<sup>102</sup>

While the GAO study documented a perceived loss of resources within the administrative law judge community, “many of the managers GAO spoke with said that staff pooling provided more flexibility in using staff and allowed a more balanced workload for all staff.”<sup>103</sup> The question becomes whether the net effect of this and similar actions effectively places the proverbial cart before the horse. In a 2006 Social Security Advisory Board report, staffing issues similar to those raised in 1989 were again questioned:

In discussing these figures on ALJ decisions, we do not mean to imply that only ALJs have an impact on the number of decisions. ALJs are only a part, albeit a very important part, of the hearing process. They are dependent on others to prepare cases for hearing and to write decisions after the hearings. They need staff in those positions in sufficient quantity and quality.

In fact, many ALJs and management officials have told us that their most urgent need is support staff rather than additional ALJs. We have heard that the type of support staff needed varies from office to office. In some offices there is a shortage of case technicians to prepare cases for hearing. In others, a

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<sup>102</sup> U.S. Gov't Accountability Office, GAO HRD-90-15, Many Administrative Law Judges Oppose Productivity Measures 4 (1989) [hereinafter GAO HRD-90-15, Productivity Measures].

<sup>103</sup> *Id.*

lack of decision writers creates a bottleneck. In 2005, the median office had between 4 and 4.5 staff members (decision writers, case technicians, and other support staff, excluding those designated as management). This is fewer than the peak in 2001 of 5.4 staff members per judge. Our analysis of the data from 2002 through 2005 shows that, as staff-to-judge ratios increase, dispositions per judge also tend to increase and average processing time tends to decline.<sup>104</sup>

The GAO study recounts a long history of tension between the agency and its judges, highlighting the continuing debate over the manner of judicial functioning:

Conflicts between OHA management and ALJs have existed for at least a decade. Some issues that divided management and ALJs in the late 1970s and early 1980s are still argued today. For example, in June 1977, five ALJs filed a lawsuit alleging that SSA's use of numerical production goals and related matters violated the APA and the Fifth Amendment to the Constitution. This case was settled in June 1979, in what is commonly referred to as the "Bono agreement," in which SSA and the five ALJs agreed to certain policy and practice changes.

In the early 1980s, another disagreement arose over criteria OHA management used in selecting ALJ decisions for review. Commonly known as Bellmon reviews, OHA management selected cases for review based on a judge's high allowance rates. ALJs disagreed with the selection process, claiming interference with their decisional independence. In 1983, the Association of Administrative Law Judges, which represents about 50 percent of SSA's ALJs, filed suit seeking an injunction against targeted Bellmon reviews. On June 21, 1984, before the court

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<sup>104</sup> Soc. Sec. Advisory Bd., *supra* note 40, at 14.

ruled on the suit, OHA rescinded the policy of targeting for review ALJs who had high allowance rates.<sup>105</sup>

Herein, perhaps, lies the genesis of much of the current debate between the agency and the administrative judiciary. Judges have, in recent times, reversed agency administrative decisions at a greater rate than they have affirmed such determinations. In significant part, this is because a claimant's condition worsens over time. Other factors include the fact that claimants are now overwhelmingly represented at a hearing; such proceedings usually embrace the first face-to-face encounter between the claimant and a decisionmaker, all previous decisions having been a paper or "file review."

Decisions by administrative law judges, then, invoke the human factor—largely unaccounted for by the agency in earlier administrative denials. In effect, the judge is reversing the earlier agency determination, resulting in a statistically greater frequency of "paying cases" than at lower administrative levels. Judicial decisions thus cost the agency, whose budget must then account for the greater number of pay cases than originally contemplated. As the GAO noted in 2002 in assessing "five initiatives to improve SSA's disability claims process":

[A]ccording to SSA, more denied claimants would appeal to ALJs under the Prototype [hearing process] than under the traditional process. More appeals would result in additional claimants waiting significantly longer for final agency decisions on their claims, and would increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. It would also result in higher administrative costs under the Prototype than under the traditional process. More appeals would also result in more awards from ALJs and overall and higher benefit costs under the Prototype than under the

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<sup>105</sup> GAO HRD-90-15, Productivity Measures, *supra* note 102, at 12 (footnotes omitted).

traditional process.<sup>106</sup>

High reversal rates by judges of agency disability determinations have led the agency to conclude that there is (or must be) a correspondingly high error rate among such decisions, in turn leading the agency to exert greater control over the claims process. Evidently, the agency assumes its administrative determinations are more likely to be correct than the judicial decisions of its judges. These issues came to the fore, as noted earlier,<sup>107</sup> with the initiation of the so-called Bellmon review (named after legislation sponsored by then-U.S. Senator Henry Bellmon of Oklahoma)--a program that contemplated heightened review of administrative law judge-issued "favorable" decisions.<sup>108</sup> A 1989 GAO report summarizes the intensified scrutiny of such decisions:

Based partly on the results of a 1981 study of 3,600 ALJ decisions, which concluded among other things that there was a higher probability of error in favorable decisions of those ALJs with high overall allowance rates, SSA decided to implement the amendment by directing its Bellmon reviews at those ALJs with allowance rates of 70 percent or higher. Entire hearing offices were targeted if their collective allowance rate was 74 percent or higher. Targeted ALJs were required to forward all favorable decisions (allowances) to the Appeals Council for review before their effectuation or finalization. . . . ALJs whose decisions were often objected to were to be given counseling, retraining, and eventually subjected to "disciplinary or remedial" measures. By 1983, OHA was using the own-motion rates (analyst referrals to the Appeals Council) to decide which ALJs would be targeted for review.<sup>109</sup>

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<sup>106</sup> See, e.g., GAO-02-322, *Disappointing Results*, *supra* note 56, at 3.

<sup>107</sup> See *supra* note 46 and accompanying text.

<sup>108</sup> See GAO/HRD-89-48BR, *Required Reviews*, *supra* note 46, at 1.

<sup>109</sup> *Id.* at 8.

In effect, the agency determined to “discipline” or remediate (in some cases, “retrain”) judges.<sup>110</sup> This resulted in federal litigation in 1983, which revealed, among other things, that the “Associate Commissioner for Hearings and Appeals had a performance goal in his Senior Executive Service contract to reduce ALJ allowance rates.”<sup>111</sup>

Critically, the court found:

With reason, plaintiff and its members viewed defendants' combined actions as a message to ALJs to tip the balance against claimants in close cases to avoid reversal or remand by the Appeals Council, which would increase their own motion rate, which would result in being placed on Bellmon Review, with the added potential for peer counseling and [Merit Systems Protection Board] proceedings.<sup>112</sup>

The clear agency perception was that the collective error in decisionmaking was by judges and not the underlying policies or initiatives of its administrators. In effect, the agency ascribed error to judicial decisionmaking, looking to its own analysts as a baseline against which administrative law judge decisionmaking was measured. Thus, agency initiatives since that time specifically address the question of “inconsistencies” between the underlying administrative decisionmakers and the judges<sup>113</sup> and have sought to rectify the issue through more benign methods, including “process unification.” As pointed out in a 2004 GAO study, however, the assessment of inconsistency is itself subject to question:

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<sup>110</sup> See *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1137-38 (D.D.C. 1984).

<sup>111</sup> GAO/HRD-89-48BR, *Required Reviews*, *supra* note 46, at 8.

<sup>112</sup> Heckler, 594 F. Supp. at 1139.

<sup>113</sup> See Gov't Accountability Office, GAO/T-HEHS-95-233, *Social Security Disability: Management Action and Program Redesign Needed to Address Long-Standing Problems 1* (1995) (statement of Jane L. Ross, Director, Income Security Issues, Health, Education, and Human Services Division: “In summary, our work shows that SSA has serious problems managing the disability programs on several separate but related fronts. First, the lengthy and complicated decision-making process results in untimely decisions, especially for those who appeal, and shows troubling signs of inconsistency, which compromise the integrity of the process.”).

SSA's assessments have not provided a clear understanding of the extent and causes of possible inconsistencies in decisions between adjudication levels. The two measures SSA uses to monitor inconsistency of decisions have weaknesses, such as not accounting for the many factors that can affect decision outcomes, and therefore do not provide a true picture of the changes in consistency. Furthermore, SSA has not sufficiently assessed the causes of possible inconsistency. For example, SSA conducted an analysis in 1994 that identified potential areas of inconsistency, but it did not employ more sophisticated techniques--such as multivariate analyses, followed by in-depth case studies--that would allow the agency to identify and address the key areas and leading causes of possible inconsistency. SSA has yet to repeat or expand upon this 10-year-old study.<sup>114</sup>

More than any other indicator, this illustrates the inapposite worldviews represented by the nonjudicial and judicial actors in the system. Even the Social Security Advisory Board (SSAB), a bipartisan Presidential advisory panel,<sup>115</sup> has seen a need to call for a restoration of the relationship between the agency and its administrative law judges, pointing to a "residue of mistrust that goes back at least as far as the late 1970s, when pressures to reduce the number of allowances and increase the number of decisions led to a situation that was described as 'an agency at war with itself.'"<sup>116</sup> The 2006 SSAB Report urges the agency and its judges to work with one another, recognizing the inherent and long-standing differing views of each.

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<sup>114</sup> U.S. Gov't Accountability Office, GAO-04-656, *More Effort Needed to Assess Consistency of Disability Decisions*, at Highlights (2004).

<sup>115</sup> See *About the Board--Authorizing Statute*, Soc. Sec. Advisory Bd., <http://www.ssab.gov/AbouttheBoard/AuthorizingStatute.aspx> (last visited May 14, 2012) (discussing the creation of the a seven-member bipartisan Social Security Advisory Board along with the establishment of SSA as an independent agency).

<sup>116</sup> Soc. Sec. Advisory Bd., *supra* note 40, at 15.

The agency's operational milieu, as evidenced by repeated agency action which excludes the administrative judiciary from policymaking, ignores the inherent expertise and experience the judges bring to the unique field of judicial case management.<sup>117</sup> This is most clearly seen in the recent February 8, 2008, Office of Inspector General Audit Report (2008 Report) titled Administrative Law Judges' Caseload Performance.<sup>118</sup> Instead of focusing on creative potential within the existing regulatory scheme by which administrative law judges may assume an expanded judicial role, bringing to bear their talents, training, and experience in a wider case management role, the 2008 Report, like the 1997 Office of General Counsel (OGC) Memorandum, ignores the call of the SSAB for reconciliation and seeks to reinforce the idea that judges may be held accountable for even greater productivity standards.

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<sup>117</sup> One noted commentator writes:

The term "federal administrative judiciary" is not frequently used, but it highlights the relationship between the administrative decision system and the federal judiciary. Administrative deciders are significant participants in our constitutional scheme....

Administrative Law Judges as a group are among the most diversely talented, well-trained, and deeply entrenched adjudicators in our system, even when they are compared with the federal district and state judiciary. There are almost 1,200 ALJs who are assigned to 30 federal agencies. This is approximately equivalent to the number of judges on the federal trial bench . . . .

. . . .

A survey concludes...in education, training and experience, they seem no less qualified than bankruptcy judges and magistrates, if not members of the federal bench . . . . They enjoy a more secure tenure and compensation than do bankruptcy judges or magistrates because they do not serve terms. Rather, they effectively receive life tenure subject to removal for good cause . . . . These protections provide ALJs with a certain degree of judicial independence.

Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 *UCLA L. REV.* 1341, 1343-45 (1992).

<sup>118</sup> See Office of the Inspector Gen., *Soc. Sec. Admin.*, A-07-07-17072, *Administrative Law Judges' Caseload Performance* 3-4 (2008) [hereinafter *OIG Report*], <http://www.ssa.gov/oig/ADOBEPDF/A-07-07-17072.pdf>.

The 2008 Report, like its 1997 OGC counterpart, appears to challenge the scope of judicial independence arguing that its protections be subordinated to the demands of production. “Federal legislation,” it states, “does not prevent SSA from establishing a performance accountability process wherein ALJs are held to reasonable production goals, as long as the goals do not infringe on ALJs’ qualified decisional independence.”<sup>119</sup> In making this assertion, the 2008 Report cites, among other authorities, *Nash v. Bowen*.<sup>120</sup> The Nash court explained:

The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA. The district court explicitly found that the numbers at issue constituted reasonable goals as opposed to unreasonable quotas. Judge Elfvin explained that

[a] minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not “etched in stone”, is not a prescription of how, or how quickly, an ALJ should decide a particular case. It does not dictate the content of the decision.<sup>121</sup>

The 2008 Report calls for “performance accountability procedures” to be established, examining through the course of the Report various “what if” scenarios (projecting the resulting backlog reduction if individual judges decided 400, 450, 500, or 550 cases per year).<sup>122</sup> The 2008 Report concludes that backlog reduction can be achieved by simply imposing a goal and demanding (under penalty of accountability procedures) that judges meet the goal, with no other changes to case management procedures or processes through which expanded and creative judicial management methods can be brought

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<sup>119</sup> *Id.* at 4.

<sup>120</sup> 869 F.2d 675 (2d Cir. 1989).

<sup>121</sup> *Id.* at 680-81 (alteration in original).

<sup>122</sup> OIG Report, *supra* note 118, at 6.



to bear during the life of the case. In this, it evokes the earlier Bellmon review and ignores the Bono Settlement Agreement of 1979.<sup>123</sup> The 2008 Report typifies the agency's cultural stance, looking at judges not as a valued repository of expertise but as extensions of bureaucratic will—demanding they do more, but confining such further activity to a narrow band of crystallized action and banning heightened case management authority.

The 2008 Report contemplates continuing a jurisprudence founded on the same model as has stood for multiple decades. It fails to embrace the SSAB call for collaboration generally and makes no proposals to encourage a collaborative effort to resolve caseload management and the backlog specifically. Instead, it mirrors that which has been. The agency--regardless of the efficacy of its underlying position with respect to goals and productivity--continues a seeming adversarial stance with its judges, isolating the judges in an ever-narrowing and circumscribed decisionmaking window, effectively the reciprocal course taken by Congress and the federal courts.<sup>124</sup>

#### IV. CIVIL JUSTICE REFORM IN A NEW VENUE?

One alternative previously unaddressed in this Article is whether there should even be a push for an expanded case management role for administrative law judges within SSA. Some argue that the ideal solution is a change of venue--the creation of an independent corps of administrative law judges which would, by definition not be subject to the bureaucratic stricture of any given agency, but which would nevertheless have responsibility for independent adjudication of all administrative appeals currently heard by administrative law judges across executive branch agencies.

This view finds support in an unexpected manner. While many have debated the continuing role of the federal administrative judiciary within the Executive Branch, arguments that urge a separation of administrative law judges from their respective

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<sup>123</sup> See Bono, *supra* note 34.

<sup>124</sup> See Merriam-Webster's Collegiate Dictionary 1038 (Fredrick C. Mish et al. eds., 11th ed. 2008) (providing the definition of reciprocal and, through inference, explaining that in nautical terms a reciprocal course is 180 degrees in the other (opposite) direction).

agencies, and that have at their core supposed threats to the integrity of the administrative decisionmaking process, have not won the day. Over time, the issues have come to center not so much on the question of integrity of the decisionmaking process but on effective functioning. A brief overview of the various arguments highlights this distinction.

A 1985 article in the ABA Journal titled *Breaking Away: Administrative Law Judges Seek Freer Status* recounts the introduction of legislation some twenty-five years ago whose purpose was “to consolidate federal administrative law judges into an independent corps.”<sup>125</sup> The arguments then centered on the appearance of bias as well as undue influence: “Advocates of the corps concept say it would eliminate an appearance of bias that exists because judges work for agencies whose cases they hear . . . .”<sup>126</sup>

One writer points out that it is the need “to protect the integrity, independence and impartiality of administrative law judges”<sup>127</sup> that fuels the call for reform in federal administrative adjudication. The Honorable Charles N. Bono, then an administrative law judge at SSA who chaired the ABA National Conference of Administrative Law Judges in 1992, explained that “[t]he tension between an agency's administrators and its ALJs is magnified by the fact that the employing agency has an agenda that may conflict with the judges' responsibility to provide parties with due process.”<sup>128</sup> Judge Bono further clarified his point in testimony in an April 29, 1992 hearing of the House Judiciary Subcommittee on Administrative Law and Governmental Relations: “ALJs have been subjected to monthly performance targets set by agencies; rankings, ratings and evaluations of individual performances; and threats of removal, reprimand or deprivation of staff and equipment if targets are not met.”<sup>129</sup>

Those opposed to this view argue that this is a nonissue, as

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<sup>125</sup> Faye A. Silas, *Breaking Away: Administrative Law Judges Seek Freer Status*, A.B.A. J., July 1985, at 18.

<sup>126</sup> *Id.*

<sup>127</sup> McMillion, *supra* note 31, at 103.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

evidence of bias has not been raised.<sup>130</sup> Note, however, the plaintiff's argument in *Richardson v. Perales* in 1971, raising essentially this very argument:

Finally, the claimant complains of the system of processing disability claims. He suggests, and is joined in this by the briefs of amici, that the Administrative Procedure Act, rather than the Social Security Act, governs the processing of claims and 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 that 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; and that an "independent hearing examiner such as in the" Longshoremen's and Harbor Workers' Compensation Act should be provided.<sup>131</sup>--an argument the Supreme Court then rejected:

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.<sup>132</sup>

The Author questioned, in an earlier writing, "Would the court today hold that delays in decisionmaking of between one and two years violate fundamental due process, if not the public policy

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<sup>130</sup> *Id.*

<sup>131</sup> *Richardson v. Perales*, 402 U.S. 389, 408-09 (1971) (citations omitted).

<sup>132</sup> *Id.* at 410.

underlying these benefits? Would it look to the ‘governmental structure of great and growing complexity’ of 2010 and still declare that it is ‘working well?’”<sup>133</sup>

In a more temperate assessment, the difference between a judge sitting in a court of law and an administrative law judge in the Executive Branch is described as not so much a difference in functioning, as both must strive for impartiality, but as a question of constitutional structure:

The instinctive defensive reaction to a claim that the administrative adjudicator is controlled by the agency she serves may be to raise the vigorous assertion that due process requires the ALJ be independent of the agency she serves. The distinctions between judges of the judicial branch and those of the executive branch are such, however, as to call into question such a conclusion. At the outset, it is important to note the distinctions that courts have already made that set apart the executive judiciary from the judicial branch adjudicators: that “[a]dministrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decisionmaking.” Though it may be appealing for ALJs to believe they must operate independent of their agency, constitutional jurisprudence does not support a claim that due process mandates such independence. Rather, if we conclude that as ALJs we must “avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence, neutrality, and impartiality,” as Judge Young has recommended, we must find bases for this mandate other than those found in the Due Process Clause of

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<sup>133</sup> Jeffrey S. Wolfe, *The Times They Are a Changin': A New Jurisprudence for Social Security*, 29 J. NAT'L ASSN. OF ADMIN. L. JUDICIARY 515, 543-44 (2009) (footnotes omitted) (quoting Richardson, 402 U.S. at 410).

the Constitution.<sup>134</sup>

Judge McNeil aptly points out “that by the 1930s the administrative court was entrenched and expanding, sharing much of the same apparent authority as that possessed by article III courts, without the constitutional protection of life tenure and undiminished salary.”<sup>135</sup> Administrative decisionmaking was ratified by the Supreme Court in *Crowell v. Benson*:

[The case] assumed that public rights disputes may not require a judicial decision at either the original or appellate levels. Even in private rights cases, *Crowell* held, an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions, as long as there is an adequate review available in a constitutional court.<sup>136</sup>

Critically, however, Judge McNeil notes that the inherent relationship between the administrative law judge and the agency within which he or she sits is a creature of the APA.

The ALJ serves an executive function not shared by the article III judge: her authority is no greater than that of the agency she serves, and as an adjudicator she is charged with an affirmative ethical obligation to perform judicial or quasi-judicial tasks in the context of the executive agency's mandate, not independent of that agency, for she has no authority independent of that agency.<sup>137</sup>

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<sup>134</sup> Christopher B. McNeil, Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel, 18 J. NAT'L ASS'N OF ADMIN. L. JUDGES 1, 6-7 (1998) (alteration in original) (footnotes omitted).

<sup>135</sup> *Id.* at 14.

<sup>136</sup> *Id.* (footnotes omitted) (emphases omitted) (citing *Crowell v. Benson*, 285 U.S. 22, 51-65 (1932)).

<sup>137</sup> *Id.* at 35; *see also* James E. Moliterno, The Administrative Judiciary's Independence Myth, 41 WAKE FOREST L. REV. 1191, 1192 (2006) (drawing the distinction between independence and impartiality, and noting that the

Against this backdrop, the question arises whether it is now time for SSA's administrative law judges to migrate to a separate adjudicative agency, or even to an Article I court similar to that of the U.S. Court of Appeals for Veterans Claims.

In examining the question, the issue is not whether there is a need for such action based on arguments of threats to the integrity of administrative law judge decisionmaking, agency influence, or the appearance of bias, but rather whether the agency, as a politically animated entity tasked with responsibility for such decisionmaking, has effectively forfeited its responsibility by virtue of continued ineffective action in dealing with the problem. More to the point, has the agency, by virtue of its continued animus in its relationship with its administrative law judges, made a migration of this corps of administrative decisionmakers a virtual necessity such that to do anything less would result in the continuity of the pending backlog?

The answer to these questions lies in both a historical as well as functional view of the agency and its conduct. Repeated actions since the mid-1970s have signaled agency intention to more closely manage administrative decisionmaking. As such, the issues are not new. In a 1991 article in the *Notre Dame Law Review*, Professor Daniel Gifford writes:

The focus of these debates has been the relationship between the Department's Social Security Administration and the administrative law judges, and, in particular, the extent to which the Secretary of Health and Human Services may legitimately attempt to influence the ways in which the administrative law judges work.

The SSA has justified its management initiatives as designed to improve the quality and efficiency of the social security program. They are designed, it is said, to foster efficient disposition of caseloads, to reduce inconsistency in results, and to hold back the dramatic increases in cost which have afflicted the

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administrative judges are no less judges, but are not independent as are judges in the Judicial Branch and are nevertheless required to be impartial in presiding over hearings).

program in recent years. Many administrative law judges, however, have viewed these supervisory initiatives from the Secretary as intrusions upon their independence which they have challenged in the courts. Disability claimants have also been quick to assert that these management efforts have interfered with their right to an impartial decision.<sup>138</sup>

A crucial failing, in Professor Gifford's view, has been the failure by the agency to promulgate precise procedural rules and thereby attain greater consistency in adjudicative decisionmaking:

But the SSA has been unable or unwilling to formulate other policies with sufficient clarity and comprehensiveness to reduce the disparity among the way ALJs decide cases. In the absence of precise and binding rules, the SSA has resorted to quality control programs and other management techniques. This novel approach to mass adjudication has forced a new and more precise examination of the extent to which management techniques can properly be classified as part of the policy control which belongs to the agency.<sup>139</sup>

This inaction has continued to the present. No comprehensive formal rules of procedure for disability hearings exist, and indeed, repeated calls by administrative law judges to enact rules that would at least close the record after a hearing have fallen on deaf ears. Even today, post-hearing, a claimant can discover new evidence and submit it as part of an appeal with the administrative law judge never having seen the documents. As Professor Gifford points out, "It is difficult for the SSA to complain of inconsistent decisionmaking by administrative law judges and yet fail to promulgate corrective rules. If ALJ decisions are heavily inconsistent, then large numbers of them are apparently wrong."<sup>140</sup> Arguably, then, if large numbers are

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<sup>138</sup> Gifford, *supra* note 45, at 1010.

<sup>139</sup> *Id.* at 1011.

<sup>140</sup> *Id.* at 1016-17.

wrong, why has the agency been reluctant to implement rules of procedure designed to streamline and facilitate the decisional process, effectively akin to those adopted by the Judicial Branch when it faced a similar impending crisis of cost and delay? Professor Gifford further observes:

[I]f the SSA can conclude that administrative law judges inconsistently decide similar cases, the SSA may be able to reduce the issues to written form and provide for the resolution of those issues by rule. In short, the very ability of the SSA to identify inconsistencies in ALJ decisionmaking suggests that those inconsistencies could be reduced through increased rulemaking.<sup>141</sup>

In the years since Professor Gifford's writings, the agency has continued to employ "quality control programs and other management techniques."<sup>142</sup> It has done so despite repeated audits by the GAO demonstrating that SSA's "techniques" have not worked, and continues in this path to the present time. In Professor Gifford's words, "This novel approach to mass adjudication has forced a new and more precise examination of the extent to which management techniques can properly be classified as part of the policy control which belongs to the agency."<sup>143</sup>

In 2003 the Honorable Robin Arzt, serving as an administrative law judge with the SSA, in a comprehensive analytical writing, proposed what is virtually a blueprint for a new, separate adjudicatory agency to hear and decide Social Security disability appeals. She terms this agency the "United States Office of Hearings and Appeals (USOHA)."<sup>144</sup> She proposed an adjudicatory agency having

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<sup>141</sup> *Id.* at 1017.

<sup>142</sup> *Id.* at 1011.

<sup>143</sup> *Id.*

<sup>144</sup> Robin J. Arzt, Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 269 (2003) (internal quotations marks omitted).



exclusive jurisdiction to make the final administrative decisions of Social Security Act Titles II, XVI and XVIII benefits claims. The USOHA would have permissive jurisdiction over other classes of cases, so it may hear and decide other classes of cases such as those that the SSA ALJs have heard in the past. The final administrative adjudication authority of SSA and [the Department of Health and Human Services (DHHS)] would be abolished, including the SSA Appeals Council and DHHS Medicare Appeals Council.<sup>145</sup>

Judge Arzt also proposed:

An individual ALJ's decision would be appealed to appellate panel staffed by ALJs, which would consist of three ALJs who would review the cases locally. The ALJ appellate panels would be akin to the United States Bankruptcy Court appellate panels. . .

The final decisions of the USOHA would be appealable only to the federal courts, with the District Courts as the first step in the judicial review.<sup>146</sup>

Notably, Judge Arzt proposes agency independence through appointment of a “Chief Administrative Law Judge . . . by the President from the ranks of the ALJs.”<sup>147</sup> A critical hallmark of such an independent adjudicatory agency is the ability of such a body to do what the agency has not to this point been able to accomplish: “The USOHA would set its own rules of practice and procedure and the ALJs would administer the agency.”<sup>148</sup> She argues the need for such an independent agency as predicated on a recognized need for effective adjudicatory functioning free from political or policy concerns-- issues that now plague the agency:

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<sup>145</sup> *Id.* at 274.

<sup>146</sup> *Id.* at 274-75.

<sup>147</sup> *Id.* at 275.

<sup>148</sup> *Id.*

There is an inherent, and often real, conflict between (1) the need for independent and impartial appellate administrative decisionmakers and decisions, and (2) Executive Branch agency policymakers' desire to control the decisionmakers and the outcome of their decisions to conform to policy and political concerns. This conflict results in agency policymakers' intrusions into the administrative adjudication function.

Many of the same rationales that justify Congress' creation of specialized independent Article I courts to perform the initial judicial review of final administrative decisions by Executive Branch agencies also support the separation of the appellate administrative adjudication function from Executive Branch agencies. This is done to promote decisional independence from the agencies' policymaking/rulemaking, prosecutorial/enforcement and investigatory functions.<sup>149</sup>

Judge Arzt cites to other, similar legislation by Congress, including the establishment of the U.S. Tax Court, the Court of Appeals for Veterans Claims, as well as congressional action to create the Board of Tax Appeals “to provide an independent tribunal to hear taxpayers' appeals from tax deficiency notices before payment of the tax after a Congressionally created board studied the IRS appellate review practices.” That board concluded:

[I]t would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a

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<sup>149</sup> *Id.* at 279.

judicial tribunal.<sup>150</sup>

A similar rationale, she argues, applies here. Furthermore, in a mass-justice system such as the Social Security disability appeals system, which literally decides hundreds of thousands of cases annually, the policymaking function often times served by administrative law judges through adjudicatory decisionmaking is absent. Such absence effectively moots the need for continued agency oversight of the adjudicatory function, since no policymaking function is thereby served.

[W]hen an agency no longer formulates policy through its adjudication function but does so only through rulemaking, which is the case for SSA and [DHHS Centers for Medicare and Medicaid Services], supervision of the appellate administrative adjudicators and review of their decisions by policy-making political appointees has no reason to continue. At that point, there is no reason to keep the adjudicatory function within the agency.<sup>151</sup>

Others agree, noting that “[i]n the benefit agencies, the efficient disposition of a large volume of benefit claims demands the use of relatively precise standards, whose applications do not raise significant policy issues.”<sup>152</sup> Mass-justice systems such as SSA do not formulate policy through adjudicatory decisionmaking, rendering even more significant the agency's failure to implement comprehensive rules of hearing procedure:

In a mass-justice agency, adjudication is unsuited for use as a vehicle for announcing or formulating policy. The cases come too fast and in too great a volume for decisionmakers to look to other cases as guides; sorting out, distinguishing or following large

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<sup>150</sup> *Id.* at 279-80 (alteration in original) (quoting H.R. Rep. No. 68-103, at 4 (1923)).

<sup>151</sup> *Id.* at 280-81.

<sup>152</sup> Gifford, *supra* note 45, at 997.

volumes of cases whose holdings are necessarily circumscribed by their unique factual configurations is impractical. Thus, in a mass-justice agency, the agency head does not rely on adjudication to control policy and, accordingly, does not sit as a final adjudicator. Moreover, the removal of the agency head from control of adjudication is fully consistent with the agency head's policy responsibility because no individual case is programmatically salient. The agency head is not concerned with the disposition of any one case, but with the policies applied to large classes of cases.<sup>153</sup>

The question is not an issue of judicial independence, for the administrative law judge is indeed a creature of the APA, which in turn defines the administrative law judge function as a derivative one.<sup>154</sup> Rather, the question for the agency and for Congress is an issue of effective functioning--of carrying the congressional mandate embodied within the Social Security Act forward in a meaningfully timely manner. Judge Arzt critically notes that the proposed USOHA should properly be a part of the agency, but with direct lines of authority equivalent to the Commissioner with a presidentially appointed chief administrative law judge endowed with the ability to formulate rules of procedure necessary for effective adjudication.<sup>155</sup> The functional purpose of such an adjudicative agency is to free the administrative judiciary within the agency from the miasma of policies, programs, and initiatives that, having been repeatedly tried, have not succeeded in addressing a decades-long mounting backlog.

Administrative law judges, tasked with the need to hear and decide can effectively construct and administer a system of hearings and appeals consistent with their professional worldview, experience, training, and expertise. The ability to accomplish what, to date, the agency has failed to do--establish rules of procedure--would significantly enhance proactive case management by administrative law judges who, like their Article III brethren, could become

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<sup>153</sup> *Id.* (footnotes omitted).

<sup>154</sup> See generally Moliterno, *supra* note 137, at 1191.

<sup>155</sup> Arzt, *supra* note 144, at 274.

involved in a case from the outset of the appeal, furthering a far more timely resolution than currently exists. Many case management techniques can be employed to enhance the decisionmaking process, even in the hybrid jurisprudence now framed as nonadversarial by existing agency regulation.<sup>156</sup> Meaningful judicial case management requires no less.

## V. FROM HERE, WHERE?

The wheel has effectively turned full circle. In 1989 the problem, as defined by SSA and recounted by the GAO, was a question of consistency between the judges and the agency. The so-called Bellmon review catapulted the agency and its administrative law judges into federal court with allegations by the agency of erroneous decisions on the part of the judges and claims by administrative law judges of infringement of judicial independence--accompanied by an allegation that a Senior Executive Service bonus provision was tied to a reduction in administrative law judge "reversals."<sup>157</sup>

In 2012, the question asked by the agency is now not so concerned with consistency as it is with numbers. How many decisions can an administrative law judge decide? The 2008 Report references Commissioner Astrue's statement that judges have now been asked to decide between 500 and 700 cases annually.<sup>158</sup> This is an increase in expectations that many judges have attempted to meet with varying degrees of success depending on staffing, scheduling, and accounting for the individual differences in complexity each case brings. Judges have further noted that a statistically significant number of cases have little to do with disability per se, being instead issues of overpayment, appeals on nonmedical entitlement issues (such as income and resources), and issues relating to retirement.

While it would be a welcome end to say that a solution was reached and the agency and administrative law judges are working together in much the same fashion as did the courts with members of

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<sup>156</sup> 20 C.F.R. §404.900(b) (2011).

<sup>157</sup> See GAO/HRD-89-48BR, Required Reviews, *supra* note 46.

<sup>158</sup> See OIG Report, *supra* note 118, at 6 n.29 ("SSA has asserted that ALJs should be able to process 500 to 700 cases annually," according to Michael J. Astrue, Commissioner of Social Security).

the bar and Congress in implementing the CJRA, such has not been and is not now the case. Instead, the manner in which the administrative law judge functions has remained almost unchanged, apart from the request for and production of increasing numbers of dispositions. No broad-sweeping procedural changes have been implemented that would allow a judge to become involved in a case upon the filing of a Request for Hearing; nor, in fact, have any rules of procedure actually been enacted.

Remarkably, with the difficulties illustrated by the Bellmon review and the long-standing debate over the meaning and scope of decisional independence, the administrative law judge remains at the center of the solution to the backlog crisis, though little has been done to enhance the judicial role or function in the hearings process. The current configuration is, functionally, a counter-evolutionary or retrograde step back from 1989, reflecting the removal of individual judicial staffing. The current hearing office configuration also reflects changes following the Hearing Process Improvement initiative, with a further refinement of pooled staffing into administrative groups headed by a group supervisor, potentially further distancing the judge from support staff. As the Figure below clearly shows, the administrative law judge has no direct supervision over support staff.

Figure 1<sup>159</sup> depicts the current hearing office configuration:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS  
POINT IS OMMITTED

The hearings process is depicted by the GAO at Figure 2:<sup>160</sup>

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS  
POINT IS OMMITTED

The “hearings level” description in Figure 2 describes only three administrative law judge activities:

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<sup>159</sup> See *id.* at Appendix C.

<sup>160</sup> U.S. Gov't Accountability Office, GAO-08-1053, Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog 6 (2009).

- Administrative law judge prehearing review;
- Administrative law judge conduct of a hearing; and
- Administrative law judge issuance of a decision (which may or may not be written by the issuing judge).

No in-depth study has been conducted to mirror that called for by the CJRA, examining the hearings process and the procedures by which the administrative law judge functions. No study has examined the potential role of the administrative law judge in nonadversarial versus adversarial jurisprudence; nor has any comparative study been undertaken to determine if additional benefit can be derived from assigning a case to a judge from the time it is filed--that is, from the time a request for hearing before an administrative law judge is made.

The evident assumption in the ensuing silence is that the administrative law judge is only to hear and decide the case when it is before him or her for decision. Thus, the only contemplated judicial activity prior to a hearing is to read (review) the case file once it is assigned for hearing. Once a case is assigned to a judge, he or she may also indicate whether prehearing case development is necessary, either in the form of obtaining records or scheduling consultative examinations, or may, after a hearing, order such examinations.

These activities occur within the narrow time frame, comparatively speaking, that by definition comes at the relative end of the life of the case once it is pending at ODAR. Figure 3 diagrammatically depicts the life of a case and the narrow role of the administrative law judge (the superimposed triangle) in that life.

Figure 3:

TABULAR OR GRAPHIC MATERIAL OMITTED

The inverted cone in Figure 3 illustrates the narrow scope of judicial involvement at the end of the life of the case before ODAR--and stands in contrast to a depiction of judicial involvement in a case before the federal courts, as shown in Figure 4:

TABULAR OR GRAPHIC MATERIAL OMITTED

Failing to provide innovation and creativity in the conduct of the hearings process, when coupled with a reluctance to address even basic questions, such as closing the record to the post-hearing receipt of evidence, much less formulation of a comprehensive set of rules of procedure,<sup>161</sup> reduces the mandate of greater productivity to a simple command to “pedal faster.”

The agency's administrative judiciary is keenly aware of the backlog and of the human price paid for delay, and has endeavored to redress the situation with increasing case dispositions working within the existing infrastructure. This is far from ideal. Instead, there is, and has been, a continuing need for comprehensive reform of the scope and breadth as was undertaken by Congress with the passage of the CJRA. The agency has been aware of and has been attempting to redress the backlog crisis since the late 1980s. It has not succeeded. Despite the expenditure of millions of dollars, no actions have been taken to empower the federal administrative judiciary to parallel the revolution in judicial management in the federal courts. However, it stands undisputed that the agency's administrative adjudicatory system is the largest of its kind in the world.

Standing as a gleaming example of a successful attack on the burden of cost and delay is the success of the CJRA. It has been an effective mechanism for reduction of cost and delay in the federal courts. Despite this, no hue and cry has been raised for SSA to implement the same unique innovation undertaken to avert spiraling cost and delay facing the federal courts in 1989. The growing delay

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<sup>161</sup> Some arguments have been made by representatives or claimants' organizations that to “close the record” or develop enforceable rules of procedure would somehow harm claimants. In truth, are they not harmed to a greater extent having to wait? Given that more than 80% of all claimants are now represented by counsel who are by definition equipped to deal with the requirements of such rules, little actual harm can be foreseen. Instead, the absence of rules of procedure signal a lack of accountability for representatives and leave open a hearings process which can only benefit from innovative and creative procedural rules designed to accomplish here what the Civil Justice Reform Act and its progeny have done for the federal courts. Is it possible to decide a case without a full hearing? The answer is yes. Should we discuss whether a non-adversarial jurisprudence continues as the best course in light of overwhelming representation in today's system? The answer is yes. Should comprehensive rules of procedure be established to ensure a case is ready for hearing if a hearing is required? The answer, again, is yes.



and costs in the federal courts were of such magnitude as to cause then-Senator Biden to call for congressional action in the passage of the CJRA as necessary to “grant federal courts the requisite autonomy, resources, and direction to bring about systemic reform and to solve the mounting crisis of litigation costs and delays.”<sup>162</sup>

More than business as usual is required to save the Nation's system of disability appeals. The inertia of past practices and documented animus must be overcome and creative measures employed in the framing of a renewed decisionmaking paradigm. Both the agency and its cadre of administrative law judges must embrace the call of the Social Security Advisory Board to change SSA's relationship with its administrative law judges from “one of confrontation to cooperation.”<sup>163</sup> In the highest ideals of public service, to serve the American people, it is time to empower the federal administrative judiciary--talented, capable, highly motivated men and women, dedicated to public service--and allow them the same opportunity to employ equal, if not greater, measures of creativity and judicial innovation witnessed during the past twenty years in the federal courts.

All this will not be finished in the first hundred days. Nor will it be finished in the first thousand days, nor in the life of this administration, nor even perhaps in our lifetime on this planet. But let us begin.

–John Fitzgerald Kennedy,  
35th President (1961-1963).<sup>164</sup>

#### APPENDIX I: THROUGH THE EYES OF THE GAO—SUMMARY OF KEY GAO REPORTS

Collected key GAO reports addressing the backlog of disability appeals cases reflect a growing caseload punctuated with repeated

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<sup>162</sup> Biden, *supra* note 1, at 1286.

<sup>163</sup> Soc. Sec. Advisory Bd., *Charting the Future of Social Security's Disability Programs: The Need for Fundamental Change* 19 (2001).

<sup>164</sup> Inaugural Address, 1 Pub. Papers 1, 2 (Jan. 20, 1961).

attempts by the agency to “plug the gap,” with little success.

#### GAO Report 02-322

A 2002 report characterizes the agency's actions as “disappointing,” examining four agency efforts that the GAO found had only limited or no success:

SSA has implemented four of the five disability claims process initiatives either nationwide or within selected geographic locations. As summarized below, the improvements realized through their implementation have, in general, been disappointing.

- The Disability Claim Manager Initiative. This initiative was completed in June 2001. Results of the pilot test, which was done at 36 locations in 15 states beginning in November 1999, were mixed; claims were processed faster and customer and employee satisfaction improved, but administrative costs were substantially higher. An SSA evaluation of the test concluded that the overall results were not compelling enough to warrant additional testing or implementation of the Disability Claim Manager at this time.

- The Prototype. This initiative was implemented in 10 states in October 1999 and continues to operate only in these states. Preliminary results indicate that the Prototype is moving in the direction of meeting its objective of ensuring that legitimate claims are awarded as early in the process as possible. Compared with their non-Prototype counterparts, the DDSs [disability determination services] operating under the Prototype are awarding a higher percentage of claims at the initial decision level, while the overall accuracy of their decisions is comparable with the accuracy of decisions made under the traditional process. In addition, when DDSs operating under the Prototype deny claims, appeals reach a hearing office about 70 days faster than under the traditional process because the Prototype eliminates the reconsideration step in the appeals process. However, according to SSA, more denied claimants would appeal to administrative law judges under the Prototype than under the traditional process. More appeals would result in additional claimants waiting significantly longer for final agency decisions on their claims, and would increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. It

would also result in higher administrative costs under the Prototype than under the traditional process. More appeals would also result in more awards from administrative law judges and overall and higher benefit costs under the Prototype than under the traditional process. Because of this, SSA acknowledged in December 2001 that it would not extend the Prototype to additional states in its current form. During the next several months, SSA plans to reexamine the Prototype to determine what revisions are necessary to decrease overall processing time and to reduce its impact on costs before proceeding further.

- The Hearings Process Improvement Initiative. This initiative was implemented nationwide in 2000. The initiative has not improved the timeliness of decisions on appeals; rather, it has slowed processing in hearings offices from 318 days to 336 days. As a result, the backlog of cases waiting to be processed has increased substantially and is rapidly approaching crisis levels. The initiative has suffered from problems associated with implementing large-scale changes too quickly without resolving known problems. SSA is currently studying the situation in hearing offices to determine what changes are needed.

- The Appeals Council Process Improvement Initiative. This initiative was implemented in fiscal year 2000 and has resulted in some improvements. While it fell short of achieving its goals, the time required to process a case in the Appeals Council has been reduced by 11 days to 447 days and the backlog of cases pending review has been reduced from 144,500 (fiscal year 1999) to 95,400 (fiscal year 2001). Larger improvements in processing times were limited by, among other things, automation problems and policy changes.

- The Quality Assurance Initiative. SSA's original (1994) plan to redesign the disability claims process called for SSA to undertake a parallel effort to revamp its existing quality assurance system. However, because of considerable disagreement among internal and external stakeholders on how to accomplish this difficult objective, progress has been limited to a contractor's assessment of SSA's existing quality assurance practices. In March 2001, the contractor recommended that SSA adopt a broader vision of quality

management, which would entail a significant overhaul of SSA's existing system. SSA established a work group to respond to the contractor report, but no specific proposals have yet been submitted to the Commissioner for approval.<sup>165</sup>

#### GAO Report 08-40

In a December 2007 report, the GAO even assesses the agency with responsibility for making the situation worse:

While backlogs in processing disability claims have plagued SSA for many years, several factors have contributed to their increase in the last decade including substantial growth in initial applications, staff losses, and management weaknesses. . . . 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.<sup>166</sup>

The backlog has been present and growing for more than a quarter century. Even the court in *Nash v. Bowen* couched its comments in light of the backlog, commenting: "Moreover, in view of the significant backlog of cases, it was not unreasonable to expect administrative law judges to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required

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<sup>165</sup> GAO-02-322, *Disappointing Results*, *supra* note 56, at 3-4.

<sup>166</sup> GAO-08-40, *Better Planning*, *supra* note 5, at 3-4.

no less.”<sup>167</sup>

#### GAO-02-552-T

Though the hearings backlog is longstanding, the manner in which judges conduct hearings has not changed. A 2004 GAO report echoes both the issues of increased cost and undue delay that were the subject of the CJRA, but to date have not been successfully addressed by the agency:

SSA has experienced difficulty managing its complex disability determination process, and consequently faces problems in ensuring the timeliness, accuracy, and consistency of its disability decisions. Although SSA has made some gains in the short term in improving the timeliness of its decisions, the Commissioner has noted that it still has “a long way to go.” Over the past 5 years, SSA has slightly reduced the average time it takes to obtain a decision on an initial claim from 105 days in fiscal year 1999 to 97 days in fiscal year 2003, and significantly reduced the average time it takes the Appeals Council to consider an appeal of a hearing decision from 458 to 294 days over the same period. However, the average time it takes to receive a decision at the hearings level has increased by almost a month over the same period, from 316 days to 344 days. According to SSA’s strategic plan, these delays place a significant burden on applicants and their families and an enormous drain on agency resources.

Lengthy processing times have contributed to a large number of pending claims at both the initial and hearings levels. While the number of initial disability claims pending has risen more than 25 percent over the last 5 years, from about 458,000 in fiscal year 1999 to about 582,000 in fiscal year 2003, the number of pending hearings has increased almost 90 percent

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<sup>167</sup> 869 F.2d 675, 681 (1989).

over the same time period, from about 312,000 to over 591,000. Some cases that are in the queue for a decision have been pending for a long time. For example, of the 499,000 cases pending in June 2002 at the hearings level, about 346,000 (69 percent) were over 120 days old, 167,000 (33 percent) were over 270 days old, and 88,500 (18 percent) were over 365 days old.<sup>168</sup>

#### GAO Report GAO/T-HEHS-97-118

A 1997 report summarizes the many earlier reports in a characteristically similar straightforward manner: “Despite SSA attempts to reduce the backlog through its [Short Term Disability Project Plan (STDP)] initiatives, the agency did not reach its goal of reducing this backlog to 375,000 by December 1996.”<sup>169</sup>

In short, a long series of GAO reports and findings, when considered together with the various statements of agency officials, paints a frighteningly simple picture of repeated complex initiatives (e.g., STDP--short term disability project), process improvements (e.g., HPI--hearing process improvement), and a string of alternative decisionmakers (the adjudication officer, the senior attorney, the federal reviewing official, and similar denominations of nonjudicial personnel)—all to little or no avail, despite the expenditure of tens of millions of dollars. And, while hindsight is twenty-twenty, the public, the agency, and members of Congress stand not now looking back over twenty-five years for the first time, but having done so with the eyes of many who have looked and seen similar views over many years. The gaze of members of Congress, high ranking officials, and the tenure of multiple Commissioners have seen the problems, heard the testimony, and witnessed the result.

Still, the backlog persists.

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<sup>168</sup> U.S. Gov't Accounting Office, GAO-02-552T, *Social Security Disability: Commissioner Proposes Strategy To Improve The Claims Process, But Faces Implementation Challenges* 3-4 (2004).

<sup>169</sup> U.S. Gov't Accounting Office, GAO/T-HEHS-97-118, *Social Security Disability: SSA Actions To Reduce Backlogs And Achieve More Consistent Decisions Deserve High Priority* 3 (1997).

APPENDIX II: TWENTY YEARS OF SELECTED GAO FINDINGS ON THE  
SOCIAL SECURITY ADMINISTRATION BACKLOG (1989–2009)

The Bellmon Review--GAO Letter to the Chairman of  
the Social Security Subcommittee of the House  
Committee on Ways and Means, Regarding  
Suggestions on Ways to Make the Social Security  
Appeals Process Less Burdensome

Citation: U.S. Gov't Accountability Office, GAO-HRD-89-  
48BR, Results of Required Reviews of Administrative Law Judge  
Decisions (1989), [http:// archive.gao.gov/d25t7/139091.pdf](http://archive.gao.gov/d25t7/139091.pdf).

This article assesses the merits of the Bellmon Review. It finds  
that while the reviews appear to be cost effective, they also delay the  
payment of benefits and, overall, do not appear to have much value.

GAO Report to the Chairman of the Social Security  
Subcommittee of the House Committee on Ways and  
Means

Citation: U.S. Gov't Accountability Office, GAO-HRD-90-15,  
Many Administrative Law Judges Oppose Productivity Initiatives  
(1989), [http:// www.gao.gov/assets/150/148485.pdf](http://www.gao.gov/assets/150/148485.pdf).

In a report that attempted to determine what caused the recent  
conflicts between OHA management and administrative law judges,  
GAO found that such conflicts centered around management's  
attempts to increase administrative law judges' production  
levels. The study further found that the reduction in the number of  
administrative law judges was warranted for a four-year period  
because of a sharp drop-off in the number of appeals. However,  
OHA should have rehired more ALJs when the number of appeals  
climbed back to its previous high levels.

1995

GAO Testimony of Jane L. Ross, Director, Income  
Security Issues, Health, Education, and Human  
Services Division, Before the Social Security  
Subcommittee of the House Committee on Ways and  
Means

Citation: U.S. Gov't Accountability Office, GAO/T-HEHS-95-233, Social Security Disability: Management Action and Program Redesign Needed to Address Long-Standing Problems (1995), <http://www.gao.gov/assets/110/106213.pdf>.

In this testimony, Jane Ross addressed three areas of concern about SSA management: (1) “improving the timeliness and consistency of disability decisions”; (2) “helping more people reduce their dependence on cash benefits”; and (3) “ensuring that benefits are going only to those least able to work.”

1996

GAO Report to the Ranking Minority Member,  
Committee on Ways and Means, House of  
Representatives

Citation: U.S. Gov't Accountability Office, GAO/HEHS-96-87, Backlog Reduction Efforts Underway: Significant Challenges Remain (1996), <http://www.gao.gov/archive/1996/he96087.pdf>.

The report assesses the growing difficulty SSA faces with respect to the growing backlog of cases awaiting a hearing decision. The report finds that the backlog results from “(1) multiple levels of claims development and decision-making, (2) fragmented program accountability, (3) decisional disparities between DDS and OHA adjudicators, and (4) SSA's failure to define and communicate its management authority over the ALJs.”

GAO Report to the Chairman of the Social Security  
Subcommittee of the House Committee on Ways and  
Means

Citation: U.S. Gov't Accountability Office, GAO/HEHS 96-170, SSA Disability Redesign: More Testing Needed to Assess Feasibility of New Claim Manager Position (1996), <http://www.gao.gov/archive/1996/he96170.pdf>.

The report evaluates the concerns that come along with the creation of a new position, the disability claim manager. The report finds that SSA would benefit by increasing efficiency, better addressing claimant needs, and reducing processing time. However,



the report concedes that no test conducted to assess the feasibility of the new position can be truly accurate at this time.

Testimony Before the Social Security Subcommittee  
of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO/T-HEHS-96-211, SSA Disability Reengineering: Project Magnitude and Complexity Impede Implementation (1996), <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-T-HEHS-96-211/pdf/GAOREPORTS-T-HEHS-96-211.pdf>.

The report provides information on SSA's proposal to redesign its disability claims process. Specifically, it assesses SSA's vision and progress for the redesign, the issues related to the scope and complexity of the redesign, and SSA's efforts to maintain stakeholder support. The report finds that while the redesign can reduce costs, save time, and improve the quality of service, the scope of the redesign's initiatives may jeopardize the likelihood of accomplishing the goals of the redesign.

GAO Report to the Chairman of the Social Security  
Subcommittee of the House Committee on Ways and  
Means

Citation: U.S. Gov't Accountability Office, GAO/HEHS-97-20, SSA Disability Redesign, Focus Needed on Initiatives Most Crucial to Reducing Costs and Time (1996), <http://www.gao.gov/archive/1997/he97020.pdf>.

This report studies the impact of reengineering, which is a process used by various organizations “as a means to identify and quickly put in place dramatic improvements.”

1997

Testimony Before the Social Security Subcommittee  
of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO/T-HEHS-97-118, Social Security Disability: SSA Actions to Reduce Backlogs and Achieve More Consistent Decisions Deserving High Priority (1997),

[http:// www.gao.gov/archive/1997/he97118t.pdf](http://www.gao.gov/archive/1997/he97118t.pdf).

Jane L. Ross, the Director of Income Security Issues at the Health, Education, and Human Services Division, testifies on the actions SSA undertook as they relate to SSA's management of its Disability Insurance and Supplemental Security Income programs. Ross testifies that the actions resulted in the development of plans that generally improved the management of its programs.

1999

Testimony Before the Subcommittee on Human Resources and the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

Citation: U.S. Gov't Accountability Office, GAO/OCG-99-20, Major Management Challenges and Program Risks: Social Security Administration (1999).

This report discusses the corrective actions SSA has undertaken to address major performance and management challenges, which have hampered the effectiveness of SSA. While SSA has recently developed goals for improving its management, this report emphasizes that the “agency must take actions to address the root causes of its management and performance weaknesses and ensure sustained management oversight and attention.”

GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO/HEHS-99-25, SSA Disability Redesign: Actions Needed to Enhance Future Progress (1999), [http:// www.gao.gov/archive/1999/he99025.pdf](http://www.gao.gov/archive/1999/he99025.pdf).

The report assesses SSA's efforts to redesign the disability claims process and identify actions that SSA can take to better ensure future progress. The report finds that while SSA has made progress overall, it has yet to meet most of its milestones for testing and implementing its initiatives.

GAO Report to the Chairman of the Social Security

Subcommittee of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO/HEHS-99-50R, Social Security: Review of Disability Representatives (1999), <http://archive.gao.gov/paprpdf2/161794.pdf>.

This report assesses “(1) the extent to which disability representatives contribute to decisional delays, (2) other potential reasons for decisional delays, and (3) additional options available to SSA to ensure that disability decisions are reached in a more timely manner.”

2001

GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO-01-261, Major Management Problems and Program Risks: Social Security Administration (2001), <http://www.gao.gov/pas/2001/d01261.pdf>.

“This report addresses the major performance and accountability challenges facing” SSA. This analysis hopes to help the administration carry out its responsibility in a more efficient manner by suggesting that it use its research and policy development components to assist policymakers in addressing crucial policy issues.

2002

GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means

Citation: U.S. Gov't Accountability Office, GAO-02-322, Social Security Disability: Disappointing Results from SSA's Effort to Improve Disability Claims Process Warrant Immediate Attention (2002), <http://www.gao.gov/new.items/d02322.pdf>.

This report discusses five disability claims process initiatives, four of which have been implemented by SSA, and the disappointing

improvements they have achieved.

2003

GAO Report to the Chairman of the Social Security Subcommittee, Committee on Ways and Means, House of Representatives

Citation: U.S. Gov't Accountability Office, GAO-03-117, Major Management Challenges and Program Risks: Social Security Administration (2003), <http://www.gao.gov/cgi-bin/getrpt?GAO-03-117>.

In its analysis, the GAO recommends that modernizing the federal disability programs should be added to the 2003 high-risk list. The analysis implores that SSA continue “to strengthen the integrity of the SSI program [,] . . . [i]mprove SSA's programs that provide support for individuals with disabilities[,] . . . [b]etter position SSA for future service delivery challenges[, and] . . . [s]trengthen controls to protect the personal information SSA develops and maintains.”

2004

GAO Testimony Before the Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Governmental Affairs, U.S. Senate

Citation: U.S. Gov't Accountability Office, GAO-04-552-T, Social Security Disability: Commissioner Proposes Strategy To Improve the Claims Process, but Faces Implementation Challenges (2004), <http://www.gao.gov/assets/120/110762.pdf>.

This report finds that SSA is at a “crossroads” in its efforts to improve its disability claims process and attempts to provide guidance on how SSA can effectively move forward. In particular, the report critically assesses the viability of the Commissioner's strategy to overcome the agency's challenges.

GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and

## Means

Citation: U.S. Gov't Accountability Office, GAO-04-656, Social Security Administration: More Effort Needed To Assess Consistency of Disability Decisions (2004), <http://www.gao.gov/new.items/d04656.pdf>.

The report addresses a problem that has plagued SSA: inconsistency in its decisionmaking. The report examines “(1) the status of SSA's process unification initiative, (2) SSA's assessments of possible inconsistencies in decisions between adjudication levels, and (3) whether SSA's new proposal incorporates changes to improve consistency in decisions between adjudication levels.

## 2006

### GAO Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

Citation: U.S. Gov't Accountability Office, GAO-06-779-T, Social Security Administration: Agency Is Positioning Itself to Implement Its New Disability Determination Process but Key Facets are Still in Development (2006), <http://www.gao.gov/assets/120/114067.pdf>.

The SSA has designed and implemented a new disability determination process that essentially eliminates the Appeals Council. While there are concerns associated with this new initiative, the report notes that SSA has made substantial preparation for the successful implementation of its initiatives. The report takes into account the various comments in reaching its assessment.

## 2007

### GAO Report to Congressional Requesters

Citation: U.S. Gov't Accountability Office, GAO-08-40, Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs (2007), <http://www.gao.gov/new.items/d0840.pdf>.

The report makes recommendations to the SSA Commissioner to

improve the execution of its initiatives. The report identifies trends in Supplemental Security Income disability claims from 1997 to 2006. To identify the trends, the report reviews prior GAO reports, position papers, testimonies from national advocacy groups, agency documents, and interviews of SSA officials.

2008

#### GAO Report to Congressional Requesters

Citation: U.S. Gov't Accountability Office, GAO-08-1053, Social Security Disability: Management Controls Needed to Strengthen Demonstration Projects (2008), <http://www.gao.gov/new.items/d081053.pdf>.

This report recommends that “SSA establish written policies and procedures for managing and operating its projects consistent with standard research practices and internal control standards in the federal government.”

2009

#### GAO Report to Congressional Committees

Citation: U.S. Gov't Accountability Office, GAO-09-398, Social Security Disability: Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog (2009).

In 2007, SSA implemented “a plan for eliminating the hearing backlog.” In this report, “GAO (1) examined the Plan's potential to eliminate the hearings-level backlog, (2) determined the extent to which the plan included components of sound planning, and (3) identified potential unintended effects of the Plan on hearings-level operations and other aspects of the disability process.”