

## 8. Social Security: Restructuring Disability Adjudication

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### INTRODUCTION

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This paper proposes a restructuring of the Social Security Administration’s formal disability decision-making process so that it more closely functions similar to American courts (Kessler and Finkelstein 1988, 577).<sup>2</sup> By doing so, the current adjudicatory system will gain a significant measure of heretofore unattainable flexibility, enabling early resolution of claims by means other than hearing.

It is important at the outset to note that while the authors are keenly aware of the need for systemic reform in the fundamental definition of what it means to be “disabled,” that issue is beyond the scope of this proposal, which focuses on procedural/regulatory reform affecting the decision of disability claims appealed to federal administrative law judges (ALJs) within the Social Security Administration.

The initial part advanced in the proposal seeks transformation of the role of the Social Security Administration (the Agency) from that of an uninvolved non-party in the hearings and appeals process, to that of a “party,” directly represented and engaged in individual disability hearings before ALJs. Doing so would fundamentally reform the hearings and appeals process, opening now-closed lines of communication to both the Agency and claimant’s representative. These lines of communication enable early resolution of claims, either foregoing a hearing altogether or limiting the issues to be decided, streamlining the hearings process.

The second part of the proposal continues in the same vein as the first part proposing that the Agency be represented by counsel<sup>3</sup> operating out of the Office of General Counsel (OGC); a logical result given that OGC represents the Agency in appeals of these very decisions before the U.S. courts.

The third part of the proposal further builds on the first two calling for adoption of formal rules of disability practice and procedure before ALJs, thus filling a critical gap in caseload management and

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<sup>1</sup> The opinions and views expressed are those of the authors and do not represent any view, position, policy or policy statement, or finding of the U.S. Government or the Social Security Administration or any of its components.

<sup>2</sup> The authors note the emergence of the courthouse as a multi-functional institution, focused not on litigation *per se*, but upon dispute resolution by a number of means:

“Professor Frank E. A. Sander of Harvard Law School first articulated the multi-door courthouse concept in April 1976 at a conference convened by Chief Justice Warren Burger to address the problems faced by judges in the administration of justice. Professor Sander envisioned the courthouse of the future as a dispute resolution center offering an array of options for the resolution of legal disputes. Litigation would be one option among many including conciliation, mediation, arbitration, and ombudspeople.” (*Citations omitted.*)

<sup>3</sup> “Counsel” is inclusive of licensed attorneys as well as certified non-lawyer representatives—those who have taken the Social Security Certification Examination.

adjudication. The objective for the disability adjudicatory process should be as voiced by Rule 1 of the Federal Rules of Civil Procedure (FRCP),<sup>4</sup> recognizing in Rule 1: “the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay” (Coquillette 2014).

Next, we propose that the role of the Appeals Council (AC) of the Social Security Administration (SSA) be refocused consistent with recommendations of the Administrative Conference of the United States (ACUS). The role of the AC should be that of a limited appellate body, hearing appeals only where the decision raises significant issues of public policy or statutory/regulatory interpretation.

We then question the efficacy of rewarding representatives for delayed decision making. Under the current system, attorney fees are calculated as a percentage (25 percent) of the award of “past due” benefits. The longer the wait, the greater the attorney’s fee. Unfortunately, absent enforceable rules of practice and procedure, it is all too easy to engender delay. This practice runs contrary to the public policy that seeks to minimize delay, calling into question the efficacy of the current attorney’s fee calculation.

The last part of the proposal examines the now-antiquated and costly practice of reimbursing representatives for travel, including airfare, car rental, and lodging. Though there may once have been an understandable rationale for such reimbursements when there were only a few representatives who did this work, that day has come and gone. One need only survey the Internet to discover that disability representatives may literally be found throughout the United States. Should not a representative’s travel to represent his or her client be a business expense, borne by the representative and not the American people? Travel reimbursement encourages questionable practices, including the inability to meet with the claimant in advance of the hearing, as representatives travel a “circuit,” often appearing in multiple states in as many days, with little time to meet with a claimant before a hearing and resulting in unnecessary delay.

Finally, we lay out some Key Facts relating to this issue. An Appendix is also available on the SSDI Solutions website.

## **PROPOSAL**

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### **Recognition and Treatment of the Social Security Administration as a Formal “Present Party” to Administrative Adjudications before the Office of Disability Adjudication and Review**

The Social Security Administration should be made an actual “party” to the formal disability hearing. This is a critical first step in the creation of a flexible system of formal disability adjudication and decision making—one which contemplates resolution of pending hearings by means other than a full hearing. Current formal adjudication before an ALJ generally involves only an individual “party” who has received a reconsidered determination by the Agency.<sup>5</sup> No Agency or government representative appears. However, any other person may be made a “party” if he/she shows “in writing that his or

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<sup>4</sup> FRCP Rule 1 provides: “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

<sup>5</sup> See 20 CFR Part 404.

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her rights may be adversely affected by the hearing.”<sup>6</sup> The Agency is not, by definition a “party” and chooses not to appear. As discussed, *infra*, its failure to do so significantly erodes the potential to resolve a pending hearing other than by a hearing, a result at odds with the practice in virtually every other court system in the United States, where the overwhelming majority of pending cases are resolved without hearing or trial.

By definition, the Agency’s existing system of formal adjudication is solely designed to hear and decide cases, with only very limited opportunities to resolve appeals by other means. The adjudicatory process possesses little “flex” to function otherwise. That this is so is obvious from the current single-party configuration. No representative appears for the Agency, the only government entity present being the judge—who by virtue of his/her role as a neutral is not a party, though an argument can be made that (s)he is asked to engage in activity which mimics party status (Verkuil 1978, 258-329). Without the presence of the Agency as a party to the disability hearing, the adjudicatory system will remain rigidly committed to resolving the vast majority of pending hearings only by hearing. Except for a small percentage of pending hearings decided without hearing by senior attorney adjudicators (SAAs) and a relatively few “on-the-record” decisions by ALJs, the pending hearing must be held before the ALJ, as there is no other voice of the Agency present and able to intervene at any earlier point (SSA OIG 2011).<sup>7</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> The report succinctly points out that pending hearings before the Office of Disability Adjudication and Review (ODAR) are resolved by decision or dismissal in only three ways: by decision of an administrative law judge; by decision of a senior attorney adjudicator; or by dismissal.

The following is an excerpt from Table 1 of the cited OIG report, titled, *Pending Hearings Backlog Projections (Based on FY 2012 Budget)*. Senior attorney adjudicator dispositions are shown for Fiscal Year 2010, with projections declining slightly through FY 2013. However, despite the small decline, the number is fairly consistent over time, decisions by SAAs representing the only other alternative by which to decide a pending hearing before an administrative law judge.

The OIG report further points out that SAA decisions represent less than 10 percent of case decisions, making it clear that the overwhelming majority of pending hearings must proceed in lockstep toward a hearing, with no other alternative for decision: “In FY 2010, SAAs issued 54,186 OTR [on the record, meaning, without hearing] decisions, representing about 7.3 percent of all dispositions.”

Workloads/Staffing	FY 2010 Actual	FY 2011 Projected	FY 2012 Projected	FY 2013 Projected
SAA Dispositions	54,186	53,200	49,200	48,600

That this is so is evident from the full Table, shown below. Case dispositions occur only by decisions by two ODAR actors: administrative law judges, who, by reason of the rigid single-track hearings procedure, may only decide a pending hearing by holding a hearing; or by senior attorney adjudicators who may only decide cases without a hearing, and then may only decide a pending hearing favorably. *See also*, Social Security Administration, Office of Inspector General: “Effects of the Senior Attorney Adjudicator Program on Hearing Workloads.” Report No. A-12-13-23002 (June 2013). An adverse decision may only be made by an administrative law judge, which, as noted, requires a hearing.

The only other mechanism for resolution of a pending hearing is a “dismissal,” and while a dismissal is not a decision, *per se*, such action nevertheless accounts for 15 percent of pending hearings resolved by ALJs.<sup>8</sup>

In contrast, a “flexible” decision-making system contemplates resolution of a significant number of pending hearings by more than one means, often much earlier. Such has been the evolution of the state and federal courts, termed the “multi-door courthouse.” The benefit and the rationale supportive of the “multi-door courthouse” are immediately apparent and equally applicable to disability decision making. As Judge Kessler, then Supervising Judge, Superior Court of Multi-Door Dispute Resolution Program, District of Columbia, cogently observed (1988):

“For the court, accessible and workable alternatives would mean a reduction in the number of bench and jury trials and less congestion on court calendars. Certain cases would be processed more quickly, providing judges with more time to devote to the cases that require their attention and intervention.”

The first room in the “multi-door courthouse” is generally said to be a screening room, examining “the nature of the dispute, the parties’ relationship, the amount in dispute, the cost of each [alternative dispute resolution] process, and the speed of each process,” thereby “fitting the forum to the fuss” (Hedeem 2011, 941). Termed “differentiated case management” or “triage” (*Id.*), the purpose is to advance the case towards early resolution by pairing the dispute with the most efficacious decision-

**Table 1: OIG Pending Hearings Backlog Projections  
(Based on FY 2012 Budget)**

Workloads/ Staffing	FY 2010 Actual	FY 2011 Projected	FY 2012 Projected	FY 2013 Projected
Beginning Balance <sup>1</sup>	722,822	705,367	668,104	595,691
Projected Receipts <sup>2</sup>	720,161	777,300	751,700	682,600
ALJs Available <sup>3</sup>	1,154	1,285	1,319	1,313
ALJ Productivity <sup>4</sup>	2.38	2.37	2.35	2.34
Total ALJ Dispositions <sup>5</sup>	683,430	761,363	774,913	768,105
SAA Dispositions <sup>6</sup>	54,186	53,200	49,200	48,600
Total Dispositions <sup>7</sup>	737,616	814,563	830,708	826,553
Year-End Pending <sup>8</sup>	705,367	668,104	595,691	461,586

This number does not include dismissals of the *Request for Hearing*, where the claimant withdraws or abandons his/her *Request* or passes away. More precisely, “[i]n FY 2011, ODAR issued over 793,000 dispositions, of which approximately 740,000 were issued by ALJs and over 53,000 were issued by Attorney Adjudicators . . . Of the 740,000 dispositions issued by ALJs, approximately 629,000 dispositions resulted in an allowance or denial decision and the remaining 111,000 dispositions were dismissals of the hearing request. A hearing request can be dismissed for a variety of reasons, including failure of the claimant to appear at the hearing, the claimant choosing to withdraw the hearing request, or death of the claimant.” See 20 CFR Parts 404.957, 416.1457: *Dismissal of a Request for a Hearing Before an Administrative Law Judge* (2015). See also, Social Security Administration Office of the Inspector General: “The Social Security Administration’s Review of Administrative Law Judges’ Decisions.” Report No. A-07-12-21234 (March 2012). See further still Social Security Administration Office of the Inspector General: “Hearing Request Dismissals.” Report No. A-07-10-21049 (July 2010).

<sup>8</sup> In calendar year 2011, per the 2012 OIG report, *supra*, note 6, administrative law judges disposed of 740,000 pending hearings; of which 111,000 were dismissals. Thus, of the total number of pending hearings resolved by administrative law judges, 15 percent were by reason of dismissal, that is,  $[744,000/111,000 = 15 \text{ percent}]$  and the balance of 629,000 were decided only after a hearing. This means that only 23 percent of pending hearings were resolved by other than a hearing, such that SAA decisions = 7.3 percent; and dismissals = 15 percent. This stands in marked contrast with the cases resolved other than by trial in the United States courts (70 percent).

making/dispute-resolution process. The principle is equally applicable to Social Security disability decision making, were there to be a “present party” in person of the Social Security Administration.

The concept of the “*present party*” (hereafter, the *PreP*) contemplates *two parties* to every disability hearing: the claimant who seeks an award of benefits and the *PreP*, representing the Agency. This straightforward adjustment to the disability juridical paradigm has the effect of returning the administrative law judge to his/her traditional role as an American judge, at all times a passive, neutral decision maker—longstanding traditional hallmarks of Anglo-American adversarial jurisprudence. However direct this seems, this result does not end the discussion. Why? Because the presence of the Agency in the disability hearing sets the stage for flexibility in judicial decision making, enabling a significant number of pending hearings to be decided by ALJs without hearing, or, with a limited hearing, and likely well before they might otherwise have been resolved. Apart from a relatively few on-the-record (OTR) decisions, the administrative law judge makes no decision absent a hearing (keeping in mind, a dismissal is not a decision).<sup>9</sup>

The near-exponential rise in the filing of new disability claims, with attendant increases in the number of hearings pending, serves to spotlight the inherent *rigidity* or lack of flexibility of the current system of hearings and appeals. The *PreP* heralds a fundamental change in the currently rigid disability system of hearings and appeals, bringing to it the heretofore-absent ability to “flex.” In taking his/her place on stage, the Agency’s representative ends the conveyor-belt jurisprudence reminiscent of the *I Love Lucy* skit in which Lucy and Ethel find themselves working at a chocolate conveyor belt on which masses of chocolates proceed implacably faster and ever-faster still, overwhelming the two friends in a smeared chocolaty deluge.

Put another way, the presence of the *PreP* is the difference between a 1954 Schwinn bicycle cruiser *Wasp* and a 2015 Schwinn bicycle racer *Fastback 2 Mens*. Faced with an uphill climb, the 1954 *Wasp* depends solely on increased effort from the rider, the single chain-driven gear offering no other options. The steeper the grade, the harder the rider must work, and the slower (s)he proceeds. The only other choice is to dismount the bike and walk, ensuring even greater delay. The 2015 *Fastback 2 Mens*, on the other hand, employs variable gearing ratios, maximizing the rider’s effort, ensuring a constant rate of climb, negating the adversity of the steeper grade, and allowing the rider to maintain his/her pace with the same relative effort, despite the rising road. The improved functioning in the more recent model is analogous to the nature of the proposal made here.

## PROPOSAL TWO

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### **The “Flexible” Role of the *Present Party*: Agency Representation by Counsel Attached to the Office of General Counsel**

The addition of the Agency representative or *PreP* might appear in its configuration to be simply another expression of an adversarial system—this time in the context of disability decision making—criticized by many because of the image of potentially ill claimants “cross-examined” by prosecutorial-like government lawyers bent solely on winning. Nothing could be further from the truth, taking into account the history and conceptual underpinnings upon which the Social Security Administration was constructed. The *PreP* is the evolutionary successor to the referee/hearing examiner/ALJ, charged, as were his/her predecessors, to implement the goals, purposes and policies of the Agency, and

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<sup>9</sup> See 20 CFR Part 404.957, 416.1457.

indirectly, of Congress and the American people. In this, the *PreP* looks not to the heritage of the Anglo-American adversarial system, but to the uniquely conceived “procedural innovations” which birthed “the concept of the administrator as benign inquisitor” (Wolfe 2009, 29), a concept which found its way to the Social Security hearings process and which, as here proposed, is now bequeathed to the Agency representative or “present party.” In essence, the *PreP*’s role is to promote administrative justice for all parties in a disability proceeding.

Verkuil, in a 1978 law review citing his earlier 1940 work, pointed to the then “new rationale for the role of decision maker in the hearing process.” He points out: “the Board discussed the values to be achieved in an administrative hearing in terms of ‘simplicity and informality’ as well as ‘accuracy and fairness.’ It referred to a Social Security decision maker as a ‘referee’ or ‘social agent.’ This concept of the administrator as an agent for the public (working to ensure that the program goals are fulfilled) is different from the roles assigned to the common-law judge. The Social Security ‘referee’ thus emerges with a role that is independent of the judicial one” (Verkuil, 1978, 258-329).

In adopting this new role, “[t]he 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. The scope of the inquisitorial solution was not intended to be carried over to the civil or criminal process. But it did signal the kind of innovative thinking about administrative procedure that would ultimately lead to the emergence of an independent procedural model for administrative law” (Verkuil 1978).

The jurisprudential foundation underpinning this new administrative procedure called for a decision maker who was to make decisions designed to implement programmatic policy instead of one whose role was to administer “justice” as that term is recognized in traditional Anglo-American jurisprudence.

It is this history that colors the role of the Agency representative. The *PreP* or “present party” represents the Social Security Administration and in doing so does not undertake the role of an advocate whose charge is to “win,” charged instead as the Agency’s representative to ensure that the congressional mandate manifested in the Social Security Act be carried out. It is this responsibility which motivates and circumscribes the representative’s actions in his/her role as the “present party” to the disability hearing.<sup>10</sup> The representative advocates for the correct result, urging the grant of benefits as may be appropriate given the evidentiary record; or argues for affirmation of a previous denial, again, in accord with the evidentiary record. In any given appeal, the claimant might find a “present party” an ally or a skeptic, but in either case one who is nevertheless bound to fully develop the record, having inherited the duty of inquiry from the administrative law judge. In exercising such duty, the “present party” strives for the correct and just result in accord with Social Security Act.

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<sup>10</sup> Some might argue that this places the Agency representative or “present party” in an untenable role, as the Social Security Administration has previously denied benefits at both the initial and reconsideration determination stages. Two factors mitigate against such a conclusion. First, the task of reviewing the evidence at the initial and reconsideration stages is generally undertaken by the state disability determination service (DDS), under contract with the Social Security Administration. These early administrative determinations are thus not, strictly speaking, undertaken by the Agency itself. Second, it is well-settled that the passage of time generates new evidence; and the call of the “present party” or Agency representative is not to defend the Agency’s earlier determination, but to ensure on appeal to the administrative law judge that (s)he has fulfilled his/her duty to fully inquire, considering the question of the claimant’s entitlement in light of the most recent evidentiary record developed before the administrative law judge.

In 1982, the Social Security Administration gave notice of proposed rulemaking to establish the “Social Security Representation Project.” While seemingly similar, it was not, viewing the “representative” as an adjunct to the ALJ and not an independent actor/party. The 1982 program did *not* envision the Agency as a party to the disability hearing. The failed history of the program is well documented and need not be revisited here. For the reasons cited, herein, the proposal for an Agency representative in the form of a “present party” is a timely, essential step in addressing the pervasive ills that plague the disability program.

If, as one might argue, this is yet but another variation on the adversarial model, it is nevertheless a variation tempered by the history from which it arises. A “present party” is able to interact with the ALJ as an advocate for the correct result. In this role, the *PreP* argues for the Agency as an advocate of the Agency’s social and policy mandate under the Social Security Act, its implementing regulations, and corresponding policy interpretations. This role does not conjure up inherently negative visions as some have argued, though it does move the process to more closely resemble the adversarial model. Still, this is not an undesirable result. Consider the words of legal philosopher Professor Lon Fuller (1971):

Despite its flaws, the adversarial model is preferable to the inquisitorial model. The inquisitorial model places on judges the potentially conflicting roles of fact finder and decision maker. This burden unavoidably allows biases and prejudicial influences to unfairly prejudice results. The wisdom of the adversary process is in placing potentially conflicting tasks on the participants best suited to their discharge [footnotes omitted].

In a study designed to test this very hypothesis, Thibaut, Walker, & Linds (1972, 393) constructed an experimental system designed to replicate both the adversarial and inquisitorial models. They conclude that “the most important result of the experiment is some empirical support for the general claim advanced by Fuller that an adversary presentation significantly counteracts decision-maker bias. The overall significant effect on final judgments exercised by the biasing experience lays the substructure for this empirical result.” They further concluded:

In the adversary mode, the choice alternatives are given a special salience through their physical separation and embodiment in the counterpoised adversary roles. The decision maker is presented with a clear opposition of viewpoints that dramatizes the act of choosing. In the inquisitorial mode, the act of choosing may be less clear. The decision maker may be influenced unobtrusively without ever being fully aware that choices are being foreclosed to him.

The Agency representative in the form of the “present party” or *PreP*, restores balance to the jurisprudential equation by ensuring a neutral, passive decision maker in the ALJ, while concurrently maintaining the duty to develop the record (a duty of inquiry) in the *PreP*. The benefits of the *PreP* as a flexible actor are several fold, outlined in *Table 1*. To maximize this flexibility the current attorney’s fee, presently contingent on “past due” benefits, should be revised so that a fee agreement rewards *early* hearing and/or resolution of the case.<sup>11</sup> Failure to effect this key change will adversely affect the flexible role of the *PreP*. The significance of much of this flexibility within the hearings process is that

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<sup>11</sup> As discussed in greater detail, *infra*, instead of being contingent on the award of “past due benefits”—thus, rewarding delay—a graduated fee should be instituted which is higher the earlier the case is presented. Alternately, a fee petition examining expertise, difficulty etc., should always be an option.

it need not be dependent on the ALJ, but occurs between counsel independently per the operation of (yet-to-be-adopted) rules of disability hearing procedure, much as now occurs in the state and federal courts.

Table 1

Flexible Roles of the <i>PreP</i> Upon a Request for Hearing	Duty of Inquiry	Duty of Representation	Hearing Advocacy	Case Resolution
	Early case management	Joint Case Management Order	Inquiry of claimant	Agreed Upon Decision before hearing with or without amended onset.
	Early evidentiary discovery	Assessment of outstanding issues	Inquiry of expert(s)	Agreed Upon Decision after hearing with or without amended onset.
	Early assessment for consultative examination (s).	Assessment for early disposition; nature and type of hearing, if a hearing is necessary.	Argument to the ALJ	Disputed Decision – Favorable to Claimant with no appeal permitted (after hearings) Disputed Decision – Favorable to Claimant with appeal permitted (after hearing)
				Disputed Decision – Unfavorable, No appeal permitted. Disputed Decision – Unfavorable, appeal permitted.

Thus, the benefit of the Agency representative or “*PreP*” in a disability hearing includes:

- Early case management with or without input from the judge;<sup>12</sup>
- Improved evidentiary development through early production of documentary evidence and addressing requests for consultative examination(s);
- Early review of the evidence for the purpose of determining the nature and type of hearing that will be needed, the estimated time needed for hearing, the need for expert or other witnesses;
- Potential for stipulation as to facts and legal issues to include amendments to alleged onset date and transferable skills from work history resulting in agreed-upon decision(s);
- Concurrence of parties as to readiness of case for hearing.

<sup>12</sup> Which necessarily requires early assignment of the case to the judge, contrary to current case assignment procedures in which cases are not generally assigned to judges except when a hearing docket has been set. As a result, under present processes, there is little time before the hearing for the judge to engage in any meaningful “case management.”



- Parties submitting proposed decision with recitation of issues, facts, findings and conclusion in accordance with established format to facilitate drafting a final decision.

At bottom, the Agency representative or “present party” benefits the claimant, enabling a range of activities designed to expedite hearings and appeals; and, where possible, to reach early decisions in substantial numbers of cases, leaving only those claims where there is a significant question, for hearing. With consideration for the mandates of the Administrative Procedure Act (APA)<sup>13</sup> and due process, the Agency representative or *PreP* should be attached to a Social Security Administration component outside of ODAR, ideally the Office of General Counsel, a uniquely qualified entity within the Social Security Administration, responsible for appeals to the federal courts, among other activities. This is consistent with OGC’s mission statement, and role as representative of the Agency in the United States courts.<sup>14</sup>

### **Adoption of Formal Rules of Procedure**

Conspicuously absent from the current Social Security disability hearing process are formal rules of practice and procedure governing the adjudication of disability claims. Adoption of formal rules of practice and procedure will prove beneficial both to the claimant and the Agency, establishing, among other things, clearly delineated paths to resolution of pending hearings by means other than hearing. Formal rules also include ascertainable deadlines governing both pre-hearing and hearing activity, including deadlines for the submission of evidence and for closing the record after hearing. Long delays plague the current hearings procedure, which lacks certitude and predictability with endemic delay.

Formal rules of practice and procedure promote efficiency and economy of resources. Procedural mechanisms must be in place that enable the parties to pursue flexible outcomes, not formally acknowledged under existing Social Security regulations. According to Professor Kevin Clermont (2009), the “nature of civil procedure,” is that it “observes both outcome and process values in establishing a process to resolve factual and legal disputes.”<sup>15</sup> It is precisely the absence of codified process values as expressed in a comprehensive body of procedural rules that now plagues the disability adjudicatory system.

In the context of disability hearings and appeals, it might be said that “civil procedure concerns society’s process for submitting and resolving factual and legal disputes over entitlement to the award of disability benefits under the Social Security Act and its implementing regulations.” Like Professor

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<sup>13</sup> The Administrative Procedure Act (APA) defines the scope of its reach as regards administrative adjudications when it provides at U.S. Code, Title 5, Section 554(a) that the act is applicable “in every case of adjudication required by statute to be determined on the record after opportunity for an Agency hearing.”

<sup>14</sup> The Social Security General Counsel Mission Statement provides, in-part:  
The Office of the General Counsel advises the Commissioner on legal matters, is responsible for providing all legal advice to the Commissioner, Deputy Commissioner, and all subordinate organizational components (except OIG) of SSA in connection with the operation and administration of SSA. Responsible for the policy formulation and decision making related to the collection, access, and disclosure of such information in the records of the Social Security Administration; and processing of Freedom of Information requests and appeals (under the Freedom of Information and Privacy Acts.

<sup>15</sup> Professor Clermont’s comments are clear: to carry into effect the substantive law, rules of practice and procedure governing the hearings process must echo these selfsame principles.

Clermont’s analysis, the “shapers” contemplate and “observe both outcome and process values.” At present, few if any procedural mechanisms permit, much less, envision, pro-active, early, party-driven resolution of either the disability claim generally, or intermediate issues, specifically. Indeed, under the current system, statistics show that only 7.3 percent of all pending hearings are decided without hearing (SSA OIG 2011).

Practice and procedural mechanisms can be divided into the following broad categories, which, in turn, give rise to a framework for promulgation and organization of specific procedural and practice rules to be adopted for use in Social Security disability hearings.<sup>16</sup>

1. *Pre-Hearing*: adoption of comprehensive rules governing the following pre-hearing actions:
  - a. *Case Management* – requiring/enabling the parties to meet/confer within a defined time period after the filing of the initial *Request for Hearing*, for the purpose of:
    - i. Narrowing and/or establishing the scope of the claim;
    - ii. Establishing a reasonable period for discovery/production of existing treatment and/or other medical and nonmedical records;
    - iii. Establishing the need for case development, as in consultative examinations.
  - b. Authorizing voluntary prehearing conferences between counsel for the purpose narrowing the issues and/or early resolution.
  - c. Authorizing prehearing conference by the administrative law judge for the purpose of ascertaining case readiness, discovery, or any other issue affecting hearing.
2. *Discovery and Case Development*: establishing a defined period, based on the nature of the claim, for production/submission of existing evidence as well as case development, including consultative examination(s).
  - a. *Experts*. Provision for written interrogatories to medical and vocational experts following submission of medical and/or other evidence.
3. *Early Resolution Prehearing*: authorizing prehearing conferences between counsel without the ALJ for the purpose of resolution of the claim without hearing;
  - a. Provision for submission of an agreed-decision for approval by the ALJ.
  - b. Provision for review by the ALJ, who may accept or reject the proposed decision.
4. *Resolution Post Hearing*: authorizing submission of an agreed-decision post-hearing.
  - a. Provision for review by the ALJ, who may accept or reject the proposed decision.
5. *Hearing Procedure*: establishing rules governing the nature, course and order of hearing proceedings.
  - a. Authorizing direct and cross-examination;
  - b. Authorizing the objection to evidence, whether it is testimonial, documentary, electronic or otherwise, based on minimum standards of reliability and validity.

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<sup>16</sup> The *Procedural Rules for Disability Hearings* (PRDH) should be guided, as are the Federal Rules of Civil Procedure, by Rule 1 of the FRCP:

“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

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6. *Evidentiary Standards*: establishing minimum standards of reliability and validity of evidentiary submissions in disability hearings (including limiting and/or defining the use of forms not prepared by the Social Security Administration)
  - a. The *Federal Rules of Evidence* serve as a guide, but do not govern the submission of evidence, whether testimonial, documentary, electronic or otherwise.
  - b. Provision for minimum standards of materiality.
  - c. Provision for standardized forms and/or criteria for forms used in assessment of a claimant's residual functional capacity, further ensuring uniform application of regulations. This should not foreclose opinion expressed in medical/treatment records or other submissions generated solely by the treating source.
  - d. Requiring parties to submit evidentiary documents in accordance with enforceable formatting and submissions standards.
7. *Closing the Record*: authorizing the administrative law judge to close the record within a defined period following conclusion of the hearing and prior to issuance of the decision.

Adoption of standardized *Rules of Practice and Procedure for Disability Hearings* (PRDH) would ensure predictability of proceedings, establish a clear structure within which the parties may act and interact, and foster a procedural environment conducive to effective case management and readiness as well as for early decision.

### **Refocusing the Role of the Appeals Council Consistent with Recommendations of the Administrative Conference of the United States**

ACUS (1987) issued its recommendation concerning the role of the Appeals. In particular, ACUS recommended that “[t]he Social Security Administration (SSA) should, as soon as feasible, restructure the Appeals Council in a fashion that redirects the institution's goals and operation from an exclusive focus on processing the stream of individual cases and toward an emphasis on improved organizational effectiveness.”

Toward this end, ACUS recommended various substantive and procedural changes; but notably emphasized the need for the Appeals Council to reduce its caseload in “order to fulfill its responsibility to develop, and to encourage utilization of, sound decisional principles and practices throughout SSA.” ACUS further recommended that “the Appeals Council must be empowered to exercise its review sparingly, so that it may concentrate its attention on types of cases identified in advance by the Appeals Council.”

Procedural reform necessarily includes close review of the right of appeal. In the proposed restructured disability hearings jurisprudence, the addition of an Agency representative or *PreP* acting for the Social Security Administration, triggers an additional appeals right currently, in effect, held by the Appeals Council via “own motion review.”<sup>17</sup> The presence of the Agency representative or “present party” extends the rebalanced juridical equation to the Appeals Council, such that an appeal of a decision favorable to the claimant may also be appealed by the Agency when the Agency believes the judge has erred—but only in highly circumscribed cases. Thus, a favorable decision may only be appealed by the Agency (through the offices of the *PreP*) where significant issues of public policy

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<sup>17</sup> See 20 CFR Part 404.

or statutory/regulatory interpretation are implicated. Absent such a showing, as in a case turning on credibility—a purely factual question—any appeal not meeting this standard must be dismissed.

This is consistent with the ACUS recommendation, limiting Appeals Council review of otherwise routine disability decisions in favor of a heightened leadership/policymaking role.

A similar standard should also govern appeals taken by claimants. A denial decision by an ALJ may be appealed only under the same standard—where there is a showing that the decision implicates significant public policy or statutory/regulatory construction and/or interpretation. As a result, the Appeals Council is limited in its review, effectively accepting the decision of the ALJ, except as noted above—in those cases where “significant public policy or statutory / regulatory interpretation” is implicated.<sup>18</sup>

This standard is intended as a high bar, and a decision reviewed under this standard should be reversed or remanded only where there is a finding that the ALJ’s decision was *clearly erroneous or contrary to law*. Limiting review by the Appeals Council recognizes the simple legal fact that individual disability decisions are not precedential and do not act in their resolution to establish Agency policy. Thus, review is appropriate only in those cases which significantly depart from Agency policy or which depart from or contravene accepted statutory and/or regulatory interpretation.

Enabling appeals by the Agency through the office of the “present party” or *PreP* acts to “check” a judge’s award where, as has been alleged in various congressional forums, incorrect decisions have been made in aid of the so-called practice of “paying down the backlog.” The ability to appeal a judge’s decision in a favorable case presently only exists in the Appeals Council regulatory right of “own motion review.” This proposed right of appeal broadens the potential for such review where, as noted, there has been a significant departure from Agency policy and/or statutory and/or regulatory interpretation.

Limiting Appeals Council review as first suggested by ACUS would further reduce the backlog, ensuring that cases do not simply circulate between the ALJ and the Appeals Council, thereby adding to cost and delay. The Office of the Inspector General (OIG) takes note of the present increasing workloads for the Appeals Council:

“If dissatisfied with the ALJ decision, claimants can appeal. Since FY 2007, the number of appealed cases to the AC was greater than dispositions, resulting in a tripling of pending cases. The AC pending levels grew from about 53,000 to about 157,000 cases by the end of FY 2013. The increase in pending claims also resulted in longer average processing times on appeals. Claimants waited about 364 days for an AC action in FY 2013, up from 227 days in FY 2007” (SSA OIG 2014).

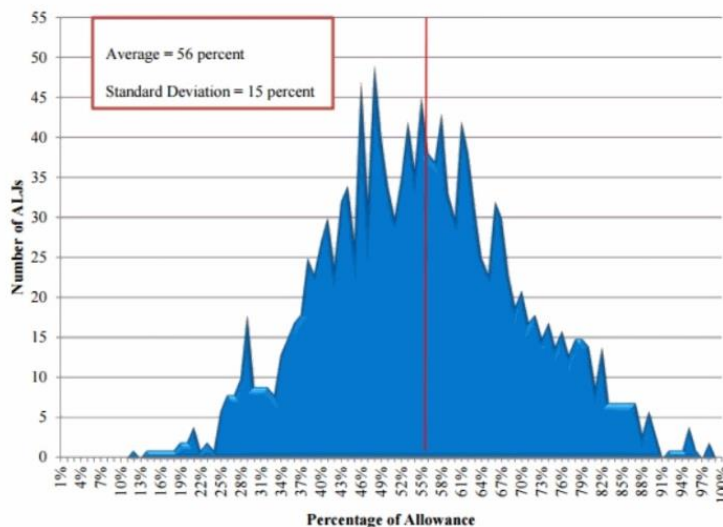
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<sup>18</sup> This effectively echoes the ACUS recommendation, which further provided:

“[T]he Secretary should direct the Appeals Council to design a new review process, subject to the Secretary’s approval, that would continue to be part of the available administrative remedy for a claimant dissatisfied with an [ALJ’s] initial decision, but that would enable the Appeals Council to deny a petition for review if the issues it sought to raise are deemed inappropriate for the Appeals Council’s attention. If a petition for review is denied, the ALJ’s decision should be deemed to be final Agency action” (ACUS 1987).

**Figure 1** shows 2013 ALJ decisional allowance rates, reflecting an average of 56 percent nationally. Close review reveals an essentially bell-shaped curve, indicating relative uniformity of decision making by the overwhelming majority of ALJs. Limiting appeals to decisions implicating “significant public policy or statutory/regulatory interpretation” will have little effect on current decisional outcomes.

**Figure 1**  
**Figure A-2: FY 2013 ALJ Decisional Allowance Rates (Relates to 1,477 ALJs with at least 200 dispositions)**



Source: Social Security Administration Office of the Inspector General Report No. A-12-13-13084.

### Assess Attorney’s Fees on the Value of Services Rendered or as a Flat Rate, Foreclosing Fees Based on Past-Due Benefits

For the Agency representative or *PreP* to be effective in seeking early disposition in disability hearings, the current basis for the award of fees as a function of “past-due benefits” in accord with a signed “fee agreement” must end.<sup>19</sup>

Where the claimant has signed a fee agreement that comports with federal statute and regulation, Social Security provides that a fee shall not exceed the lesser of:

<sup>19</sup> Attorney fees awarded by United States District Court under the authority of the Equal Access to Justice Act (EAJA) are not here discussed. See, Social Security Administration: Hearings, Appeals and Litigation Law Manual (HALLEX), ¶ I-1-2-91 (2015), provides in part:

The Equal Access to Justice Act (EAJA), United States Code, Title 28, Section 2412: “authorizes an attorney to obtain reimbursement of expenses incurred (e.g., legal fees, expert witness fees, etc.) in the course of representing a litigant in a court action and certain administrative proceedings involving a government Agency; stipulates that reimbursement of legal fees and other expenses applies only with respect to proceedings in which the party prevails against the Agency, and only if the court finds that the position of the government was not substantially justified; and provides that when a representative received fees for the same work under both section 206(b) of the Social Security Act [U.S. Code, Title 42, Section 406(b)] and EAJA, the representative must refund to the claimant the amount of the smaller fee.”

- 25 percent of the claimant's *past-due benefits* **OR**
- \$4,000 if the fee agreement was approved before February 1, 2002.
- \$5,300 if the fee agreement was approved on or after February 1, 2002, but before June 22, 2009.
- \$6,000 if the fee agreement was approved on or after June 22, 2009.

Applicable regulations also alternately provide for payment of a fee, determined as a result of a “fee petition,” considering:<sup>20</sup>

- (i) The extent and type of services the representative performed;
- (ii) The complexity of the case;
- (iii) The level of skill and competence required of the representative in giving the services;
- (iv) The amount of time the representative spent on the case;
- (v) The results the representative achieved;
- (vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and
- (vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

For the vast majority of representatives, the fee agreement has become the norm, whereas the fee petition is generally utilized where more than one attorney/representative has rendered services. No issue is raised by use of a fee petition, as this generally results in an assessment of fee as a question of skill.

At issue is the use of a fee agreement where the calculation is not based on skill or effort, but simply on “25 percent of past-due benefits or \$6,000, whichever is less” (SSA 2015). The problem is immediately apparent: a fee that increases with the passage of time is a direct *disincentive* to early case management and disposition. There is no good reason, other than ease of calculation, to maintain such a corrosive disincentive,

Past-due benefits are defined as those “that result from a favorable determination or decision (hereafter ‘decision’) and are the amount of benefits for all beneficiaries under title II of the Act that have accumulated because of a favorable administrative decision, up to but not including the month the Social Security Administration (SSA) effectuates the decision. Therefore, for most fully favorable decisions, the end date of the past-due benefits period is the month before the month SSA effectuates the decision.” *The net effect*: the longer a case is pending, the greater the attorney’s fee, with a current ceiling (when signing a fee agreement) of \$6,000. The obvious conclusion is that, regardless whether or not intended, there is a built-in incentive for delay.

Given that some 80 percent of claimants are now represented, there is an inherent reward for those who delay, whether intentional or otherwise (SSA OIG 2007).<sup>21</sup> This circumstance stands in direct

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<sup>20</sup> See 20 CFR Part 404.

<sup>21</sup> Based on this September 2007 report by SSA’s OIG, which shows that of the 559,000 claims heard by ALJs in FY 2006, 439,000 were represented by attorney and non-attorney representatives, representing claimants in almost 80 percent 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.” The number of persons is likely higher now as may be inferred from recent statistics showing an increase in the number of representatives now appearing at the initial stages of the disability applications process. Government Accountability Office. GAO Report No. 15-62, “Social Security

contravention to ongoing congressional concern over the current backlog, continuing endemic delay and the simple plea by claimants who are in need assistance at the earliest opportunity (Fahrenthold 2014).<sup>22</sup>

Employing representatives who are only paid if they win, and whose pay is calculated as a function of past-due benefits creates an essential imbalance in the jurisprudential paradigm of today's disability hearing. Furthermore, a contingent fee encourages increased filings for benefits as representatives advertise for clients and encourage pursuit of disability, which is in effect pursuit of a fee (Paletta and Searcey 2011).<sup>23</sup> A contingent fee based on past-due benefits encourages delay because the greater the delay, the larger the attorney fee.

Equally significant, "*Pay-for-delay*" creates an inherent conflict between the representative, who benefits from delay, and his client, who seeks an early resolution of his claim for benefits. There are a number of alternatives to the current *pay-for-delay* contingent fee" (Wolfe and Engel 2013, 46).

*A flat fee:* One example is a flat fee.<sup>24</sup> Upon award, an attorney or representative would be entitled to an established fee, regardless of the amount of past-due benefits or the amount of time spent preparing the case. Instead, the fee amount would be established by the complexity of the case, much as is the case now with a fee petition. Adopting the current maximum fee of \$6,000, the judge would determine whether counsel would receive one-third of the maximum (\$2,000), two-thirds of the maximum (\$4,000), or the maximum fee (\$6,000), dependent upon the complexity of the case. No appeal could be taken from this administrative judicial determination. Fee petitions would be precluded, in effect replaced by a simpler calculation. The fee would be taken from a claimant's past-due benefits or, if this amount were insufficient, the balance would be paid by the government to counsel. The amount advanced by the government would be deducted from the claimant's monthly benefit in \$100 or other

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Disability Benefits, Agency Could Improve Oversight of Representatives Providing Disability Advocacy Services." GAO Report No. 15-62 (December 2014).

<sup>22</sup> Mr. Fahrenthold observes in his October 2014 Washington Post article that there is "a queue of waiting Americans larger than the populations of six different states. It is bigger even than the infamous backups at the U.S. Department of Veterans' Affairs (VA), where 526,000 people are waiting in line, and the patent office, where 606,000 applications are pending", further stating:

"When . . . [ALJs] . . . make a [disability] ruling, they must decide whether someone is truly unable to hold any job. That is slow work, made slower by a pileup of outdated rules and oddball procedures. The judges' official list of jobs, for instance, is a Depression-era relic last updated in 1991. It still includes "telegram messenger" and "horse-and-wagon driver"—not exactly growth industries. It doesn't mention the Internet at all." *Id.*

<sup>23</sup> Paletta and Searcey wrote:

"Lawyers Harry and Charles Binder began representing applicants for Social Security disability benefits in the 1970s, when the field was a professional backwater. Last year, their firm collected \$88 million in fees for guiding clients through the system, government data indicate, making it the nation's largest Social Security disability advocate by far. . . . The Social Security Administration figured cases would move through the pipeline faster if more claimants were guided by experts. So in 2004 the Agency and Congress relaxed rules governing representation, making it easier for non-lawyer advocates to get paid. Binder swiftly hired lower-paid non-lawyers to handle cases, ramped up advertising and began processing far greater numbers of clients."

<sup>24</sup> See, generally, Government Accountability Office, Report No. 15-62, 2014, concerning the application of flat fees.

increments (as appropriate to the claimant’s circumstances) until the government was repaid. No hardship rules would apply. This alternative has some appeal for it allows administrative law judges, who have no ability to institute sanctions, to redress poor representation or other conduct by means of a fee adjustment.

*Reverse-Time Dependent Fees:* Alternately, in direct response to the pending backlog, attorney fees could be reverse-time-dependent. A hearing within six months of filing the *Request for Hearing* would result in payment of the maximum fee of \$6,000. Holding a hearing within 12 months would result in payment of \$4,000 (two-thirds of the maximum), whereas a hearing held after 12 months would result in a fee of \$2,000 (one-third of the maximum). The same rules for payment would apply as outlined above, including the disallowance of fee petitions. Time-dependent resolution would encourage counsel to proceed with the case, thereby benefitting the claimant, who, as noted, has an interest in a timely decision. Where delay was occasioned by factors outside the representative’s control, the judge would have the discretion to “bump” to the next earlier fee category.

*Hybrid Fees:* The two foregoing scenarios could be combined in a *hybrid* scenario, such that the primary determining factor would be time, and upon motion of counsel the administrative law judge could increase an otherwise lower fee, recognizing that delay was caused by complexity and not foot-dragging. “Elimination of the current pay-for-delay contingent fee ends the incentive for delay by the representative and at the same time re-incentivizes counsel to proceed apace, all to the benefit of the claimant. Realignment of the fee structure accomplishes a positive realignment of both the claimant’s and the representative’s interests” (GAO 2014).

### **Curtailement of Travel Reimbursements to Attorneys/Representatives.**

The Social Security Administration currently pays travel fees to attorneys and non-attorney representatives who travel to represent a claimant.<sup>25</sup> Social Security provides for reimbursement for travel for “[y]ou, [the claimant] your representative, and all unsubpoenaed witnesses we or the State Agency determines to be reasonably necessary who attend disability hearings.” The Code of Federal Regulations, Title 20, Section 404.999c, details what travel costs are reimbursed:

- “(a) Reimbursement for ordinary travel expenses is limited—
- (1) To the cost of travel by the most economical and expeditious means of transportation available and appropriate to the individual’s condition of health as determined by the State Agency or by us, considering the available means in the following order—
- (i) Common carrier (air, rail, or bus);
  - (ii) Privately owned vehicles;
  - (iii) Commercially rented vehicles and other special conveyances.”

Amazingly, travel costs also include reimbursement for “unusual travel expenses,” provided they are approved in advance. These include:

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<sup>25</sup> See 20 CFR Part 404.



## SOCIAL SECURITY: RESTRUCTURING DISABILITY ADJUDICATION

“Unusual expenses that may be covered in connection with travel include, but are not limited to—

- (1) Ambulance services;
- (2) Attendant services;
- (3) Meals;
- (4) Lodging; and
- (5) Taxicabs.”

The rationale for such payment is no longer applicable. In an era when at least 80 percent of claimants are represented, there appears to be little or no justification for such payments. In effect, the government is subsidizing private enterprise, with little or no rationale. So pervasive is Social Security’s disability program nationally, no formal data is required to conclude that lawyers and non-lawyer representatives who represent claimants can literally be found in every municipality in the United States.

Given the number of annual hearings, discussed *supra*, travel costs across some 150 ODAR offices potentially amounts to millions of dollars each year. The Office of Inspector General cites an ACUS in-house study to the effect that “SSA video hearings could save ODAR an estimated \$59 million, annually” (SSA OIG 2012a). So-called national law firms and non-lawyer disability advocates advertise in most major U.S. media markets, seeking out-of-state claimants despite the often thriving practices of local counsel and non-lawyer representatives. Foreclosing travel subsidies for private firms would return the cost of such travel to the private sector, where it belongs. Indeed, then-Senator Tom Coburn, of Oklahoma, introduced Senate Bill 3003, “Protecting Social Security Disability Act of 2014” that, among other things, would “prohibit a representative from being reimbursed by the Social Security Administration for travel expenses related to a case.”

In an earlier era when few attorneys or non-lawyer representatives were available to represent claimants, there may have been some justification for reimbursing travel expenses. Such justification no longer exists. Expending public monies to support private practice simply makes no sense. The cost of travel should simply be, as with any other private enterprise, a cost of doing business and should not be, as it is now, an all-but-hidden public subsidy. This is not, however, simply a question of appropriate expenditures of ever decreasing public monies; *it is also a question of hearing efficiencies*. Frequently, out-of-state lawyers/representatives never meet with their clients until the day of the hearing. This results in missing documents, failed communication, and hearing postponements.

These practices, enabled by the Agency’s travel reimbursement policy, frequently have an unintended adverse effect on claimants. Because lawyers and non-lawyer representatives are, by definition, traveling (not uncommonly, from a state different than that of the claimant’s residence) there is no person-to-person meeting between the claimant and the representative before the day of the hearing. Anecdotal stories abound, describing the traveling lawyer/representative searching the lobby, photo in hand, asking one person after another, if they are “the client”—often less than an hour before the hearing is to begin.

That such travel fees have become common practice is readily apparent. It is not uncommon for a representative to schedule travel to one locale for a hearing Monday morning, then board a plane for a neighboring state for a hearing on Tuesday, generally meeting the claimant shortly before the scheduled hearing. It is not unusual in such cases to find two, three, and in some cases more than five different representatives who have at one time or another been designated by the claimant to represent

his or her interests, only to be succeeded by a different member of the same firm because of varying travel schedules or postponements.

Is there any valid reason why the federal government should incentivize hearing inefficiencies by paying for representatives' airfare and other travel, when local counsel are almost always available to handle such cases without the need for such subsidies?

There is not. Legislation should be enacted ending lawyer and non-lawyer subsidies as an ill-conceived use of scarce public funds.

## KEY FACTS

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### The Hearings Process

The Social Security Administration has not altered its adjudicatory model for more than 50 years. Given the shortcomings of earlier “solutions,” the persistent and growing *hearings pending* backlog and concerns for errant ALJ decisions augurs for a change. When first devised, the hearings process was conceived as non-adversarial, adopting an inquisitorial jurisprudence akin to that of judicial systems in continental Europe, this in light of the fact that few persons were represented. Professor Viles published his study of the Social Security disability system in 1968. He describes, in the words of one [then] hearing examiner [now an administrative law judge], the 1968 hearing procedure, still followed today. Rather than act at all times as a neutral, the hearing examiner mimics, in part, each of the parties, acting to develop the evidence favorable to the claimant, as well as that for the government. (S)he is then to return to the neutral position, and despite having just searched the evidence for evidence both for and against the claimant, render an impartial decision. (Viles 1968)

With one telling exception, this 47-year-old description of the 1968 disability hearings process reflects precisely the same hearings procedures in effect today. In other words, despite the passage of time and notwithstanding the addition of new technology (*e.g.*, video hearings), the disability hearing of 2015 resembles, with little exception, the disability hearing before a Social Security hearing examiner in 1968.

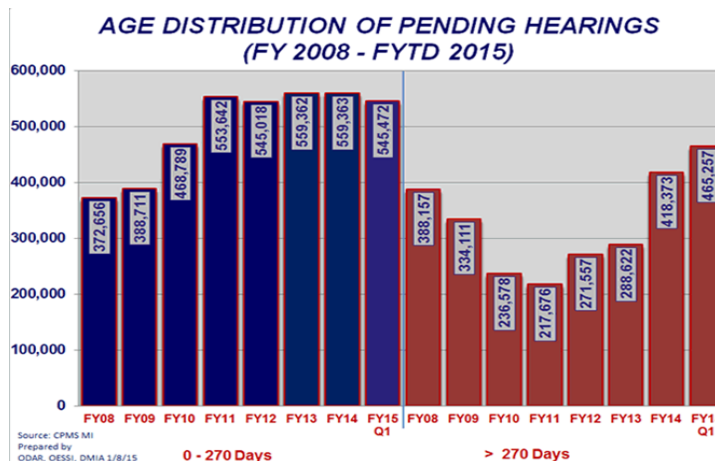
The telling exception? The presence of lawyers and non-lawyer advocates as claimant's representatives. Contrary to the 1968 hearing examiner's observation, at least 80 percent of claimants are now represented. This is not a new figure, but has gradually increased over time. Social Security noted in a September 2007 report by its OIG that in fiscal year 2006, 439,000 of the 559,000 claims heard by administrative law judges were represented by attorney and non-attorney advocates, representing claimants in almost 80 percent of claims appealed. The OIG noted: “[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR” (SSA OIG 2007).

### The Pending Hearings Backlog

The backlog is not, new, but is, instead, the product of an ongoing, flawed adjudicative appeals process which embraces an antiquated, outdated jurisprudence—a holdover from a time when few claimants were represented by either counsel or non-lawyer advocates. **Figure 2** below reflects not only the distribution of appeals pending hearing by their age, but also the total numbers of appeals annually. Even a quick glance demonstrates a backlog growing since 2008. Adding the number cases pending less than 270 days with those pending greater than 270 days reveals a rapid increase in the number of

pending hearings, growing from 760,813 in 2008 to 1,010,729 in 2015, the numbers representing an overall increase of more than a quarter million hearings pending in less than seven years. Examined as a percentage of pending hearings, the backlog has increased in this short period by almost 25 percent (24.73 percent.)

**Figure 2**



Source: Social Security Administration Official Website September 2015

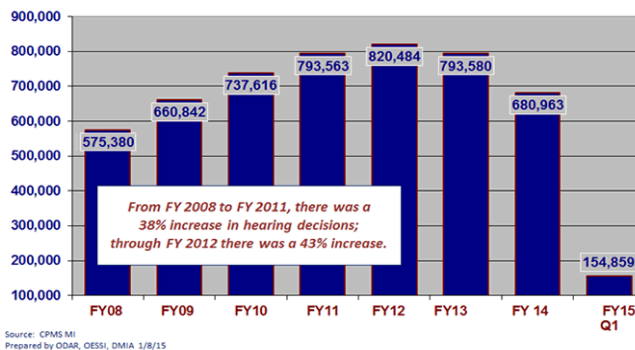
### National Hearing Decisions by ALJs

The Social Security Administration Office of the Inspector General observes that “SSA has experienced a growing hearing backlog and increasing case processing times in recent years, causing the public to wait longer for decisions. SSA’s pending hearing backlog grew from about 694,000 cases at the end of June 2010 to approximately 955,000 at the end of June 2014. Average processing time on hearings has also increased from 415 days in June 2010 to 437 days in June 2014. Annual appeals hearings before federal administrative law judges continue to rise in response to rising numbers of applications” (SSA OIG 2015a).

Despite significant increases in the number of hearings held by administrative law judges, there remains a growing backlog of undecided appeals, a fact which starkly highlights the impending insolvency of the Social Security Disability Insurance (SSDI) program. See **Figure 3**.

**Figure 3**

**NATIONAL HEARING DECISIONS (FY 2008 - FYTD 2015)**



Source: Social Security Inspector General, September 2015

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