Government Accountability Office Reports: Repositories of Institutional Knowledge in Social Security Disability Adjudication and Transformation Tools

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Acknowledgments

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Abstract

This research involves analysis of reports and testimonies from the Government Accountability Office (GAO) into Social Security Disability Adjudication. The GAO is a legislative Agency. The reports come as a result of detailed research and data collection. They serve not just those looking into the institutional knowledge of Social Security Disability Adjudication, but also those generally looking into Federal Agency processes as well. The GAO has reported on activities beyond that of Federal Agencies and, in instances, has called upon the National Center for State Courts. Examination of the GAO reports pertaining to Social Security adjudication serve to broaden the background of the Federal Administrative Law Judge and the 54 State Disability Determination Agencies. A review of other GAO reports, include those pertaining to "other" Federal Courts and the Federal Judiciary offer opportunities to explore and take advantage of "institutional knowledge" and lessons learned from other organizations. The GAO has evidenced value in "institutional knowledge." On January 17, 2010, the GAO reviewed matters involving Administrative Law Judges and cautioned, "retiring employees can leave gaps in institutional knowledge." This research reviews what institutional knowledge may be derived from the GAO reports as archives, and what may be derived from such reports to aid in the transformation of Social Security Disability adjudication.

The GAO values evaluating and transforming organizations. The GAO calls on the successes of some Federal Agencies/Branches as models for others. This research reviews how operations of other branches may be useful in Social Security to the greater efficiencies of Social Security Disability adjudication. The research crosses over and derives information from organizations noted in the reports as a basis to sharpen

efficiencies, such as the National Center for State Courts' CourTools, and the Federal Judicial Center's Judicial Impact Statements. In addition, the research draws attention to the Federal Judiciary case assignment methodology - on the basis of "weight" or complexity, rather than numbers; this serves as a means not only to assign work, but also to assign resources and personnel. To adopt the use of case weighing, as well as to adopt other useful tools found in the GAO reports is to transform. Hence, the methodology here has been to explore the subject reports and to take on review of some additional sources.

A theme central to the present study is that cases are of economic value. This is a theme that the research traces to 1916 with American Bar Association President Elihu Root's speech *Public Service by the Bar*. To accept that cases are of economic value is to make the case for greater *tribunal* efficiencies and speedier processing; to draw tools from the GAO reports is to build upon that case.

The *Findings* section offers detailed analysis of the interplay of *Due Process* at State and Federal levels in processing Social Security Disability adjudication. This is accomplished by drawing institutional knowledge from the GAO reports. The *Findings* also highlight the need for continued interweaving of State and Federal activities to enhance and enliven the relationship, as well as to reduce the GAO-recognized possibility of racially, ethnically, and gender-based disparate decision-making.

The *Conclusions* are based on the *Literature Review* and the *Findings***.** These lead to the *Recommendations*. An adjudication structure that intertwines the Federal and State Governments is consistent with the Founders' principle that such Congressionally-delegated *tribunals* should operate in harmony; research to find how the GAO reports may be used to build upon a structure, is research in harmony with the GAO's mission.

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INTRODUCTION

"It will not be contended that Congress can delegate to the courts *or to any other tribunals* powers which are strictly legislative. But Congress may certainly delegate to *others* powers which the legislature may rightfully exercise itself."

Chief Justice John Marshall[1]

This research pioneers the use of Government Accountability Office (GAO) reports and testimonies[2] as a means to capture archived information and data pertaining to decisional or "adjudication" processes arising under Federal statute.

What is at stake here is a means for retrieving data pertaining to Social Security Administration (SSA) disability insurance (DI) and supplemental security income (SSI) programs providing benefits for those "whose disability prevents them from pursuing gainful employment." These are programs which the U.S. Supreme Court recognizes "…are of a size and extent difficult to understand." [3]

To draw data from GAO reports is to enhance one's "understanding." "Lessons learned" from previous Social Security disability adjudication designs and practices may

[1] *Wayman v. Southard*, 10 Wheaton 1, (1825).

[2] As a general matter, this paper refers to GAO "Testimonies" as synonymous with GAO "Reports." This is done here with a view towards greater readability of the immediate research product. As a general matter, a testimony may be distinguished from a report; as a practical matter, the line may be a thin one as the GAO testimonies amount to written testimony, rather than testimony in the form of transcript. This research discusses GAO reporting into adjudication in "Adult Disability" cases. SSI "Childhood Disability" is not a part of this research.

[3] *Heckler v. Day*, 467 U.S. 104, 106 (1984), citing *Richardson v. Perales*, 402 U.S. 289, at 399 (1971).

prove useful in the exploration made with a view towards updating disability adjudication models. The GAO reports abound with such "lessons learned" in Social Security disability adjudication. To venture beyond the GAO Social Security reports into those involving the Federal Judiciary and other courts, is to reach a greater understanding of practices that may be transferrable to Social Security disability adjudication processes, in order that greater efficiencies may be achieved.

Assuming that greater efficiencies may be found in the Social Security "lessons learned" and in the GAO reports pertaining to the Federal Courts, the GAO reports serve as tools to enable transformation and help reduce the "size" of the populations awaiting resolution of their claims pending before the Social Administration and those pending before the 54 individual State Agencies which adjudicate Social Security Disability claims. In short, such tools may be of use in finding means to reduce "backlog."

Fifty-four State Agencies, known as State Disability Determination Services (DDSs), make initial and reconsideration determinations of disability in Social Security disability entitlement adjudication, as well as - initial reconsideration, and reconsideration "hearing" level determinations of "medical disability cessation" in Social Security disability cases.[4] "Claimants" (applicants seeking disability) and "Beneficiaries" (individuals who have previously been found "disabled") dissatisfied with unfavorable State-level reconsideration determinations are entitled to a hearing before a Federal Administrative Law Judge[5] assigned to the Social Security Administration's Office of Disability Adjudication of Review (ODAR).

[4] There is an additional "Federal" disability determination agency servicing the Western Pacific Islands.

[5] Generally, this paper places "Administrative Law Judge" in brackets as substitute for term "ALJ" found in GAO reports. The term "Administrative Law Judge" and "Judge" may be found in the reports as well.

The GAO reports draw one towards an understanding of the roles of the Social Security Administration, the State Disability Determination Services, and the Federal Administrative Law Judges in the adjudication of the "difficult to understand," Social Security disability entitlement programs.

The GAO is a Legislative Branch Agency established by the Budget and Accounting Act of 1921. The Comptroller General of the United States heads the GAO. The Agency is responsible for auditing and evaluating programs, activities, and financial operations of the executive branch.[6] Generally, the Comptroller General offers a Federal Agency[7] the opportunity to comment on the report or testimony findings [8]

"Federal Administrative Law Judge" is a generally accepted term, but it does not seem to be found in reports specific to SSA. "ALJ" may be obsolete. 5 Code of Federal Regulations (C.F.R.) Section (§) 930.203b provides, "The title 'administrative law judge'' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." Likewise, the present paper substitutes "Government Accountability Office" for the now obsolete "Government Accounting Office."

[6] For purposes of this research, the word "Agency" includes the Executive Departments and the independent Agencies as well. Formerly a part of the Department of Health, Education, and Welfare (which is currently the Department of Health and Human Services), the Social Security Administration is an Independent Agency. The SSA Administrative Law Judges come under the SSA's Office of Disability Adjudication and Review (ODAR), formerly known as Office of Hearings and Appeals (OHA), and previously as the Bureau of Hearings and Appeals. Social Security Administration became an independent agency in 1994. Generally, this paper references Social Security or SSA in matters predating 1994. This is for convenience and to make this paper more readable. To reiterate, before 1994, SSA was a component of Department of Health, Education, and Welfare, or as HEW is currently titled, Department of Health and Human Services.

[7] While not Federal Agencies, the Federal Judiciary has been the subject of GAO reports and elements therein have been afforded comment opportunity. The Federal Judicial Center and the Administrative Conference of the Courts have been afforded comment opportunity to GAO reports. The Federal Judicial Center is the educational arm of the Federal Judiciary the Administrative Conference of the Courts is the administrative or governing branch. Neither have jurisdiction over the Federal Administrative Law Judges. While not a Federal Court, the District of Columbia Courts are subject to GAO reports and have been afforded comment opportunity.

[8] Office of Management and Budget (OMB) Circular No. A-50, *Audit Follow-up* thereby incorporating certain provisions of Circular A-73, *Audit of Federal operations and programs*, Revised and replacing and rescinding Circular A-50 *Executive branch action on General Accounting Office reports*, revised, dated January 15, 1979 http://www.whitehouse.gov/omb/circulars_a050/ (Accessed Feb. 11, 2011).

The GAO inquiries have extended beyond Federal Agencies. The GAO has made inquiry of the Chief Judges and State Attorney Generals of the 50 states on occasion and received responses from 36.[9] The Deputy Comptroller General recognized that the National Center for State Courts was working on a national program to collect and report reliable and comparable caseload statistics "needed to assess the capacity of the State court systems to handle additional caseloads." The Deputy Comptroller General called upon the Center for assistance in responding to Congressional inquiry, "Can State courts assume the diversity caseload now handled by Federal Courts?" [10]

The GAO also reported on a non-Federal court system and noted that the National Center for State Courts has devised a database system to determine staffing levels needed for a given workload, - a "weighted caseload" system. The GAO has recommended that the District of Columbia Courts consult with others who have used workload-based methodologies in order to evaluate court case processing staffing levels; the GAO added that the "D.C. Courts consulted with the National Center for State Courts and the Administrative Office of the U.S. Courts prior to commissioning a court staffing level study." The GAO noted that the *Status* of this *Recommendation* was *Closed-Implemented*. [11]

GAO reports involving Social Security Disability processing impact State governments as the 54 State Disability Determination Services are State agencies.

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[9] Government Accountability Office (hereinafter GAO), *State Exclusionary Rule Procedures*, 81-33 (Washington D.C.: Dec. 22, 1980).

[10] GAO, *Summary of Facts on Federal Diversity Cases,* GGD-78-38, (Washington D.C.: Feb. 28, 1978), 9.

[11] GAO, *D.C. Courts Staffing Level Determination Could Be More Rigorous*, GGD-99-162 (Washington D.C.: Aug. 27, 1999), pages 2 and 9 and *Recommendations.*

The GAO has examined matters pertaining to Federal Administrative Law Judges appointed under the Administrative Procedure Act of 1946.[12] What is a Federal Administrative Law Judge? The Federal Judicial Center provides the answer:

"Federal Courts Outside the Judicial Branch"

"Some federal courts and adjudicative bodies are not part of the judicial branch ….The administration of these courts is not governed by the policies of the Judicial Conference of the United States. Most of the federal courts outside the judiciary were established by the Congress to carry out a legislative power, such as the determination of taxes or the governance of the armed forces.

"Some federal courts and adjudicative bodies are not part of the judicial branch…the administration of these courts is not governed by the policies of the Judicial Conference of the United States…

"More than 1,300 administrative law judges serve in the executive branch departments. These judges conduct hearings, issue or recommend decisions, and enforce agency regulations. More than 1,100 of the federal administrative law judges work for the Social Security Administration."[13]

The GAO has observed that, [f]ederal executive departments and agencies process a larger caseload than U.S. courts, protect the rights of a larger number of citizens and employ more than twice as many Administrative Law Judges as there are active Judges in Federal trial courts." [14]

The Federal Judicial Center recognizes this Administrative Law Judge category of Federal Court *outside the Judicial Branch*, as a Court that has hearings, issues decisions, recommends decisions and enforces regulations. However, the Founders of our

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[12] GAO, *Management Improvements in the Administrative Law Process: Much Remains to Be Done,* FPCD-79-44 (Washington, D.C.: May 23, 1979), cover.

[13] (http://www.fjc.gov/public/home.nsf/hisj) (accessed on 5 Jan 2011). The omitted section from this Federal Judicial Center reference included the Federal Judicial Center's recognition of: the Tax Court, the U.S. Court of Appeals for the Armed Services and the Court of Veterans Appeals. As such, these Courts, along with Federal Administrative Law Judges, constitute the *Federal Courts Outside the Judicial Branch*.

[14] GAO, *Administrative Law Process: Better Management is Needed,* FPCD-78-25 (Washington D.C: May 15, 1978), cover.

Constitution valued a government with power vested in three co-equal branches. On balance, Chief Justice John Marshall gave perspective on the delegation of powers, and by doing so; Chief Justice Marshall gave recognition to *tribunals* independent of the courts. [15]

The Founders also recognized the need to balance Federal interests from those of the States. The Founders recognized that harmony could be found intertwined among the State and Federal adjudicative bodies. Chief Justice William R. Rehnquist has focused on this point, by calling attention to *The Federalist 82.* Chief Justice Rehnquist pointed out:

> "It is also a truism that the inherent dynamics of federalism create potential discord, but that concept can be turned on its head. The dynamics of federalism can also lead to cooperation and mutual benefit. Despite the difference in our systems, and our occasional differing interests, we need to remind ourselves of Alexander Hamilton's argument when he first tried to convince a skeptical audience that the Constitution's mixed judicial system could work. National Courts need not overpower or supplant the existing state courts, Hamilton wrote. Instead, "the national and State systems are to be regarded as *one whole."* [16]

Chief Justice Marshall recognized the legislature could delegate authority to *other tribunals.* Chief Justice Rehnquist invokes Alexander Hamilton for advancing "the national and State systems are to be regarded as *one whole."* Thus, the Administrative Procedure Act not only serves as a blending of Legislative and Judicial function into otherwise Executive Agencies, but, with the disability adjudication provisions of the Social Security Act, the Administrative Procedure Act amounts to a vehicle blending National and State systems into one whole. That even the Nation's highest Tribunal,

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[15] *Wayman v. Southard*, Obit. cit.

[16] *The Federalist No 82*, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) quoted in William H. Rehnquist, Chief Justice, Supreme Court of the United States, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 Virginia L. Rev.1657, 1658 (1992).

Supreme Court recognizes that the programs "are of a size and extent difficult to understand" – would demand nothing less than this National alliance taking on such programs.

Due Process is the glue that binds this State-Federal Partnership. On December 3, 1987, the GAO recognized that for purposes of Social Security disability adjudication, "at least two decision levels provide *Due Process* protection to claimants." The Legislative Agency offered *Goldberg v. Kelly*, 397 U.S. 254 (1970) as authority for this point. This served as the GAO's tacit recognition that *Due Process* was inherent in Administrative Law Judge hearings of which disability claimants would be entitled. The GAO recognizes such *Due Process* at State level as well. The GAO recognizes that in 1983, Congress changed the "continuing disability review" (CDR) process. Congress required that all beneficiaries [previously found to be "disabled" under Social Security programs] being "dropped" from [taken off of] SSA "disability rolls" be afforded the opportunity to continue receiving their benefits until they are afforded a State Agency-level "evidentiary hearing." The purpose of these State hearings is to afford these Beneficiaries to introduce evidence and be represented by counsel.[17]

Thus, the opening quote comes into context here. Chief Justice Marshall takes recognition of the legislature's authority to delegate powers, while at the same time, the Chief Justice observes that there are courts and there are *other tribunals*. The Federal Judiciary Center recognizes Federal Administrative Law Judges as Federal Courts, though outside of the Federal Judiciary. Social Security Administrative Law Judges

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[17] GAO, *Social Security: Observations on Demonstration Interviews With Disability Claimants*, 88-22BR (Washington D.C.: Dec. 3, 1987), 8, and 8 footnotes 3 and 4. (footnote 1 on this page adds that there is one

amount to *other tribunals*. State Agency reconsideration adjudicators, particularly those conducting cessation reconsideration hearings, share with Federal Administrative Law Judges the obligation to ensure *Due Process.* In turn, the Federally-legislated obligation of these State Officers to provide hearings – the nature of which, the GAO recognizes, obligates these State Adjudicators to ensure *Due Process*, - renders these State officials as *other tribunals* to whom Congress has delegated authority. Thus, the need to examine these State and Federal *tribunals* and their impact on Social Security Disability processing is of immediate importance.

Indeed, the Government Accountability Office has called to Congress's attention that "[d]isability trends will have a significant effect on future Social Security program costs as the Baby Boom generation ages." Over the next 75 years, from the number of Beneficiaries receiving disability benefits will rise "from the current 7.2 million to more than 16 million…revenues will not be adequate to pay full benefits as defined under current law." [18]

DDS in each state {except South Carolina, which has a separate agency for the blind}, the District of Columbia, Guam, and Puerto Rico).

[18] GAO, *Social Security and Minorities: Earnings, Disability, Incidents, and Morality Are Key Factors That Influence Taxes Paid and Benefits Received*, GAO 03-387 (Washington D.C.: Apr. 27, 2003), 6, 7. Of Note, about the same time that this report was disparities in disability issues impacting minorities, the National Center for State Courts was working on a national program to collect and report reliable and comparable caseload statistics, of which was touched upon in the *Introduction*, was recognizing, in the State Courts, *Continuing Immigration and Shifting Influence and Relevance of Racial and Ethnic Identity*. The Center recognized that "Labels and legal decisions based upon old concepts of racial or ethnic identity will lose relevance, and the need (and costs) for qualified foreign language interpreters and culturally competent judges and staff will grow." The report took into account Department of Labor statistics and recognized that the Spanish-speaking immigrant population is expected to increase to 50% by 2050. "Depending on how people assimilate/intermarry and label themselves, minority groups will make up nearly half of the population. The report indicated that this development is "little different "from the U.S. experience in the late 19th and early 20th centuries. *Future Trends in State Courts 2004* (National Center for State Courts, Williamsburg, Va. 2004, Carol Flango Editor), 4-5.

Hence, the necessity is established to draw upon institutional knowledge derived from administration of these programs and this information is archived in the reports of the Government Accountability Office. At the same time, the Government Accountability Office reports are repositories for ideas designed to further the missions of other Agencies and Government Branches. These reports document programmatic recommendations and memorialize successes which may serve as models transferable to the greater efficiencies of Social Security disability adjudication. Exploration of the GAO reports should come as an immediate requirement - "because of ongoing concerns about the positioning of the Social Security's disability programs to provide meaningful and timely support to Americans with disabilities, the GAO has added modernizing federal disability programs to the 2003 *high risk list.*"[19] SSA "needs to better position [itself] for future service delivery challenges" as the GAO recognizes, SSA has been "without a concrete service delivery plan to detail where or how it will provide services in the future."[20] Thus, disability adjudication inefficiencies carry a price. The GAO reports archives provide guidance for a future delivery trajectory.

The timely adjudication of disability claims, as well as the making of determination of findings that individuals may return to work as their disabilities have ceased - are matters which have bearing upon local and National economies. That the States are to provide such decision-making and that these State activities are Federally-funded are all matters contained within the institutional knowledge of the GAO reports. Thus, one striving for productivity in case adjudication may now at an increase in pending claims which SSA

[19] GAO, *Performance and Accountability: Major Management Challenges and Program Risks Social Security Administration*, 03-117 (January 2003), *Highlights.*

[20] *Id*.

attributed, in part to "state personnel furloughs, which affected DDS worker productivity."[21] The GAO described the situation as follows:

"In its *Fiscal Year 2009 Performance and Accountability Report*, SSA reported that about a dozen states had furloughed federally funded state workers who make disability decisions for the SSA. The agency also estimated that initial claims will continue to increase and remain at historically high levels for the next several years."[22]

Did State policymakers of 12 States take pause to become informed by GAO decisions as a predicate to furloughing these workers whose employment status has no fiscal impact on a State's governmental coffers? Did any policymakers pause to consider the impact of such furloughs of a Federally-reimbursed workforce may have on constituent disabled populations? If there was pause, such policymakers may have considered that these State Disability Determination Services adjudicators have fiscal impact. They determine those individuals, of the increasing universe of the pending claimants, qualify for Federal disability entitlements. – this is a fiscal impact, not based on money alone, but upon disabled populations' access to medical treatment and access to vocational-related rehabilitation as well. That these furloughs occurred brings home the value of the GAO reports as repositories of institutional knowledge. These 12 States' policymakers' decisions will always remain part of the institutional knowledge repository contained in the GAO reports. Such GAO reporting amounts to a retrospective "Impact Statement" of State furlough activity in that the GAO memorializes the result of such furloughs, and these furloughs in 12 states "affected DDS worker productivity."

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[21] GAO, *Social Security Disability: Management of Disability Claims Workload Will Require Comprehensive Planing*, 10-667T (Washington D.C.: Apr. 27, 2010), 7.

[22] *Id.*

Further, had the decision-makers of these 12 States, turned to the institutional knowledge contained in GAO reports, they would have gleaned from a 1978 GAO report how a threatened six-week lay-off of Federally-funded DDS personnel, which would have had "a crippling effect on the disability program"- was adverted and, as a result, - DDS disability adjudicators were not "bumped" to give favor to non-disability adjudicator State employees with more senior tenue.[23]

Moreover, the Twelve States that recently furloughed DDSs would have had public access to the GAO reports. As such, these State policymakers were in a position to recognize that Congress has delegated to organizational elements within their State DDSs the obligation to provide their States' citizenry *Due Process*, as well as to make determinations with respect to monetary entitlements – determinations that directly impact on State economies. The GAO reports recognize this be the case. The GAO's recognition of these organizational elements within these 54 State Agencies as providing *Due Process*, contributes to the conclusion that, for purposes of the disability cessation evidentiary hearing anyway, these amount to *other tribunals* as recognized by Chief Justice Marshall and as emphasized in the present research. As such, discussion of furlough, or for that matter – "bumping" of DDS adjudicators to favor of non-DDS, but otherwise greater-seniority State employees, might not have been contemplated by State Policymakers. Proper stewardship of funds in Federally-assisted and Federally funded, and Federally-reimbursed programs, to include ensuring that those who qualify for entitlements under Federal entitlement programs - are matters that touch both State and National economies.

[23] GAO, *A Plan for Improving the Disability Determination Process by Bringing it Under Complete Federal Control Should Be Developed*, HRD-78-146 (Washington D.C.: Aug. 31, 1978).

Brian J. Ostrom and Roger A. Hansen offer pause and perspective, a "discussion of efficiency also helps to underscore that timeliness and quality case processing are both 'economic goods.' All economic goods have value in the sense that in order to get more of any good, we are willing to forgo some amount of any other good. There is a temptation to think that the term *goods* applies only to tangible goods. This temptation must be resisted. 'Economic goods are all valued things that are scarce.'"[24]

This perspective is at the heart of Social Security's role as the GAO sees it, "SSA's primary mission is to make accurate and timely payment to eligible beneficiaries in the most efficient manner."[25]

In from a consulting firm's viewpoint, in order for SSA to achieve "quality objectives for the disability program," it must to depart from its "existing quality assurance focus on identifying errors," it must adopt "the broader concept of quality management [that] encompasses all of the efforts of an organization to produce quality products." "A best practice quality management system for SSA's disability claims process would develop a clear operational definition of quality with multiple dimensions, such as accuracy, timeliness, efficiency, customer service and *due process*.[26] Hence, this research is imperative.

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[24] Brian J. Ostrom and Roger A. Hanson *Efficiency, Timeliness, and Quality A New Perspective from Nine State Criminal Trial Courts* Prepared for the National Institute of Justice and the State Justice Institute (Williamsburg, Va. National Center for State Courts 1999), footnote 89, page 73. Ostrom and Hanson cite (*Posner 1979*) for their internal-quote. This reference is apparently derived from Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, (8 J. Legal Stud.) 103 (1979).

[25] GAO, *GAO's Views on the Report of the Congressional Panel on Social Security Organization Concerning Establishment of an Independent Agency for Social Security*, 124786, (Washington D.C.: Jul. 30, 1984), 1.

[26] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, GAO-02-322 (Washington, D.C.: Feb. 27, 2002), 26, 27.

LITERATURE REVIEW

In August 30, 1916, Senator Elihu Root, speaking as President of the American Bar Association, introduced economic principles in his discussion of *Public Service by the Bar*. In doing so Root, was as much as speaking for Judges and Court Administrators:

"We at the Bar are not producers. We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous [members of the Bar], however, beyond the number necessary to do the law business of the county, are…drags upon the community and upon all sound economic principles ought to be set to some other useful work." [27]

Senator Root spoke of the ends to which such work was to be done in his visioning of a change of direction towards *public service*. To get there, courses had to be redirected, particularly the one whereby:

"Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude…in

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The "best practice" quality management system" of SSA's existing system found to be "'substantially deficient" follows: 1)-develop a clear operational definition of quality with multiple dimensions, such as accuracy, timeliness, efficiency, customer service and *due process*; 2) -develop and support performance measures that are closely tied to the definition of quality; 3)-support a quality focused culture – that is, employees and management rather than just the designated quality department must be responsible for quality. Managers in every component must champion the common quality objective; provide information that can be sued to improve the disability decision-making process and disability policy; 4)-provide employees with the resources to produce quality outcomes and serve and value employees for their contribution to success; 5)-ensure that the disability programs are national programs. This should include a measurement system that can identify variation and a systematic effort to address variation when it is identified; 6)-support statutory and regulatory requirements. This goes beyond measuring performance as required by statute to providing information that can address congressional concerns, assist in the analysis of proposed legislation, and support the monitoring and evaluation of its implementation. *Id.*

[27] Elihu Root "Public Service by the Bar President's Address American Bar Assn. at Chicago August 30, 1916 (Sent out with Complements of George H. Paine, Philadelphia, Pa. 1916), 6 bound at addresses of Taft, Root, Wilson, et. al., 1911-1919 JAGC [Army Judge Advocate General School Library], 494 at 498.

which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country" [28]

Invocation to contribute to the administration of justice while adding to community wealth and effectiveness calls attention to the work of Brian J. Ostrum and Roger A. Hansen. They recognize that, "discussion of efficiency also helps to underscore that timeliness and quality case processing are both 'economic goods' All economic goods have value in the sense that to get more of any good, we are willing to forgo some amount of any other good. There is a temptation to think that the term *goods* applies only to tangible goods. This temptation must be resisted. 'Economic goods are all valued things that are scarce.'" [29]

The GAO views Administrative Law Judges in economic terms. It has "emphasized, judges are pivotal figures in the costly administrative adjudication process. They make decisions which can have the force of law and which can significantly impact the national economy and the claims for administrative justice of thousands of citizens and business firms."[30]

Economy is of concern for a government attentive to populations in need. The government's role in decisions involving individuals with disabilities and the aged with needs did not began with Social Security Administrative Law Judges, or State Agencies, as we know them, rather the role may be traced to Henry VIII who took over functions previously vested in the religious and turned the responsibilities to the Justices of the

[28] *Id.*

[29] Brian J. Ostrom and Roger A. Hanson *Efficiency, Timeliness, and Quality A New Perspective from Nine State Criminal Trial Courts*, Obit. cit.

[30] GAO, *Management Improvements In The Administrative Law Process: Much Remains To Be Done*, Obit. cit., 6.

Peace. Generally, the entitlement afforded to one in need amounted to delineation of the boundaries within which the individual could beg.[31] The Justice of the Peace role is transitioned to the North American Colonies. Alms houses and poor farms emerged. [32]

By 1935, 31 individual States had programs offering cash assistance to aged residents with needs. The Social Security Act of 1935 created a number of programs to include the "Old-Age Insurance program that is the cornerstone of today's Social Security program, and "a national program of needs-based benefits for the aged." "In 1950, another program was added which provided federal grants to defray partially the costs of state assistance to the needy who were permanently and totally disabled"[33]

The Disability Insurance (DI) program was a "major expansion" in the Social Security program. [34] The Social Security Disability Insurance Program "was established in 1954, under Title II of the Social Security Act, to prevent the erosion of retirement benefits of wage earners who became disabled and were prevented from continuing payments into their Social Security accounts."[35] In 1956, this was extended as an insurance program providing benefits to workers unable to work because of severe long-term disability.[36]

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[31] William R. Burger, Merrill Youkeles, *Human Services in Contemporary America* (Brooks/Cole Thomson Learning, Belmont Calif. 2000 5th Ed.), 148. and Charles A. Beard, *The Office of Justice of the Peace in* England, *Studies in History, Economics, and Public Law,* (The Columbia University Press, New York N.Y. 1904), 87 -89.

[32] GAO, *Social Security: Historical Development and Current Structure, Benefits and Contributions*, 124148 (Washington D.C.: Apr. 17, 1984), 1, 2, 6 and 7.

[33] GAO, *Social Security: Historical Development and Current Structure, Benefits and Contributions,* Obit. cit.

[34] *Id.*

[35] GAO, *A Plan for Improving the Disability Determination Process by Bringing It Under Complete Federal Management Should Be Developed,* Obit. cit.,1.

[36] GAO, *Social Security Disability Programs: Fully Updating Disability Criteria Has Implications for Program Design*, 02-919-T (Washington D.C.: July 11, 2002), 2.

In 1972, Supplemental Security Income (SSI) Amendments (Title XVI) to the Social Security Act were enacted; "the new Title XVI transferred *from the States* to the Social Security Administration primary responsibility for welfare aid to the aged, the blind, and the disabled." [37] A result, "Nationally uniform eligibility requirements replaced the multiplicity of requirements that existed in Federal-state welfare programs that were administered by the States. The Federal government pays SSI benefits.[38] Federally-funded, but state run State Disability Determination Services (DDSs) make initial and reconsideration disability decisions in both DI and SSI cases.

On the basis of this discussion of changes in SSA disability laws and procedures alone, there is support in the GAO's observation:

> The history of this country's social insurance programs is one of change and expansion. SSA has been required to respond to frequent legislative changes which have not only modified the original Social Security Act but also, in some cases, have considerably expanded the agency's basic mission. SSA has had to implement legislative changes with little advance notice in a short time."[39]

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[37]Uniform Caseload Accounting System *Federal Administrative Law Judge Hearings Statistical Report for 1976-1978* (Office of the Chairman, Administrative Conference of the United States, July 1980), 14. The *Forward* of this document indicates "When the Uniform Caseload Accounting System was developed under former Chairmen [of the Administrative Conference] Antonin Scalia and Robert Anthony, it was intended as a three-to-five year 'pilot project', the Conference has received much encouragement in this effort; but now it is time for a reckoning of the project's long-term goals and the Conference's ability to meet these goals." Stephen L. Babcock Executive Director Administrative Conference of the United States, added, "I hope that users of this report will help by sending in their comments and suggestions."

From the present researcher's review, the data contained in the Administrative Conference "pilot project" pertaining to Federal Administrative Law Judge Hearings may be analogized to the statistical information that the Deputy Comptroller General was offering Congress from the National Center for State Courts on February 28, 1978, in response to Congress' inquiries, to include: "Can State courts assume the diversity caseload now handled by Federal courts? The National Center for State Courts' data was from a "research project now underway which it [was] developing a national program to collect and report reliable and comparable caseload statistics…needed to assess the capability of the State court systems to handle additional caseloads." GAO, *Summary of Facts on Federal Diversity Cases*, Ob. cit., 9.

[38] *Id*., 318.

[39] GAO, *Increased Efficiency Predicted if Information Processing Systems of the Social Security Administration are Redesigned*, B-164031 (4) (Washington D.C.: Apr. 10, 1974), 7.

"Impact Analysis." is a management tool to assist in the taking on of changes. In 1995, William Jenkins, Jr. Assistant Director, Administration of Justice Issues, General Accountability Office offered *Observations on Impact Models for Federal Courts*. Mr. Jenkins noted that "[a]n increasing portion of the GAO's congressional request work focuses on the potential (prospective) impact of various programmatic options…This is a marked change from the generally retrospective analysis that has, until recently characterized almost all of the GAO's work."[40]

Retrospective and prospective impact analyses "are hardly mutually exclusive. A useful, realistic estimate of what may happen in the future must generally be grounded in a firm understanding of what has happened in the past and why."[41] Mr. Jenkins offers that "the GAO's interest is quite eclectic and practical, focusing primarily on operational impact issues."[42] We may get "a better estimate of the impact on the federal courts of doubling the number" of [a specific case type], "if we understand what impact the recent growth in those cases has had already on the courts and their operations." We would, of course, also need some means of estimating whether the experience to date with [the particular case type] is likely to grow linearly – more of the same – or whether something

[40] William Jenkins, Jr. "Observations on Impact Models for the Federal Courts" (Conference on Assessing the Effects of Legislation on the Workload of the Courts: Papers and Proceedings, Federal Judicial Center Washington D.C. 1995, A. Fletcher Mangum Editor), 117. Examples offered within this quote are restructuring VA Health Care services and expanding prison boot camps.

[41] *Id.*

[42] *Id*., at 128. Mr. Jenkins notes, "Certainly, we in the GAO are interested in such analyses. But each audience has somewhat different interests and needs. Academics generally have an interest in building coherent theories of behavior. Members of the bar are generally interested in the impact the changes may have on their clients, access to the courts, and, consequentially, judicial remedies. Judges have an interest in the impact that legislative changes may have on their workload and the resources available to process it." "Certainly the immediate audience for most judicial impact analyses is Congress..." At page 2 is found, "[l]ess frequently, Congress is interested in the probable effect of the change on state courts. Members who are former governors or mayors are the mostly likely to have such concerns. Congress may also be

is likely to occur that will alter prior trends and lead to a somewhat different result."[43] To summarize:

"[T]he most reliable and accurate estimates of the future impact a particular policy (legislative or administrative) may have are likely to flow from (1) a firm understanding of what has happened in the past and why; (2) a careful assessment of how the current proposal is similar to and different from prior legislation or policies whose actual impact is known; and (3) how these similarities and differences – even the sheer volume of cases- affect the usefulness of prior experience as a guide to the impact this particular proposal may have."[44]

The Mr. Jenkins spoke as a member of the GAO Directorate charged with the Federal Judiciary, recognizes that impacts associated with case processing are "particular costs in time, money, staff, and so forth that may or may not be considered in any particular analysis of changes in case processing," adding "[p]erhaps at the broadest level are such impacts as a weakening or strengthening of the public's perception of the courts as fair, assessable forums in which to seek redress for disputes."[45]

Mr. Jenkins shared these observations with the National Judicial Center. The Office of Government Relations of the National Center for State Courts also addressed the

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interested in the substantive effect of a proposed change. One example is the debate concerning the impact on death penalty defendants of more limited access to federal courts via habeas corpus proceedings.

[43] *Id*., 117-118. Mr. Jenkins' example is "firearms cases."

[44] *Id*.,118. Of Note, Per cover of statement of a June 24, 2003, GAO report, Mr. Jenkins' role has been recently designated as Director Homeland Security and Justice Issues. See GAO, *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related-Workload Measures*, 03-937T (Washington D.C.: June 24, 2003). The present paper will shortly draw attention to this work to show contrast in emphasis of the GAO department which addresses Social Security, as well as reporting on Administrative Law Judges as the GAO emphasis on SSA, and that on Administrative Law Judges focus on "numbers" of cases adjudicated whereas the reports which come are addressed by Mr. Jenkins' directorate look upon cases and allocation of personnel on the basis of "weighted workloads." This paper will touch upon Mr. Jenkins' directorate's work(s). In doing so, this research invites an evaluator to cross cut in order clone with that of another Agency or that of another GAO directorate in order to build the capacity of an agency such as SSA. Such a course is in harmony with GAO, *Program Evaluation: An Evaluation Culture and Collaborative Partnerships Help Build Agency* Capacity, 03-454 (Washington D.C.: May 2, 2003).

[45] *Id*.., 118 - 119. The GAO Director overseeing Federal Judiciary studies has touched upon the equivalent of CourTools 1) *Access and Fairness*, 3) *Time to Disposition*, 5) *Trial Date Certainty*, and 10) *Cost per case*

Federal Judiciary Center with Mr. Jenkins, offering *The Impact of National Legislation on State Courts*. The Center informed the Federal Judiciary Center Conference of understanding of court management, workload factors, and case flow having "grown in sophistication and reliability" in a period exceeding a decade and this growth was the result of empirical work with individuals "concerned with delay in the courts."

"This [growth in understanding] has been reinforced by the *Trial Court Performance Standards*, which are in a substantial way a reflection of the consensus among practitioners of the critical components of the court as an organization, as well as a statement of intentions. Not only do the *Standards* require courts to implement changes in law and procedures, but they also require the courts to inform the community (including the legislature) of its programs and most importantly, to anticipate new conditions or emerging events and adjust themselves accordingly."[46]

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[46] Thomas A. Henderson with Marilyn M. Roberts and Maria E. Schmitt, *Office of Government Relations National Center for the State Courts* "The Impact of National Legislation on State Courts" (Conference on Assessing the Effects of Legislation on the Workload of the Courts: Papers and Proceedings, Federal Judicial Center Washington D.C. 1995 A. Fletcher Mangum Editor).105, 107 within this quote, the following references are cited: David Neubauer, *Judicial Process: Law Courts and Politics in the United States* (1991), Barry Mahoney et al. *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts* (National Center for State Courts 1988), Commission on Trial Court Performance Standards, *Trial Court Performance Standards with Commentary* (National Center for State Courts). Trial Court Performance Standards Project (from hence CourTools was derived) was intended to be of use for all trial Courts. Nancy Gist, the Director of the project expressed the hope of the project that the Standards and Measurement System be of avail to "every trial court in the Nation" and that each avail its use to "begin improving access to justice and its administration with equality, integrity, and timeliness. Ms. Gist reminded us that the System was "[c]rafted by a commission of leading trial judges, court managers, and scholars and demonstrated in trial courts across the Nation, the measurement system is an invaluable resource for enhancing a court's ability to provide fair and efficient adjudication and disposition of cases." Monograph "Trial Court Performance Standards and Measurement System Implementation Manual," (Williamsburg, Va. National Center for State Courts, July 1997), iii.

These ***Performance Standards*** summarized as ***10 CourTools***, include: **1)** *Access and Fairness* - Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect; **2)** *Clearance Rates* - The number of ongoing cases as a percentage of the number of incoming cases; **3)** *Time to Disposition* -The percentage of cases disposed or otherwise resolved within established time frames; **4)** *Age of Active Pending Caseload* - The age of the active cases that are pending before the court, measured as the number of days from filing until the time of measurement; **5)** *Trial Date Certainty* - The number of times cases disposed by trial were scheduled for trial; **6)** *Reliability and Integrity of Case - Files* The percentage of files that can be retrieved within established time standards, and that meet established standards for completeness and accuracy of contents; **7)** *Collection of Monetary Penalties* - Payments collected and distributed within established timelines, expressed as a percentage of total fines, fees, restitution, and costs ordered by a court [perhaps modifiable to SSA cases in terms of overpayment collections]; **8)** *Effective use of Jurors* - [Inapplicable in Administrative Law Tribunals as there are no juries]; **9)** *Court Employee Satisfaction* - Ratings of court employees assessing the quality of the work environment and relations between staff and management; and, **10)** *Cost per case*- The average cost of processing a single case, by case type. As cited in Brian J. Ostrom and Roger Hanson, *High Performance*

In light of what Mr. Jenkins has offered, impact analysis presupposes that information is something which is useful and of value. Hence, such information would be an economic good, particularly where it serves in the manufacture of greater efficiencies in case processing which has already been established as a good of economic value.

Thus, the notion of "use" emerges. "'Use' is said to be evaluation's Holy Grail, the anointed purpose, which has motivated a legion of evaluators."[47] "Use" of evaluation is of value in producing efficiencies; "Use" is evaluation's purpose in case processing.

Surveys offer a means to evaluate systems. Questions contained in a 1978 GAO survey of Administrative Law Judges indicate that the GAO recognized a number of means to measure an Administrative Law Judge's activity. Number of assigned cases, case weighting, and time that a respective case was with the Administrative Law Judge were among the factors considered as possible measurements. The responses indicated that the Judges were reprimanded if they did not meet a set national case average.[48]

Court Frame Work, Achieving High Performance: A Framework for Courts (Working Papers Series National Center for State Courts, Williamsburg Va. April 2010), 50.

[47] Gary T. Henry, "Why Not Use?" *The Expanding Scope of Evaluation Use* New Directions for Evaluation a publication of the American Evaluation Assn. No. 88, Winter 2000, 99 (San Francisco, Calif. Jossey Bass Pub. 2000, Valerie J. Caracelli and Hallie Preskill Editors), 95

[48] GAO, *Administrative Law Process: Better Management is Needed,* FPCD 78-25 (Washington D.C: May 15, 1978). 91.

Per GAO, *Administrative Law Process: Better Management is Needed,* FPCD 78-25 (Washington D.C: May 15, 1978). 91, Questions 34 & 35 posed to Administrative Law Judges of all Federal Agencies are as follows:
"Question 34--- Is the system to determine [Administrative Law Judge] productivity based on any of the following methods? (check only if yes.)
(34-1) Specified number of cases per month
(34-2) Weighing of cases based on the time it takes to adjudicate each type of case.
(34-3) Time standard for each type of case.
(34-4) Time standard for each state of case.
(34-5) Other, please specify."

Evaluation of "lessons learned" and understanding another Agency's operational Agency may serve the operations of another organization. The GAO tacitly recognized that case weighting may be of use in Administrative Law Judge procedures in its 1979 questionnaire. In contrast, on June 17, 1996, Federal Judicial Branch, through the Administrative Office of the Courts, was undertaking a comprehensive review of its work measurement formula for assessing court staffing needs in order to determine how greater efficiencies might be incorporated into the Court system's weighting methodology. At the same time, the Administrative Conference of the Courts was initiating and pursuing studies "about ways to economize while continuing to provide a consistently high quality of justice and …be an 'honest broker' of ideas relative to economy and efficiency,"[49]

The majority response to this question was "There is a national average established upon past records that [Administrative Law Judges] try to meet each month. When they do not reach the national average, they are reprimanded"

Question 35--- Is of the following feasible for determining [Administrative Law Judge] productivity in your agency? (check only if yes.)
(35-1) Specified number/ month
(35-2) Weighing of cases based on the time it takes to adjudicate each type of case.
(35-3) Time standard for each type of case.
(35-4) Time standard for each state of case.
(35-5) Other, please specify.

In substance, the response was as follows: "It was stated that there was too much *variation* in the nature of cases to set a simple criterion." Moreover, "[i]t was felt that productivity should be *weighted* by the type of result, i.e., dismissal, affirmation, reversal, or partial reversal." "Things which should be considered in determining the productivity of [Administrative Law Judges] are case load, analyzation [analyzation" is written without context], time standard from request for hearing and receipt of file, and time standard from date the case was assigned to [Administrative Law Judge] until the decision is rendered." GAO, *Id.*., 92. At the time of this 1979 study, a typical Social Security case had the following characteristics: 92 days to decision, 77 pages transcript, and three witnesses *Id*.., 59). Administrative Law Judges' role pressures "were similar to those used in a nationwide survey conducted several years ago. They were concerned principally with work overload and role conflict and ambiguity. Each of these has been shown to reduce productivity."…SSA Judges experienced the most pressures from their role. The SSA Administrative Law Judges' "pressures have to do with the amount of work and time and resources available to do it (pages 57-58).

[49] GAO, *The Federal Judiciary: Reviews of Court Operations Should Adhere to Oversight Standards*, GGD-96-114 (Washington D.C. June 17, 1996), 11.

Thus, benefit is derived from drawing upon the institutional knowledge found in the repositories of the GAO SSA reports, while the value of borrowing from the lessons learned from reports touching other agencies is brought home There is value in the study of a system to include an Administrative Law Judge hearing process of which one writer has observed, has "allowed SSA to incorporate the advantages of individualized attention to claimants while still efficiently processing large numbers of claims at the initial and reconsideration levels… It has been done so despite remarkable increases in workloads and complex program changes that could not have been foreseen by its depression-era founders." [50] This amounts to a positive assessment of *public access and fairness* in the SSA *tribunals*, and is the *first* CourTool Performance measurement standard.[51] This bespeaks well of the State and National relationship. Case processing speed and efficiency in these National and State *tribunals* are measurable things of value.

[50] Frank R. Lindh, *An Examination of the Proposed "Closed Record" Administrative Law Judge Hearing in the Social Security Disability Program*, 6 W. New Eng. L. Rev. 745 (1984), 2, 3 and as cited within this reference J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983). 28, and note 12 at 214. http://digitalcommons.law.wnec.edu/lawreview/vol6/iss3/8 (accessed February 17, 2011).

[51] GAO, *Social Security Administration: Major Changes in SSA's Business Processes are Imperative* T-AIM-94-106 (Washington, D.C.: April 14, 1994), 4 supports the proposition that CourTool 1) *Access and Fairness* applies and is indicative that other CourTools measurements would apply as well.

METHODOLOGY

This project incorporates a three-part research design (1) review of Government Accountability Office Reports with focus on Administrative Law Judges generally and Social Security at both State and Federal Levels in particular to demonstrate how the GAO reports are archives of Agency institutional history including policy impacts (2) review of SSA and other Government Accountability Office reports with a view towards finding information useful to transform the processes associated with the Social Security adjudication processes, (3) review of data from other sources referenced in GAO reports to include that from the National Judicial Center, Administrative Conference of the Courts and the National Center for State Courts with deriving information useful towards transformation of processes with a focus on time saving and greater efficiencies. Greater efficiencies are to be viewed in terms of demographics of changing client populations, *Due Process* and ethnic/racial characteristics, quality of decisions, effective human resource distribution; this is all without mention of public policy "interest in protecting some or all Disability Insurance and dependents' benefits from potential benefit reductions."[52]

The methodology should bear answers to inquiry "What should the bar, Judges, Administrators, and the *other tribunals*, as Elihu Root's current audience, be adding to the wealth and effectiveness of all energy in the community of which Senator Root

[52] GAO, *Social Security Disability Reform: Issues for Disability and Dependent Benefits*, 08-26 (Oct. 26, 2007), 8-9.

spoke in 1916 and the administration of justice, of which he strongly challenged all to contribute?"

The present research answers this inquiry. This methodology has come "informed" with the "Literature Review." The Review has drawn upon Senator Root. It has offered a picture of State and Federal disability adjudicators operating in tandem. Moreover, it has drawn from GAO reports, sources from organizations which include the National Center for State Courts and the National Judicial Center. The overlying themes touched within these are refining Agency efficiencies. It is Root who makes the connection with the economy and this was in 1916. Thus, methodology comes informed by Brian J. Ostrom and Roger A. Hansen and their, "discussion of efficiency also helps to underscore that timeliness and quality case processing are both 'economic goods.' All economic goods have value in the sense that to get more of any good, we are willing to forgo some amount of any other good. "Case efficiencies are economic goods in the sense that 'Economic goods are all valued things that are scarce.'" [53] The methodology is to proceed to the data taking into account that adjudication processes; melding with demographics, harmonizing Federal and State shared responsibilities to provide *Due Process*, while upholding public policy, as well as the value placed by the Founders in keeping a Nation informed also amount to "valued things."[54]

[53] Brian J. Ostrom and Roger A. Hanson *Efficiency, Timeliness, and Quality A New Perspective from Nine State Criminal Trial Courts*, Obit. cit.

[54] The Comptroller General espoused value in an informed Nation as a Founders' principle: "Since the founding of our republic, the importance of informing the nation has been an essential component of a healthy democracy. In our country, power resides with the people and their duly elected representatives, and knowledge serves to inform and constrain the use of power. This idea is embodied in forms ranging from the decennial census to the notion of annually reporting on the state of the union, with its history of providing a broad, general picture of the nation's position and progress, along with the President's agenda for the coming year." [54] GAO, *Informing Our Nation Improving How to Understand and Assess the USA's Position and Progress*, 05-1 (Washington D.C.: Nov 10, 2004), 3. The GAO's keeping a Nation informed is inherent in its Public disclosure of its Reports and Testimonies, of which the present research is based.

FINDINGS

FINDING 1: THE GAO REPORTS SERVE TO MEMORIALIZE AND PRESERVE INSTITUTIONAL KNOWLEDGE WITH RESPECT TO SOCIAL SECURITY DECISION-MAKING AND PROCESSING. THEY OFFER A PICTURE OF THE DUE PROCESS AT STAKE.

GAO Director of Homeland Security and Justice Issues William Jenkins embraces institutional knowledge as a management tool in recognizing that, "[t]he most reliable and accurate estimates of the future impact a particular policy may have is likely to flow from a firm understanding as to what has happened in the past and why…even the sheer volume of cases-affect the usefulness of prior experience as a guide to the impact this particular proposal ["policy" whether legislative or administrative] may have."[55]

The Director GAO Human Services Division accords value in institutional knowledge, In speaking of SSA as an independent agency, the Director observed that the Social Security Advisory Board which "could serve to provide institutional memory on policy issues…"[56] More recently, the GAO called attention to "institutional knowledge which may be lost in the event of "[r]etiring" Administrative Law Judges. [57]

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[55]William Jenkins, Jr. "Observations on Impact Models for the Federal Courts" (Conference on Assessing the Effects of Legislation on the Workload of the Courts: Papers and Proceedings, Obit. cit., 118.

[56] GAO, *Statement to Present GAO's Views on H.R. 825, a Bill to Make the Social Security Administration an Independent Agency*, 126772 (Washington D.C. Apr. 23, 1985), 3. This reference involved the "Social Security Advisory Board" a board currently in place and which the GAO recognized "We continue to believe that the board should only be advisory in nature, and should have no role in the day-to-day operations of SSA."

[57] GAO *Results Oriented Cultures: Office of Personnel Management Should Review Administrative Law Judge Program to Improve Hiring and Performance Management* GAO-10-14 (Washington D.C.: Jan 15, 2010), page 14.

Institutional knowledge of Social Security Processes is important to SSA as a result of the number of program changes and innovations over the years. It becomes of critical importance to the *Due Process* that is at stake. The impact of face-to-face disability adjudication is part of the GAO reservoir of knowledge. Its success has been documented at State reconsideration level even though for a time, SSA eliminated the reconsideration Step in a number of States altogether – resulting in claimants having to go to Administrative Law Judge level after initial State adjudication denial. In light of this, GAO reports documenting results from face-to-face, or in-person adjudication at State reconsideration level may serve as a basis for an *Impact Statement* were face-to-face reconsiderations to be performed in the course of adjudication of an application for benefits in the future. Moreover, although not specifically concluded in the Reports, the institutional knowledge archived in the GAO reports may lend a conclusion that there is a nexus between delay in entitlement processing delay and deterioration in an applicant's health. This is shown in the discussion of the *Due Process* that is at stake. Of note, both SSA and the GAO recognize that *Due Process* is involved in SSA disability processing.

The GAO reports preserve such knowledge pertaining to Federal and State Disability processes and offer retrospective impact assessment pertaining to *Due Process* at both levels and the proven benefit of face-to-face evidentiary review with a claimant's case at a State Agency reconsideration step previous to that of the Administrative Law Judge. Such information may prove useful for the researcher seeking to be informed of what has worked in terms of such face-to-face reviews in the past will serve to a program towards face-to-face adjudication which is done, at times, at State level and conducted in the

course of Administrative Law Judge hearings. Hence, this portion of the study will touch upon administrative disability decision-making at both State and Federal levels.[58]

Due Process is the "glue" which binds the Federal and State DDS levels. However, not only do the State Decision disability decision-makers make adjudications which touch the daily lives of the citizenry and impact the State and National economies, but that these State activities there might be an argument that the State DDSs are subject to Title VI "Non-Discrimination in Federally Assisted Programs" provision of the Civil Rights Act of 1964 to include its provisions with respect to Federally-based contracts. Moreover, *Due Process* as guaranteed by the States comes under the 14th Amendment, not the Fifth Amendment. This might arguably have implications under the so called "Reconstruction" Civil Rights Acts as well.[59]

On balance, in 1986, the Supreme Court observed that the disability determination is made under by the States under the authority of SSA. This may weigh in as far as the *Due Process* implications under the various Civil Rights Acts are concerned. However, concerns under the Civil Rights Acts were not the issues before the Supreme Court.[60] The GAO recognizes the State Agencies as "federally funded, but state administered." [61] They work under agreements with SSA and require no State implementing legislation.

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[58] The criteria for disability decision-making may be found at Appendix I. The criteria for decision-making to reach a finding that disability has ceased in the matter of an beneficiary previously found disabled may be found at Appendix II.

[59] 42 United States Code, Section 1981 prohibiting race discrimination in contracts, Section 1983 giving opportunity for Federal and State causes of action to redress State action violating Federal protected right(s), and Sections 1985 and Section 1986 touching upon conspiracies to deprive equal rights and privileges.

[60] *Bowen v. City of New York,* 476 U.S. 467 (1986).

[61] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, GAO-02-322 (Washington, D.C.: Feb. 27, 2002).

However, as the GAO noted in August 1978, "State laws and practices control many administrative aspects of the disability determination process because the personnel involved are State employees."[62] Congress amended the Social Security Act in 1980 to strengthen SSA's control and oversight of the DDSs." The amendments directed the [Social Security Administration] to "promulgate regulations specifying, in such detail as he [or she] deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program…"[63]

The GAO has explained the statutory provisions as follows: "the Secretary was given broad discretion to determine what to regulate in the administrative area, including, the administrative structure of the DDS. Also, the amendments empowered the Secretary to take over the disability determination function should a DDS fail to make determinations consistent with established guidelines." [64]

In 1985, the GAO recognized that: "Recently, the federal - state relationship was strained" as some States refused to process cessation cases which take up whether disability and its associated monetary entitlements end the GAO noted that "likely, the nature of current federal/ state arrangement will always result in some tensions, although there are some indications that they are lessening."[65] These disability reexaminations,

[62] GAO, *A Plan for Improving the Disability Determination Process By Bringing It under Complete Federal Management Should be Developed,* Obit. cit., 2.

[63] GAO, *Current Status of the Federal/State Arrangement for Administering the Social Security Disability Programs,* HRD-85-71 (Washington D.C.: Sep. 30, 1985), 2.

[64] *Id.*

[65] *Id., at 3.*

"continuing disability reviews" or CDRs, may result in cessation of disability in the event that a beneficiary is making sufficient income to amount to "substantial gainful activity or having "medically improved to the point that they are able to work." [66]

After discussing "[c]hanging the operating structure of programs as large and complicated as these [which] raises as number of difficult questions." – the 1985 report questioned whether the Federal or States would accept a change,

"[W]e are unaware of any major movement towards changing the current arrangement. At the state level, there is no indication that governors are eager or willing to give up their states' role in the disability determination process." [67]

The Social Security Administration offered comments to this report,

"(C)urrent Federal/ State regulations do not provide for direct Federal Control over the States. {States are given] "responsibility for management of the adjudication process and control of their operations as long as performance is adequate under the standards we have set for accuracy and timeliness of decisions…Within these parameters we and the States have done well on the whole."[68]

For both the DI and SSI programs, disability for adults is defined as an inability to engage in any substantial gainful activity because of a severe physical or mental impairment. The GAO recognizes that problems are associated with "complex disability claims process." The process involves an application for benefits at "one of 1,300 SSA's [Federal employee-staffed] field offices," the field office's forwarding of application to "one of 54 state DDS agencies where a team consisting of a specially trained disability examiner and an agency physician or psychologist reviews available medical evidence to

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[66] GAO *Social Security Administration: Better Planning Needed to Improve Service Delivery* GAO-10-586T, (Washington, D.C.: Apr. 15, 2010), 3 and page 3, footnote 2.

[67] GAO, *Current Status of the Federal/State Arrangement for Administering the Social Security Disability Programs*, Obit. cit. at 4

[68] *Id.*, pages 29-30.

determination whether the individual is disabled." From this "initial" level, a claimant may ask for Agency reconsideration of decision. From there, the claimant may request an Administrative Law Judge hearing. From there, the claimant may seek remedy from the SSA Appeal's Council – for a review. Thereafter, a dissatisfied claimant may take the matter to Federal District Court. In 1998, SSA spent "almost 66 percent of its administrative budget, on its disability programs." The "disability beneficiaries are only 21 percent of the agency's total number of beneficiaries." In 1999, terms, "The cost of making a determination at the DDS level was $547 per case, while the cost of an [Administrative Law Judge] decision was an additional $1,385.[69]

October 1, 1976, the GAO acknowledged that *Due Process* is to be provided in hearings at Administrative Law Judge Level in recognizing that the Social Security Act's appeals procedures was the Attorney General's model for its recommendation for the Adjudication process under the Administrative Procedure Act. The GAO concluded, [t]hus, because the same procedural requirements of due process apply under the [Administrative Procedure Act] and the Social Security Act, the claimant can receive an equitable hearing under either." [70]

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[69] GAO, *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*, (Washington D.C.: Oct. 21, 1999), 2, 3, 5, 2 at footnote 2.

[70] GAO, *Problems and Progress in Holding Timelier Hearings for Disability Claimants*, HRD-76-173 (Washington D.C.: Oct. 1, 1976), 6. Of note, at this page is found "SSA is apparently moving away from its longstanding non-interference role in dealing with [Administrative Law Judges]. For example productivity goals have been set and supervisory, peer review and counseling systems have been established. While we did not consider all of the personnel management aspects of [Administrative Law Judges] being under either the APA or the Social Security Act, we believe that SSA's change of position in dealing with [Administrative Law Judges] as presently contemplated, does not violate the APA. Therefore, our efforts were directed towards developing recommendations to improve SSA's present adjudicatory system." At page 8 is found "While [Administrative Law Judge] production has increased during [1971 through 1975 – (52,427 requests received in 1971 and 154,962 by 1975)], this has not prevented a large number of cases from being left pending at the end of each year." The GAO summed this report on its cover, "Individuals who are denied social security disability benefits wait an average of 8 months to obtain an appeals hearing

In 1981, the Social Security Administration recognized that *Due Process* was to be afforded in disability cessation cases, in the *Administration's Comments* to a GAO report, the cover of such report informs, "[a]s much as $2 billion annually in Social Security disability benefits may go to individuals who are no longer disabled." SSA offered in its *Comments*, [i]t should be recognized that "due process requirements do produce a certain amount of delay in effectuating terminations."[71]

In 1987, the GAO identified Supreme Court decision *Goldberg v. Kelly*, 397 U.S. 254 (1970) as requiring *Due Process* at Administrative Law Judge and State Reconsideration Evidentiary Hearing Officer Level. The GAO summarized the decision, "the court held that a person's statutory entitlement to welfare benefits was a form of property interest that could not be terminated without offering a hearing that satisfied specific requirements of due process."[72]

Congress passed legislation in 1983 allowing a beneficiary being "dropped from the disability rolls," be entitled to an evidentiary hearing where they could be represented by counsel. If the decision was unfavorable, and the applicant requested review, the application would be sent to another State examiner [other than the one who made the initial decision that disability ceased] for reconsideration. Thus, in addition to making initial disability decisions, State Disability Determination Services were making decisions as to whether disability "ceased." The GAO recognizes, "Although typically,

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and a decision on their claims. Delays are caused by the large backlog of hearing requests, problems arising from the nature of the hearing process itself, and shortcomings in obtaining and using hearing staff. The Social Security Administration is attempting to reduce hearing workload by increasing its staff and productivity."

[71] GAO, *More Diligent Follow-up Needed to Weed Out Ineligible SSA Disability Beneficiaries*, HRD-81-48 (Mar. 3, 1981), 30.

in Social Security disability programs, evidentiary hearing have only been held by [Administrative Law Judges], such hearings are also now being held at the reconsideration level."[73]

GAO reports offer information beyond their titles is evident in the processes as outlined in the April 20, 1989 GAO report *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* which gives a summation of the processes involved in Social Security disability hearings. [74] Examination of it shows the importance of decision-makers and claimants meeting "face-to-face" with decision-makers. Institutional knowledge may be drawn from this report of which may serve as a basis of future decision-making models – to include face-to-face decision-making at State reconsideration level before entitlement to a Federal Administrative Law Judge hearing. Such models may not necessarily be solely in the matters of "cessations." As such, it may be looked at from the "retrospective impact" to go on towards the "perspective impact" perspective

The GAO noted in this April 20, 1989 report, that with "few exceptions an [a Administrative Law Judge] conducts the first face-to-face interview with a claimant, which can be an important factor in accessing a claimant's limitations and [residual functional capacity, i.e. the work function which a claimant can perform notwithstanding the claimant's medical impairment(s)]" The report notes that [Administrative Law Judges] "held hearings in about 94 percent of the cases they decided in fiscal year 1987."

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[72] GAO, *Social Security: Observations on Demonstration Interviews with Disability Claimants*, Obit. cit., 8 and footnote 3 at 8.
[73] Id., 8-9.

[74] GAO *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* HRD-89-22 (Washington D.C.: Apr 20, 1989).

"Others [the ones without hearings] were decided on the basis of the evidence in the file, usually in favor of claimants." [75]

"At a hearing, [the report adds] an [Administrative Law Judge] will ask a claimant questions about such areas as work history, current activities, and perceptions of his or her impairment; thus an [Administrative Law Judges] can form an opinion as to a claimant's credibility. An [Administrative Law Judge] may also have a physician present as medical advisor, who will review the file, listen to the claimant's testimony and render and opinion on the severity of the claimant's impairment and its impact on the claimant's capacity for work-related activities. Similarly, an [Administrative Law Judge] may use a vocational expert to answer questions about the claimant's past work experience and its relevance to jobs the claimant might be physically able to perform with his or his impairment.

"Although [Administrative Law Judges] use the same consulting examiners [physicians with contracts through the States to examine applicants] as DDSs, [Administrative Law Judges] attempt to get more evidence than do the state agencies. SSA wants the consulting examiners' reports to DDSs to include only objective medical findings..."

The report discussed attorney representation. "Attorneys [per OHA statistics for 1986] ere present at 65 percent of [Administrative Law Judge] hearings." The report noted that generally [in DI cases] the claimants agree to 25 percent of retroactive benefits paid and that SSA withholds up to 25 percent of retroactive benefits and will pay the attorney directly on receipt of a fee petition approved by [ODAR]. The GAO noted that the attorneys often add to the evidence by submitting physician and other expert reports.

The GAO called attention to a 1981 study conducted in response to a Social Security Amendment. This study is called the Bellmon Study. The GAO summarized this study, which:

"[S]howed the importance of face-to-face interviews in [Administrative Law Judge] decisions. SSA studied 3,600 [Administrative Law Judge] decisions taking a representative subsample of 1,000 cases from the total these were edited to delete all reference to a claimant's "face-to-face" interview with the [Administrative Law Judge].

[75] *Id.*

Expert testimony was retained. The cases were distributed to a representative sample of 48 [Administrative Law Judges]. The original [Administrative Law Judge] granted benefits to 63 percent of the claimants. The sample [Administrative Law Judge] granted benefits to 46 percent. Thus, the *face-to-face interviews* with claimants appeared to make a difference in a significant number of [Administrative Law Judge] decisions." [76]

The GAO summed its findings on April 20, 1989, to the effect that Administrative Law Judges, "less frequently reversed determinations in cases where state DDS conducted personal interviews with claimants at the reconsideration stage of the appeal procedure."[77]

Thus, taking the April 20, 1989 GAO report *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* as an example, one can see that a report is informative beyond the subject matter as suggested in its title. This document informs the reader what Social Security Administrative Law Judges do at hearings level. It gives one insight into the impact that seeing a claimant "face-to-face" may have at Judge level and outlining the Social Security disability evaluation process. It does all of this with the goal of exploring what has happened in "projects" where there were "face-to-face" encounters are conducted at State level. As such, the report offers "institutional knowledge" into the mechanics going on within the Administrative Law Judge hearing with claimant meeting face-to-face with the Administrative Law Judge.

Moreover, the report offers *Conclusions*. "Decisions about disability case for some categories of claimants are reversed by Administrative Law Judges at a higher frequency than others. If some of these cases could be approved at [State Agency] reconsideration stage, (1) claimants would save time and money and (2) some of the workload at the

[76] *Id.*, 18-19.

[77] *Id.*, Abstract.

hearing offices would be relieved, giving [Administrative Law Judges] more time to deal with difficult cases." [78]

On July 11, 1996, the GAO was pointing out that significant challenges remained for SSA to reduce backlog and pointed out the backlog has "caused hardship for those disability claimants who are unable to work or to afford needed medical treatment while awaiting a final decision"[79] The National Center for State Courts recognizes that during severe deficits economics, State Governments decrease eligibility to Medicaid."[80]

On April 24, 1997, the GAO was urging backlog reduction and consistent decisions and noted that these should be given high priority. The GAO noted that in about 10 percent of the cases reaching Administrative Law Judge level, claimants "*switch their primary impairment from a physical to a mental claim*." The 1994 study data showed that "additional evidence was an important factor in 27 percent of Administrative Law Judge allowances. [81] Such findings would offer support for timely adjudication to preclude deterioration of claimant health and earlier face-to-face presentation in the process.

The final level of process at SSA Agency is that of agency-appointed reviewing "Administrative Judges" of the Appeals Council.

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[78] *Id*., 22-23.

[79] GAO, *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain*, HEHS 96-87 (Washington D.C. July 11, 1996), 10.

[80] *Future Trends in State Courts* 2004, Obit. cit.5. This 2004 National Center for State Courts report was from 2004. On March 30, 2011, the GAO reached similar findings in a report which recognized value in institutional knowledge in its title: GAO, *State and Local Governments, Knowledge of Past Recessions Can Inform Future Federal Financial Assistance*, 11-401 (Washington D.C.: March 30 2011), 19.

[81] GAO, *Social Security Disability, SSA Actions to Reduce Backlogs and Achieve More Consistent Decisions Deserve High Priority*, T-HEHS-97-118 (Washington D.C.: Apr. 24, 1997), 8.

"The Appeals Council is SSA's final administrative appeals level and is comprised of administrative appeals judge reviewers. The Appeals Council may uphold, modify, or reverse the administrative law judge's action, or it may return the claim back to the administrative law judge for another hearing and issuance of a new decision. The decision of the Appeals Council is the Commissioner's final decision.[82]

"After all SSA administrative remedies are exhausted, a claimant has further appeal rights within the federal court system, up to and including the U.S. Supreme Court."[83]

Returning to the matter of State Agency reconsiderations, as part of a Prototype Initiative, in 1999, the claimants of one fifth of the States were no longer receiving the additional step of State-level reconsideration review of their cases; SSA eliminated the reconsideration process in 10 States. The next step for a claimant dissatisfied with the initial determination from these States would be Administrative Law Judge hearing. These States are: Alabama, Alaska, the Los Angeles area of California, Colorado, Louisiana Michigan, Missouri, New Hampshire, New York, and Pennsylvania. [84] While the result of this may have been to the effect that there was no State level reconsideration denial of claims, this dropped the prospect of favorable resolution of claims at the second-step level [reconsideration] in these States serving to necessitate the need for more formal Administrative Law Judges in cases which may have otherwise been found "favorable" at the reconsideration stage in one fifth of the Nation

By April 27, 2010, the GAO was pointing out that the SSA was intending to reinstate the State level reconsideration in the 10 States where it was bypassed going back to 1999. SSA was planning to do this with a view towards eliminating backlogs at Administrative

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[82] GAO *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs* GAO-08-40 (Washington, D.C.: December 7, 2007).

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[83] GAO, *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain,* Obit. cit., 11.

[84] GAO *Social Security Disability: Management of Disability Claims Workload Will Require Comprehensive Planning,* Obit. cit., footnote 2 at page 3.

Law Judge Hearing Office level. With this, the GAO observed: *"Urgency can dictate a pattern of attacking workloads at one or another phase, only to be confronted with a backflow elsewhere in the pipeline."* [85]

The GAO spoke with respect to the 10 subject States, but went on addressing how SSA's actions could impact all States. "In fact given the trajectory in DDS workloads, SSA's most significant backlogs could shift from the hearings level to DDS offices where large numbers of both initial and reconsideration pending claims could accumulate."[86]

FINDING 2: FEDERAL AND STATE STAKEHOLDERS SHOULD BE WORKING IN TANDEM TO TAKE ON THE BACKLOG IN DISABILITY CASES.

In anticipation of Social Security becoming an independent agency, the GAO pointed out to Congress on September 14, 1993:

"Restructuring government to better serve people is a complicated and arduous task, particularly when the agency and programs in question historically have been among America's most successful. Experience tells us there is no simple formula for bringing about the betterment of all we seek, but we would be pleased to continue to work along with you and your Committee, in helping determining the best ways to proceed." [87]

On the same page of this testimony, is found a glimpse into the SSA disability picture. "[T]he disability program and the Supplemental Security Income program are experiencing a major growth in the benefit rolls. Today, more people receive disability benefits than ever before. This rapid growth has spawned a deterioration in services

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[85] *Id.*, 11. Of note, SSA did not indicate that reconsiderations were being reinstated in the respective States because of SSA ascribed value in the State processes or of the impact of placing claimants in these States in a position where they would be on par with citizens from other States who were receiving this additional level of adjudication.

[86] *Id.*

[87] GAO, *Social Security as an Independent Agency*, T-HRD-93-34 (Washington D.C., Sep. 14, 1993).

exemplified by the unacceptably long time it takes to make disability decisions." However, well before and well after Social Security became and independent Agency, the GAO was recommending SSA take steps towards adopting quantitative measurement.

The transparency of the GAO in this regard is evident to the extent that it places its reports on the web. On October 1, 1976, the GAO reported with respect to Administrative Law Judge processes and went on to make recommendations with respect to the States.[88] The GAO offered *Recommendations which currently read*, "SSA should ensure that state agencies have procedures for: (1) informing claimants; (2) ensuring uniformity of criteria; (3) identifying problems; and (4) improving judicial and personnel procedures" As of the writing of the present research, all such 1976 *Recommendations* remain "In progress." The GAO has placed its own *Comments* to its 1979 report on the web; they currently read, "*When we confirm what actions the agency has taken in response to this recommendation, we will provide updated information."* While this web portal has a place reserved for a GAO "Director" and "Team" (presumably to monitor and update), there is *no* GAO Directorate *or* is any specific Team currently listed as being charged with follow-up responsibility for all of these 1976 recommendations – all of which remain open[89] This is all indicative of a need for SSA, State agencies, and indeed, - the GAO, to share the responsibility to be accountable for follow-up in these important disability programs.

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[88] GAO, *Problems and Progress in Holding Timelier Hearings for Disability Claimants*, Obit. cit, *Recommendations* portal.

[89] *Id.* at recommendations portion (http://www.gao.gov/products/HRD-76-173#recommendations) (accessed March 11, 2011). Note, as this exists on the GAO *Recommendations for Executive Action* is printed in Red. The terms "Director" and "Team" would amount to entities within the GAO.

On October 9, 1979, the GAO observed that for SSA disability programs, "[m]eaningful program evaluation is limited further because: time and accuracy goals for processing claims do not consider the effect of one on the other; not all systems for measuring achievement provide reliable data; and the Social Security Administration has no means of measuring program efficiency."[90] On September 30, 1985, the GAO recognized that statutorily SSA was to "promulgate regulations [detailing] performance standards and administrative requirements and procedures" to be followed by the disability determination function in order to assure effective and uniform administration of the disability insurance program…"[91]

From what has been shown, backflow can happen anywhere in the process and has been longstanding; without means of measuring program efficiency, backflow may be expected. On balance, the soundness and harmony in the State and Federal systems has been celebrated by M. Maslaw who had examined delay in the processes back in the 1970's. Maslaw later offered that the State Agencies exhibited significant efficiencies in processing large amounts of disability determinations while the Administrative Law Judges had a humanizing effect on the system.[92] Maslaw's position regarding Administrative Law Judges provides support for a further conclusion that now that State DDSs have been brought in face-to-face in the reconsideration cessation/evidentiary hearings as recognized in the GAO reports, there may now be an enhancement of

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[90] GAO, *Controls Over Medical Examinations Necessary for the Social Security Administration to Better Determine Disability*, HRD-79-119 (Washington D.C.: Oct. 9, 1979), Cover sheet.

[91] GAO, *Current Status of the Federal/State Arrangement for Administering the Social Security Disability Programs*, Obit. Cit.

[92] Frank R. Lindh, *An Examination of the Proposed "Closed Record" Administrative Law Judge Hearing in the Social Security Disability Program*, Obit. cit..

humanizing effect of individualized attention to applicants afforded at State level as well. A humanizing effect was shown at State level face-to-face application reconsideration demonstration projects; this would account for the fact that denied claimants requested less Administrative Law Judge appeals and that the Judges felt comfortable with the State Agency adjudications resulting from such face-to-face reconsideration adjudications. Less Administrative Law Judge requests stems from such humanizing effect at in-person State Agency application level reconsiderations and the prospects for earlier resolution may preempt backflow at Administrative Law Judge hearings level. Such impact may have been foreseen were the impact of these earlier demonstration projects revisited with a view towards efficiently engineering the disability adjudication process.

Whether or not there are measurement standards in place, one cannot take on "backflow" without heeding some definitional guidance. A December 7, 2007 GAO report offered a definition of "backlog" – "the number of pending claims that exceed the number that should be optimally pending in any one year" and "the number of claims that exceed the optimal level that should be pending in the pipeline." [93] This is more

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[93] GAO *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs* GAO-08-40, (Washington D.C.: Dec 7, 2007). The GAO detailed its methodology for computing "backlogged claims." The GAO was doing this for the disability insurance claims rather than the SSI "because the number of [disability insurance] cases is larger than the number of SSI cases, but the differences in processing times between the programs is minimal." The methodology was looking into backlogging at initial application level, the Administrative Law Judge hearings level, and the Appeals Council level. The GAO could not compute the number of claims backlogged at the reconsideration level as SSA had not established an optimal level of pending claims at that level that would allow computation of the backlog. The GAO looked at data from "New Receipts" – "the number of new claims receipts during the fiscal year at each level of adjudication. These included cases at DDS initial claim which would have excluded cases resulting in non-medical denial and hence were without the need for a DDS medically-based determination. "New Receipts" also included claims at these levels of adjudication: reconsideration claims, appeals for a hearing before an administrative law judge, and appeals for review by the Appeals Council. The GAO also analyzed data on continuing disability reviews – including new receipts as well as dispositions and pending cases for fiscal years 2004 to July 2007. The GAO also took into account "Dispositions" – the number of cases in which some adjudicative action was taken regarding the disability benefit claim during the fiscal year at each level of disposition. A "Disposition" would include an allowance, a denial, or a dismissal. The GAO also took into account "Pending Claims," i.e. the number of

extensively outlined in the below footnote. However, in order for SSA and the States to better work together, greater attention may be given to what is at stake. Is it a matter of case numbers or is it a matter of what it takes to get the work done? A weighted workload study similar to the one the Federal Judiciary utilizes, as found in the GAO studies into the Third Branch and into the District of Columbia Courts, may position the Federal Agency and the States to be able to utilize weight measurements on the basis of the work that is required to get a particular type of case adjudicated.

Moreover, from what has been shown herein, the District of Columbia Courts complied with GAO recommendations to consult with the National Center for State Courts for input on the prospects of a staffing study.[94] Finding what resources it takes to

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claims pending in review by SSA at the end of the fiscal year, at each adjudication level. The GAO also took into account the "Average processing time," which is the average time it took SSA to adjudicate a claim and reach a decision for all cases that were decided during the fiscal year, at each level of adjudication. SSA's estimate of the number of cases that should optimally be pending at year-end; this was known as "Target-Pending"

To calculate the number of backlogged claims at the end of each fiscal year for each level of adjudication, the GAO compared the "targeted number of pending cases at that level of adjudication to the actual number of pending cases. If the actual number of pending cases exceeds the targeted number of pending cases then the difference is backlog." The GAO noted that SSA had not develop estimates of the targeted number of pending claims for fiscal years prior to 1999 and SSA has not developed estimates of the targeted number of pending claims at the DDS reconsideration level.

[94]GAO, *D.C. Courts Staffing Level Determination Could Be More Rigorous*, Obit. cit.. "The Chief Judge of the Court of Appeals indicated that the National Center has a great deal of experience with methodologies that might be effectively used for such a study, and, therefore is in a better position to identify the advantages and disadvantages of each." *Id.*, at 10. The GAO notes that "NCSC has developed and promulgated a "weighted caseload" system. Under this system, officials determine how much time is taken up by case in the courts or courts under study. The officials then determine how much judge or staff time is taken up by different types of cases in the court or courts under study. The officials then determine how much judge or staff time is taken up by the court's caseload as "weighted" by the time factor and compare total judge or staff years, as calculated, with the actual judges or staff available. How much time is taken up by a certain type of case can be determined by actual measurement of cases in court or by the 'Delphi' method of getting judges, staff or outside experts to estimate the length of time certain cases would take. For example, if a court had five full-time staff members (and thus 5 staff years), and it was determined that the court's annual workload would take 7 staff years to complete, there would be a need for two additional staff members. However, it could also be found that the court's workload required only 4 staff years, in which case there would be one more staff member than needed. This system was developed to give state *government decision-makers* an independent, objective way to evaluate the need for court personnel based on the actual amount of time and resources different court activities should take…In promulgating this method and advocating its use, NCSC acknowledges that decisions on the size of a court or court staff

get the work efficiently done would dovetail with the prospective that Court efficiencies are things of economic value; it would be in harmony with the array of CourTool performance measures management tool which takes into account assess and employee satisfaction as components of its 10 measures.

Quality is of importance in anything of value. This would be the case with respect to State Agency decision-making April 28, 1994 report. As one finds in GAO report entitled *Quality Assurance Independence*, the Social Security Administration has a regional structure for ensuring the quality of decisions made by DDSs. Each SSA Disability Quality Branch (DQB which were independent from the Regional Commissioners' offices since July 1987) works with the regional medical consultants (RMCs) to determine whether DDSs comply with regulatory accuracy standards. As the RMC staff serve a "vital quality assurance review function for SSA's disability programs, but have remained under the management and supervision of the Regional Commissioners' office. The GAO recommended that the RMC be transferred to an SSA unit with no disability programs management responsibility. The recommendation noted that it was implemented and the *Comments* were "SSA is redesigning the disability determination process including the overall quality control system. SSA's Commissioner has approved a set of 'guiding principles' for the new Quality Assurance System. One of these principles addressed the recommendation in that the reviews will be performed by an organizational unit with no disability program management responsibility."[95] The

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cannot, and should not be based solely on results obtained by a statistical model. Data from the model according to NCSC, must be interpreted in a social, cultural, and political context, and factors peculiar to each court and court circuit should be considered." *Id.*, 9-10.

[95] GAO *Social Security Administration: Quality Assurance* Independence, HEHS-94-151R (Washington, D.C.: April 28, 1994).

extent to which quality has been added to the picture since 1994 may remain open to discussion. That the data for State reconsideration levels was unavailable for GAO review on December 7, 2007 suggests that quality was not wholly subject to SSA accounting at that time, - particularly as the purpose of quality branch was to ensure that the States comply with regulatory accuracy standards. However, SSA, or for that matter – any Agency should keep quality as a part of its conversation.

The importance of maintaining data at disability reconsideration levels, not to mention all levels - is borne out in the legislative history of the Administrative Conference of the United States. As the Senate recognized by July 1977, such legislative history had quotes from a 1959 speech by Chief Justice Earl Warren:

"Perhaps even more discouraging in the agency proceedings [than the generally recognized existence of undue delay] is the fact that meaningful information on the state of backlog, and the extent of the delay, is not even available." [96]

Thus room remains room for improvement. In 1976, Social Security was charged [for a period of time] with securing information from the States in Black Lung cases (for a period, Social Security Judges were processing these cases along with disability claims and faced the addition of SSI – hence sources of additional backlogging in the 1970s). The GAO observed "We believe SSA should meet the convenience of State Systems rather than relying on the States to do most of the work."[97] However, by September 13, 2010, State Disability Examiners were recognizing that the States were operating on

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[96] Senate Committee on Governmental Affairs, *Committee Report, Study on Federal Regulations*, Prepared Pursuant to Senate Resolution 71, 95th Congress, 1st Session, p. 148., citing Address by Justice Earl Warren, before the annual convention of the Federal Bar Association (September 24, 1959), as quoted in Senate Committee on the Judiciary, Report No. 621, to accompany s. 1664, 88th Cong., 2nd Session. (1963).

[97] GAO, *Examination of Allegations Concerning Administration of the Black Lung Benefits Program*, MWD-76-22 (Washington D.C.: Jan. 14, 1976), 7.

multiple computer "Legacy" systems facing: "aging technology", "transaction failures", "long rollout cycle for modifications," with "difficulty in sharing work among components and that this "not the product of a strategic plan."[98]

This point warrants a look back at what has been seen, States are an integral part of the Federal Social Security adjudication process. This is in conformity with a Federal law and regulation. The States, like other elements within the Social Security adjudication arena, have been subject to the intricacies of Federal legislation. They have interplay, not only with the Social Security Administration, but with the Administrative Law Judge *tribunals*, – the level above the State-based disability and disability-cessation determination making. Ultimately, decisions originating at State adjudication levels may go up to the Supreme Court. State Agency involvement with respect to disability cessation, for that matter – State involvement in all processes, is demonstrative of the significant role that the States have been tasked with playing in these Congressionally-established disability adjudication programs; the States provide *Due Process* in these important Federal disability programs. This interplay of the States with a Federal Government is something of which Congress has evidenced value. This gives one pause to ponder whether this system, of *tribunals*, closely approximates what Alexander Hamilton had in mind in advocating that the Federal Courts were in harmony with the State Court Systems?

It is worthy to note that by Federal statute, the States make, at least at the "initial" or first level, the determination as to the date that that an individual became disabled for

[98] Slides 2010 National Association of Disability Examiners National Conference http://www.nade.org/2010_conference_coverage.htm (accessed March 18, 2011).

purposes of the Federal program.[99] Further, one may consider the State-disability determination processes which, as described, appear to be essentially "final" upon a finding that a claimant "is disabled" for purposes of these Federal programs. With these – questions might arise as to the bearing of State involvement on a Federal entitlement process.. This calls to mind the Fourteenth Amendment which is the basis of the States' due process obligations. Moreover, a reading of Section 4 that the Fourteenth Amendment [with deletion of Civil War pension and bounty wording], reads, "The validity of the public debt of the United States, authorized by law…shall not be questioned."[100]

In concept, the State-Federal Relationship is in harmony with the Founders' principles. However, as has been shown, the SSA vision of the utilization of the State level has served in part, as a means of eliminating Administrative Law Judge hearings backlog by passing cases [through remand] to the States' reconsideration adjudicators. While time considerations in terms of hearing backups may have been the basis for this, no statistics appear to have been offered as to the time saved for an applicant awaiting case resolution. Indeed, on December 7, 2007, the GAO reported to Chairman of the Committee on Ways and Means that they could not "calculate the backlogs for the

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[99] 42 United States Code Section 421 provides, generally with respect to Social Security Disability Insurance , that the "day disability began, and the determination of the day on which such disability ceases, shall be made by a State agency…" This Supplemental Security Income cross reference to Section 421 (and consistent with State agency reference) is found at 42 United States Code Section 1383b.

[100] With respect to the Constitutional Provisions:
U.S. Constitution, Amendment 5: "No person shall be…deprived of life, liberty, or property, without due process of law…" (Due Process applicable to the Federal Government)

U.S. Constitution, Amendment 14 , Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Due Process applicable to the States)

reconsideration stage since SSA could not provide data that would allow" [the GAO] "to do so."[101] This prompts inquiry here, what does this do to a process of which, the GAO has noted is "complex and fragmented" from the start?[102] Further, in viewing the bigger picture, one must not lose sight of the statutory need to review the matter of whether disability has ceased and the provision of evidentiary hearings at State level. So, those looking into SSA disability at both the Federal and State Levels, should remain mindful that of concerns in these areas.

Timely and efficient continuing disability reviews are necessary to determine the criteria in conducting a continuing disability review and require examiners to find evidence of medical improvement since this last decision. Some DDS Directors reported that it may be difficult to assess medical improvement in cases where the prior disability decision was based on incomplete or poorly documented evidence."[103] The sequential decision-making process for disability cessation decision-making is found at the Appendix II to the present study.

While not stated in GAO reports, there may be additional purpose for retaining the reconsideration step in the SSA adjudication process. An additional step in the decision-making process may reduce the universe of claimants whose claims may be subject to racial and ethnic "disparities" with respect to Administrative Law Judge decisions. On July 11, 2002, the GAO called attention to its 1992 report that analyzed racial differences

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[101] GAO, *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs*, Obit. cit., footnote 1 at page 2. The GAO recommended "SSA monitor the reconsideration stage for backlogs and better plan, execute, and evaluate initiatives to address backlogs." *Id*. Highlights page.

[102] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, 02-322 (Washington D.C. February 27, 2002), 5.

in allowance decisions "mostly with respect to [Administrative Law Judge] decisions. The GAO wrote that in the "next phase of our work, we plan to examine the extent to which disparities still exist within SSA's disability decision-making process."[104] In short, one may conclude that the greater number of steps of review in the process, the lesser likelihood that racial or ethnic decisional disparities exist.

Congressional delegation to the *other tribunals* of Federal Administrative Law Judges and State adjudicators has been emphasized herein. Changes are emphasized at this point. The Comptroller General has observed, [t]he history of this country's social insurance programs is one of change and expansion. SSA has been required to respond to frequent legislative changes which have not only modified the original Social Security Act but also, in some cases, have considerably expanded the agency's basic mission. SSA has had to implement legislative changes with little advance notice in a short time."[105] This Comptroller General observation was made in 1974. Its message still has bearing on the work of the Federal Administrative Law Judges and State Disability Agencies. It supports the rationale for "judicial impact" statements for new legislation or policies from or on behalf of these *other tribunals*. This is also what a consulting firm recommended in order for SSA to produce quality outcomes for its disability products. The firm endorsed a "best practice" quality management system which, in part, would, "support statutory and regulatory requirements."

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[104] GAO, *Social Security Disability Programs: Fully Updating Disability Criteria Has Implications for Program Design*, Obit. cit., 2.

[105] GAO, *Increased Efficiency Predicted if Information Processing Systems of the Social Security Administration are Redesigned*, Obit. cit., 7.

"This goes beyond measuring performance as required by statute to providing information that can address congressional concerns, assist in the analysis of proposed legislation, and support the monitoring of its implementation."[106]

[106] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, Obit. cit.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION 1: THE GOVERNMENT ACCOUNTABILITY REPORTS AND TESTIMONIES SERVE AS REPOSITORITORIS OF AGENCY INSTITUTIONAL KNOWLEDGE AND ARE USEFUL IN AGENCY TRANSFORMATION.

The GAO is a Legislative Agency which offers reports and testimonies to Congress into administrative and program matters. Its reports offer a longitudinal picture of matters of concern in a particular agency. Generally, this research has delved into review of Social Security Disability programs and focused on the role of the Administrative Law Judge and the State Disability Determination Cessation Reconsideration Evidentiary hearing officer. In addition, this research has touched upon the use of State Agency face-to-face disability adjudication before a claimant has a right to an Administrative Law Judge. Such reporting may be useful in Agency transformation. The Cessation Reconsideration Evidentiary Hearing Officer is recognized by SSA and the GAO is a *Due Process* requirement.

In addition, the face-to-face examination at State level for reconsiderations of disability applications, rather than just as a part of cessations, though conducted solely as part of an SSA demonstration project, was effective as evidenced in the GAO reports. Such demonstration face-to-face State Agency project activities resulted in applicants for disability being informed: as to the precepts of the decision-making processes a claimant's case and of the type of medical information needed for the claimant's case. It afforded applicants the opportunity to be face-to-face with a decision-maker early in the process; this would be all in keeping with the consulting firm's recommended best practice quality management system of customer service and *Due Process*. It is added

here that having the claimant in at an early opportunity and offering input as to needed medical information would serve the ends of timeliness and efficiency and lessor case backlog further up the pipeline as well.

Furthermore, this demonstration project showed that State Agencies approved more disability applicants' claims at the in-person reconsideration level, as compared to non in-person control reconsideration group. Judges were more at ease with the results of the in person State Agency face-to-face reconsideration adjudications and less claimants contested unfavorable face-to-face reconsiderations, thereby eliminating need for Administrative Law Judge Hearings in many Claimant's cases. This is demonstrative of the usefulness of the GAO reports as repositories of institutional knowledge. Were a program to be undertaken offering applicants the opportunity for State Agency face-to-face reconsiderations, - a program in keeping with the consulting firm's recommendation that SSA "ensure disability programs are national programs," - the success of such a program as a means of providing customer service and reducing requests for Judge hearings has been established. Thus, the GAO reports are repositories of institutional knowledge and amount to Impact Statements of the prospects of success for such a program. This would be demonstrative of wisdom of SSA successfully borrowing, from the GAO Directorate charged with inquiry into the Federal Judiciary - the notion of Judicial [*Tribunal*] Impact Statements for emerging disability adjudication designs.

The February 27, 2002, GAO report containing the consulting firm's recommendation is indicative that it was SSA engaged the consulting firm; as such, SSA should take heed of the firm's sound recommendations to take a business approach in disability adjudication processing. The firm was visioning that SSA adopt a more quality-focused

business culture. The firm endorsed that SSA programs should be National programs. This, would be aligned with refocus upon the State reconsideration process, and certainly beyond that of which the GAO identified on December 7, 2007 when GAO informed the House Ways and Committee, "SSA could not provide data" "that would allow" the GAO to "calculate backlogs for the reconsideration stage." Offering opportunities for such face-to-face at the 54 State DDSs and the Federal DDSs would certainly serve to ensure that these are National programs and in keeping with the consulting firm's recommendations. Notwithstanding the inability of SSA to provide reliable data with respect to this important State activity in the Nation's disability processes, it is the nature of the consulting firm's recommendations which bear Chief Justice Rehnquist out: "[t]he dynamics of federalism…lead to cooperation and mutual benefit." This in-person reconsideration State Agency adjudication tool may prove useful for an Agency considering transformation and the successes of such face-to-face reconsiderations are all documented in the GAO reports.

Furthermore, the need to steer an Agency's management from a course bent on finding error to a best practice quality management system (as the independent consulting firm recommended) is found in the reports as well. The consulting firm's recommendations will remain enshrined in the GAO repositories. As such, SSA's future successes may be measured by the extent to which the Agency adheres to these quality recommendations.

RECOMMEDATION 1: AGENCIES AND BRANCHES OF GOVERNMENT AT ALL LEVELS SHOULD AVAIL THEMSELVES OF USE OF THE GAO REPORTS ALL OF WHICH ARE READILY ACCESSIBLE.

The GAO reports have outlined the value in face-to-face decision-making at State Level as a predicate to Administrative Law Judge hearing entitlement. Were the GAO

reports touching upon this taken to heart, SSA might not have eliminated the Reconsideration level in 10 States only to reinstate it. However, the Agency was not doing this on the basis of the earlier GAO findings of efficiencies at face-to-face reconsideration level, but rather - the Agency was doing this with a view to address Administrative Law Judge hearing level backlog. To this, the GAO may have been informed from its institutional knowledge of the disability adjudication processes – in offering "Urgency can dictate a pattern of attacking workloads at one or another phase, only to be confronted with a backflow elsewhere in the pipeline."

Moreover, where policymakers of 12 States to have availed themselves the institutional knowledge contained in the GAO reports, there may have been a lessor likelihood of furloughs of Federally-funded State DDS employees who are with the States to provide services to the States' disabled populations The failure of these policymakers of these 12 States to become informed by GAO reporting which may have preempted the furloughs in these 12 States now remain memorialized among the institutional knowledge of the GAO reports.

CONCLUSION 2: DELAY IN SSA DISABILITY ADJUDICATION MAY HAVE A DETERIORATING IMPACT ON AN APPLICANT'S HEALTH AND WELL-BEING.

Individuals awaiting their disability decisions are subject to limited access to finances and limited access to healthcare. By the time their cases reach Administrative Law Judge level, 10 percent of the claimants change their alleged impairment from a Physical Condition to a Mental Condition. Moreover, the deteriorating nature of delay upon an applicant's well-being is readily derived from the institutional knowledge contained in the GAO reports. In describing a recently imposed reduction to 60 days within which a

claimant could make request for an Administrative Law Judge hearing, - the GAO noted, "[p]reviously, when a claimant had 6 months to make such a request, there was a greater chance of his condition deteriorating."[107] In 2004, the National Center for State Courts recognized that during times of economic downturns, States offer less in terms of Medicaid assistance.[108]

RECOMMENDATION 2: CONSIDER OFFERING FACE-TO-FACE STATE RECONSIDERATION EVIDENCE HEARINGS PREVIOUS TO ADMINISTRATIVE LAW JUDGE HEARING ENTITLEMENT. TAKE IMMEDIATE STEPS TO OTHERWISE ELIMINATE BACKLOG. CONSIDER LEGISLATIVE ACTION TO PROVIDE MEDICAL CARE FOR APPLICANTS PENDING RESOLUTION OF DISABILITY APPLICATION.

As the Administrative Law Judge hearing level has been traditionally the subject of backlog, the provision of opportunities to present evidence and appear face-to-face with a State agency adjudicator may be a means to resolve claims in a fashion to pre-empt Administrative Law Judge Hearings. Other than Cessation evidence hearing, the Administrative Law Judge may be the first time that an individual sees a decision-maker face-to-face. State Reconsideration Face-to-face reconsideration may serve to resolve matters at an earlier level which involves less expense than that at Administrative Law Judge Level. It will have the effect of placing beneficiaries in the pipeline for Medicaid and other medical assistance sooner. It will also afford get them an avenue to vocational rehabilitation. The GAO recognizes "employment assistance…could allow claimants to…potentially remain off the disability rolls." However, this is not offered until after the

[107] GAO, *Problems and Progress in Holding Timelier Hearings for Disability Claimants*, HRD-76-173 (Washington D.C.: Oct. 1, 1976), 28.

[108] *Future Trends in State Courts* 2004, Obit. cit.5. Subsequently, the GAO has made similar observations. GAO, *State and Local Governments: Knowledge of Past Recessions Can Inform Future Federal Financial Assistance*, 11-401 (Washington D.C. March 2011).

claimant has gone through the "lengthy disability program and proven his or her inability to work." By the time an individual has gone through this, the individual's skills, work habits, and motivation to work are likely to deteriorate during this long wait."[109]

The efficacy of face-to-face State Agency reconsiderations has been established as found in SSA's institutional knowledge from the GAO report repository. "SSA conducted a study to determine if personally contacting the claimant upon reconsideration of his claim would prevent cases from reaching the hearing level unnecessarily." With this the State Agency interviewed the claimant to explain the basis for the initial denial and received an explanation from the claimant as to why the claimant disagreed. The claimant was afforded the opportunity to offer new evidence. "For, example, it gave the claimant an opportunity to add new material to his case at an early stage and made it possible for him to obtain a fuller understanding of disability requirements." This study encompassed 16 States and a control group; the control group processed under routine, non-face-to-face, non-claimant-contacted conditions. "Only 30 percent (1,955 of 6,592) of the claims in the control group were awarded, compared to 45 percent (3,148 of 6,924) in the experimental group. Additionally, a lower percentage of those in the experimental group whose claims were denied filed for a hearing."[110]

Moreover, the GAO noted in a subsequent study of face-to-face State Agency disability reconsiderations, that Administrative Law Judges, "less frequently reversed

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[109] GAO, *Social Security Disability: Commissioner Proposes Strategy to Improve the Claims Process, But Faces Implementation Challenges*, 04-552T (Washington D.C.: March 29, 2004), 5.

[110] GAO, *Problems and Progress in Holding Timelier Hearings for Disability Claimants*, Obit. cit., 28.

determinations in cases where state DDS conducted personal interviews with claimants at the reconsideration stage of the appeal procedure."[111]

Congress has delegated to the States (for a time in demonstration projects) the authority to provide the opportunity for face-to-face evidence examination in disability cessation cases (with the Administrative Law Judge hearing entitlement remaining as the next appeal route). As such, Congress acknowledged value in such State Agency in-person redeterminations. Moreover, SSA has established that the result of such State Agency in-person disability claim reconsiderations, is to greater inform disability claims, while at the same time - lessen the population which would request an Administrative Law hearing. The Administrative Law Judge hearing is more costly than a State Agency disposition.[112] To consider opportunities for in-person State Agency reconsiderations is in keeping with the GAO's belief, "that there is no quick and simple solution to hearing delays and that only time and improved case techniques will enable Social Security to speed the hearing process."[113]

As for services for claimants awaiting resolution of their applications for benefits, the GAO placed modernizing SSA disability programs on its *High Risk List* in 2003 indicating that it would likely require legislative action. As the GAO recognized "because of ongoing concerns about the positioning of the Social Security's disability

[111] GAO *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* , Obit. cit.

[112] In 1999, "The cost of making a determination at the DDS level was $547. per case, while the cost of an [Administrative Law Judge] decision was an additional $1,385.
see: GAO, *Social Security Disability: SSA Has Had Mixed Success in Efforts to Improve Caseload Management*, Obit. cit.

112 GAO, *Problems and Progress in Holding Timelier Hearings for Disability Claimants*, Obit. cit.

programs to provide meaningful and timely support to Americans with disabilities, the GAO has added modernizing federal disability programs to the 2003 high risk list."[114]

CONCLUSION 3: CASES ARE ECONOMIC GOODS AND REQUIRE TIMELINESS AND QUALITY CASE PROCESSING.

The emphasis on research into SSA disability adjudication inherent in the GAO's extensive reporting into such matters, as well as the Federal Disability Programs being placed on the GAO's *High Risk List* going back to 2003 is evidence that the GAO places high value on these matters. The emphasis in the reports in speed and efficiency and taking out disparity make these areas, "valued things." As such, program managers, administrators and Judges in SSA and in other agencies and *tribunals*- should consider adopting the approach, (which this research traces to 1916), as succulently underscored by Brian J. Ostrom and Roger A. Hansen and , "discussion of efficiency that timeliness and quality case processing are both 'economic goods' All economic goods have value in the sense that to get more of any good, we are willing to forgo some amount of any other good. There is a temptation to think that the term goods applies only to tangible goods. This temptation must be resisted. 'Economic goods are all valued things that are scarce.'"

RECOMMENDATION 3: ENBRACE AND INSTILL AT ALL LEVELS THE ATTITUDE THAT CASES AS ECONOMIC GOODS WITH A VIEW THAT "ECONOMIC GOODS ARE VALUED THINGS THAT ARE SCARCE. IN CHAMPIONING THIS ATTITUDE, ABANDON THE OUTMODED APPROACH THAT CASES ARE "FUNGIBLES."

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[114] GAO, *Performance and Accountability: Major Management Challenges and Program Risks Social Security Administration*, 03-117 (January 2003), *Highlights.*

Timely and efficient Social Security disability processing serves as the doorway for disabled populations, not only to receive monies, but also to receive vocational rehabilitation opportunities and medical care. These are matters touching the economy. The frontline for these vocational services is at the States, as such, they (and every participant to include Administrative Law Judges) need to be included as stakeholders.

Tools are needed to get the job done. The Federal partners must take the lead. The GAO as much as chided Social Security in January 1976 for taking a passive stance in seeking information from the States on matters involving Black Lung benefits. Nonetheless, the State DDSs remain faced with "legacy computer systems."

All stakeholders should consider availing themselves of the tools offered by the other sources as found in the GAO reports. For instance, weighted workloads have proven useful in both the State and the Federal Courts. The GAO has detailed the case weighting system developed at the National Center for State Courts. The Center recognizes that it takes a statistical model into account, but remains mindful that it must be "interpreted in a social, cultural, and political context." Cases should no longer be looked at or assigned in terms of numbers and number of cases should not be a pretext for the *tribunal* staffing. Cases should be embraced with economic value beyond that of fungibles.

Moreover, these *tribunals* should consider availing themselves of the National Center for State Courts' CourTools as a valuable tool in managing the processes. Case load clearance rates, age of pending cases, time to disposition, and trial date certainty are all tools of which a Federal adjudication agency may use to better economize these *other tribunals*. This is without mention of customer access and employee satisfaction. *Of particular importance* in cessation cases is the CourTool with emphasis on reliability and

integrity of cases. This would hold true particularly with regard to the integrity of files constituting the file which served as the basis of an initial decision finding "disability." In such an instance, respective electronic and paper data would be critical for a State Agency reviewer in determining whether disability had ceased.

CONCLUSION 4: THE AGENCY SHOULD ENSURE THAT ALL NECESSARY DECISION-MAKING CRITERIA IS ADDRESSED IN JUDGE AND LOWER-LEVEL ADJUDICATION DISABILITY DECISIONS AND THE SSA RECORDS OF BENEFICIARIES FOUND TO BE "DISABLED" SHOULD BE PRESERVED IN ORDER TO ENSURE THAT FUTURE CONTINUING DISABILITY REVIEWING AUTHORITIES MAY ASSERTAIN THE BASIS OF PREVIOUS FINDING OF "DISABILITY."

Reliability and Integrity of case file as the initial decision, case file and respective electronic and paper data would be critical for a State Agency reviewer and an Administrative Law Judge in determining whether disability had ceased. File and coding of medical condition must accurately reflect the basis of the decision and the correct medical impairments upon which the decision is based. The evaluation process found at Appendix II has more steps than the evaluation process to find an individual disabled (Appendix I). As there would be a lessor likelihood of an appeal of a favorable disposition, here may be a temptation to issue a favorable State determination or Administrative Law Judge decision without providing an adequate rationale or information for the basis of the decision. Moreover, without adequate controls and training, there might be lax maintenance of a disability file, it would be difficult to determine when disability has ceased.

RECOMMENDATION 4: CHAMPION A CULTURE THAT TREATS SOCIAL SECURITY DISABILITY DECISIONMAKING AS AN ONGOING PROCESS

Social Security disability determination begins at the State Agency and it ends there with disability cessation determinations (which does not pre-empt an Administrative Law Judge Hearing). Congress requires these, and SSA recognizes that their value to the Trust fund is $10 dollars saved for every dollar invested. However, SSA has recognized this on one hand, and recognizes that it defers cessation determination processing. That Congress wants these cost-saving activities to transpire - is evidence of Congress' sense of value in the integrity of the decision-making process. This is without mention of the value of savings to the Trust fund, as well as the value of having the Nation's workforce pool available to individuals currently "on the disability rolls" before their work skills diminish as a result of the time of which decisions in their cases are allowed to languish with time. If such deferral is allowed in such a program designed for cost-savings, would be indicative that disability determination is not being viewed as an ongoing process. This suggests a likelihood that disability may be drafted and files may be stored in such a fashion to look at the picture in the short run, rather than looking at the big picture – where an individual's condition should be measurable, not only to the extent that an adjudicator may say that such claimant is "disabled," but also later, if not a number of times later – an adjudicator may be able to ascertain whether or not an individual is no longer disabled using the original disability decision as a starting point for discussion.

State level reconsideration adjudications were bypassed in 10 States going back to 1999. In 2010, the GAO reported that SSA was planning to reinstate reconsiderations in these 10 states with a view towards eliminating backlogs at Administrative Law Judge Hearing Office level. With this, the GAO as much as recognized that SSA was not treating disability as an ongoing process, rather it was shifting workloads from one level

where they were already located to one that previously served as a predicate for the other. The GAO was pointed in its response *"Urgency can dictate a pattern of attacking workloads at one or another phase, only to be confronted with a backflow elsewhere in the pipeline."*[115]

The GAO foresaw how such actions could impact all States, in noting "In fact given the trajectory in DDS workloads, SSA's most significant backlogs could shift from the hearings level to DDS offices where large numbers of both initial and reconsideration pending claims could accumulate." Such a situation would not have been envisioned by the statutory and regulatory provisions that founded the SSA decision-making process. It certainly does not bespeak a process with a total quality best practice design which would take into account multiple dimensions such as "accuracy, timeliness, efficiency, customer service, and *due process* as its product" – the nature of which the private consulting firm has commended to SSA. Such recommendations are enshrined in the institutional knowledge of the GAO reports

To get to treating disability determination as an ongoing process the Agency needs to go beyond the timely scheduling and processing of cessations. However, this is a product with a wide array of customers, - to include beneficiaries who need the timely resolution of their cases if not to get on to the workforce, but to eliminate the effect on their well-being as they await resolution of their concerns. These customers also include public who are impacted by the Trust Fund.

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[115] GAO *Social Security Disability: Management of Disability Claims Workload Will Require Comprehensive Planning,* 10-667T (Washington, D.C., Apr. 27, 2010), 11. Of note, SSA did not indicate that reconsideration were being reinstated in the respective States because of SSA ascribed value in the State processes or of the impact of placing claimants in these States in a position where they would be on par with citizens from other States who were receiving this additional level of adjudication.

Moreover, disability determination is an ongoing process, just as racial, ethnic, and gender make-up and demographics are an ongoing process. In 2004, the National Center for State Courts recognized that "Labels and legal decisions based upon old concepts of racial or ethnic identity will lose relevance, and the need (and costs) for qualified foreign language interpreters and culturally competent judges and staff will grow." As such, there is a need to consider that addressing the concerns of an adjudication process which will be culturally competent must be taken on now – this would include not only Administrative Law Judges, but the *other tribunals* at all 54 states and the Federal DDS office as well. Were disability adjudication not to be looked at as an ongoing process, this situation, to include the need for translators may have an impact at the State levels, particularly in light of provisions of Title VI of the Civil Rights Act of 1964 and its preclusion of discrimination in Federally-assisted programs and Federal contracts. There may be a distinction here - as it may be argued that it is the SSA disability adjudication at State DDS levels entails State assistance to Federal disability programs. One way or another, due process, and for that matter equal protection should remain at the forefront of the process.

In this regard, indeed with regard to the management practices of any Agency tasked with a disability-determination function, such Agency should not continue or resume with its longstanding approach of looking for errors as called to attention by the consulting firm, but rather take on the business model of which the consulting firm recommended:

> "SSA could only achieve its quality objectives for the disability program by adopting a broad, modern view of quality management. While SSA's existing quality assurance practices focus on identifying errors, the broader concept of quality management encompasses all of the efforts of an organization to produce quality. The firm outlined seven requirements of a 'best-practice' quality management system and concluded that the existing system is 'substantially deficient in the extent to which it satisfies each of

these requirements A best practice quality management system for SSA's disability claims process would -develop a clear operational definition of quality with multiple dimensions, such as accuracy, timeliness, efficiency, customer service and *due process*.[116]

To reengineer the disability adjudication model in this business-oriented fashion will result in positive outcomes on all fronts. Such reengineering would serve as a turnabout in the processes the GAO has traditionally viewed such processes as having been problematic. This would be a turnaround from systems which the GAO has recognized as having "long-standing problems associated with SSA's disability programs [which] have contributed further to the backlog."[117] The GAO has noted that such problems include "fragmented program accountability." Looking back from 1996, the GAO observed that "over the last decade, SSA has relied primarily on hiring more [Administrative Law Judges] and support staff and use of overtime to handle increasingly large workloads. [118] However, the GAO went on to report:

"Key SSA and [Administrative Law Judge Hearings Office] officials told GAO that previous initiatives attempted to make the hearings process more efficient, but that their impacts were limited by SSA's focus on minor process changes and applying more resources to the appeals process rather than addressing the longstanding problems central to the backlog of long-standing problems central to the backlog of claims awaiting processing." [119]

CONCLUSION 5: STATE CESSATION RECONSIDERATION EVIDENTIARY OFFICERS AND ADMINISTRATIVE LAW JUDGES ARE *OTHER TRIBUNALS*. ADMINISTRATIVE LAW JUDGES ARE *OTHER TRIBUNALS*, WHILE AT THE SAME TIME, ARE FEDERAL COURTS OUTSIDE OF THE JUDICIARY. BOTH THE STATE ADJUDICATORS AND FEDERAL ADMINISTRATIVE

[116] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, Obit. cit., 26, 27

[117] GAO, *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain*, HEHS 96-87 (Washington D.C. July 11, 1996).

[118] GAO, *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain*, HEHS 96-87 (Washington D.C. July 11, 1996), 4.

[119] *Id.*

LAW JUDGES ARE CRITICAL TO SOCIAL SECURITY'S DISABILITY DETERMINATION MISSION.

This was brought out in the *Introduction* and *Literature Review*. Chief Justice John Marshall recognized the legacy of the *other tribunals*. More recently, Chief Justice Rehnquist has invoked Alexander Hamilton in noting "the national and State systems are to be regarded as *one whole*. That the State and Federal systems have been shown to work in tandem within the context of Social Security adjudication is in harmony with the principles of the Founders of our Constitution.

RECOMMENDATION 5: NOW THAT A SYSTEM OF FEDERAL AND STATE COURTS HAS BEEN IDENTIFIED WHICH COMPORTS WITH TRIBUNALS AS JUSTICE MARSHAL HAS RECOGNIZED THEM *AND* WHICH INVOLVES STATE AND FEDERAL LEVELS WORKING TOGETHER IN HARMONY AS ALEXANDER HAMILTON HAS ENVISIONED, IT IS TIME TO RALLY TOWARDS OPTIMUM RESULTS IN PROVIDING THE PUBLIC THE SERVICES WHICH THE FOUNDERS WOULD ENVISION.

A narrative of adjudication trailing back to the Founders is a starting point for transforming an organization. Here one finds over 54 organizations – at Federal and State levels to Administrative Law Judges linked in the *same* narrative. Together, they will go about to achieve the speed and efficiency to discover the "valued things" – effective case processing and disposition. The researcher invites this Nation's effort to do this by writing the retrospective *Impact Analysis* now. In 1984, the GAO pointed out that the "incessant changes" in leadership which "caused a lack of institutional memory, expertise, and continuity in problem solving" [120] The GAO added that [c]ontinuing legislative changes to social security programs accompanied by short implementation

[120] GAO, *GAO's Views on the Report of the Congressional Panel on Social Security Organization*, Obit. cit.,3.

times have increased systems backlogs."[121] The GAO offered insight as to what should be sought in SSA programs generally:

"Accountability and oversight of the Administrat[ion]'s managerial actions are built into our government structure. The President can exercise such accountability through the policy development and oversight roles of the central management agencies, as well as through the budgetary process carried out by [Office of Management and Budget]. The Congress can directly assure accountability through the legislative and appropriation processes. In addition, the GAO, as an independent arm of the Congress can carry out reviews of how well Social Security is being managed."[122]

Further, Congress has directly solicited the State Disability Determination Services for input on the Disability Programs.[123]

Moreover, in a report wherein the GAO foresaw the Social Security Administration as an Agency which would be "addressing the technological, social, and demographic challenges of the 21st century, - the Legislative Agency offered its support for a proposed "Beneficiary Ombudsman to sponsor and support beneficiary interests." However, the GAO added that such role could be rendered ineffective unless this person reports at a very high level within the [SSA] organization"[124] Although such Ombudsman position may not have been established, SSA has generally expressed to the GAO, "we welcome any suggestions for improving the decision-making process."[125]

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[121] *Id*., 2.

[122] *Id.,* 8.

[123] GAO, *Social Security Administration's Program for Reviewing the Continuing Eligibility of Disabled Persons,* Obit. cit., 11, 12.

[124] GAO, *GAO's Views on H.R. 791, a Bill to Establish the Social Security Administration as an Independent Agency*, Obit. cit., 3, 9.

[125] GAO, *Current Status of the Federal/State Arrangement for Administering the Social Security Disability Programs,* Obit. cit., 29.

The extent to which racial, ethnic, demographic disparities are permitted to remain in Government entitlement adjudication systems, is to the extent to which greater efficiencies may not be reached in any *tribunal*. Moreover, it is to the extent that *Due Process* and equal access is not afforded. In April 1992, the GAO determined that racial differences in disability determinations "in the initial disability decisions of state agencies and in the appeals decisions of administrative law judges" warrants further investigation.[126] By September 22, 1992, the GAO noted that, "the percentage of black applicants allowed disability benefits is lower than the percentage of white applicants allowed," and went on to observe that its "analysis showed that, except for young SSI applicants, the lower black allowance rate in initial disability decisions could be explained by black applicants having less severe impairments and having demographic characteristics associated with lower allowance rates, regardless of race." The GAO added that in appeals before Administrative Law Judges, "the racial differences were both larger and more difficult to explain."[127]

In 2002, the GAO looked back on its 1992 report where it "found that racial differences in allowance decisions – mostly with respect to [Administrative Law Judge] decisions – could not be explained by these and other key factors." The GAO noted that it had recommended "that SSA investigate the matter further and, if needed, take appropriate actions to correct and prevent any unwarranted racial disparities." [128] However, from the GAO's review of "SSA's working papers pertaining to the study" and

[126] GAO, *Racial Differences in Disability Decisions Warrants Further Investigation,* Obit. cit., Introductory Correspondence.

[127] GAO, *Social Security: Racial Difference in Disability Decisions*, Obit. cit., Summary.

[128] GAO, *Social Security Disability Decision-Making: Additional Measures Would Enhance Agency's Ability to Determine Whether Racial Bias Exists*, 02-831 (Washington D.C.: Sep. 9, 2002), 2.

verbal information from SSA officials, the GAO identified "several weaknesses in SSA's study of racial disparities" which included use of a "potentially nonrepresentative final sample of cases in their multivariate analyses, performing only limited analyses to test the representativeness of the final sample, and using certain statistical techniques that could lead to inaccurate or misleading results. Moreover, "its final sample included only a small percentage of the case files in its initial sample in part because staff were unable to obtain many of the associated case files or hearing tapes [129] Whether one considers SSA Administrative Law Judges and State Agency adjudicators to be Constitutionally-delegated *tribunals* or not, it is imperative that means are secured to eliminate the possibility of racially disparate decision-making and other areas of disparate adjudication results.. On March 29, 2004, the GAO looked back at its 2003 report where it discussed possible racial disparities in 1997 to 2000 hearing decision-making. The GAO noted that in Administrative Law Judge hearings without attorneys "African-American claimants were significantly less likely to be awarded benefits than white claimants." Moreover, "other factors – including the claimant's sex and income and the presence of a translator at a hearing – had a statistically significant influence on the likelihood on benefits being allowed."[130]

In order for such decision-making processes to efficiently operate and to eliminate confusion and unnecessary commerce at higher levels of adjudication, it is also imperative that notices of Agency action be provided with clarity. However, in September 2000, the GAO pointed out with respect to award letters and payment

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[129] *Id.,* 9.

adjustment letters that "unclear communication was caused by many of the same problems we identified in SSA's letters in 1994, such as illogically sequenced information, incomplete or missing explanations, contradictory information, and confusing numerical information."[131] Indeed, on January 9, 2009, the GAO pointed out that notices to denied claimants provide inconsistent and, in some cases, misleading information about the evidence obtained. The GAO concluded that, as a result, claimants may lack information need to follow-up with specific providers who may have relevant records. [132] To better inform SSA disability applicants through clearer notices, is to provide better customer service. Moreover, it would serve to eliminate some sense of stress to members of the public attempting to navigate through a system of government programs of which even the which the Supreme Court acknowledges as are of "a size and extent difficult to understand." To achieve greater understanding by the public, is to achieve greater program efficiencies and speedier dispositions.

Updated standards for medical disability determinations are necessary for the integrity of the decision-making process of these *tribunals*. On May 25, 1982, a State Agency Director responded to Congress inquiry and offered, "the [medical] listings [upon which disability is premised] are about 10 years out of date…therefore, we may be allowing claims in which return to work is more than reasonable, in light of current medical

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[130] GAO, *Social Security Disability: Commissioner Proposes Strategy to Improve the Claims Process, But Faces Implementation Challenges*, Obit. cit., 5.

[131] GAO, *Social Security Administration, SSA's Letters to the Public Remain Difficult to Understand*, Obit. cit.., 4.

[132] GAO, *Social Security Administration: Improving Notices to Denied Claimants*, Obit. cit., 3.

practice."[133] On July 11, 2002, the GAO was recognizing the fully updating disability criteria has implications for program design and that while SSA began its "current effort to update the disability criteria began in the early 1990's." By 1994, 5 of the 14 "body systems in its *Medical Listings"* had changes finalized. The Agency's efforts to update the *Medical Listings* were "curtained in the mid-1990's due to staff shortages, competing priorities, and lack of adequate research on disability issues" "SSA resumed updating the *Medical Listings* in 1998…As of early 2002, SSA has published the final updated criteria for 1 of the 9 remaining body systems not updated in the early 1990s (musculoskeletal) and a portion of a second body system (mental disorders)…SSA's slow progress in completing the updates could undermine the purposes of incorporating medical advances into its medical criteria. [134]

Further, the GAO has noted that for purposes of determining what work an individual may or may not be able to perform as a result of impairments, the "SSA relies upon the Department of Labor's *Dictionary of Occupational Titles* (DOT) as its primary data base." However, the GAO was reporting in 2002, "Labor has not updated DOT since 1991 and does not plan to do so."[135] By 2004, the GAO was recognizing that "medical advances and economic and social changes have redefined the relationship between impairment and the ability to work."[136] All components should take steps to ensure that

[133] GAO, *Social Security Administration's Program for Reviewing the Continuing Eligibility of Disabled Persons,* Obit. cit., 12.

[134] GAO, *Social Security Disability Programs: Fully Updating Disability Criteria Has Implications for Program Design*, Obit. cit., 7, 8.

[135] *Id.,* 7.

[136] GAO, *Social Security Disability: Commissioner Proposes Strategy to Improve the Claims Process, But Faces Implementation Challenges*, Obit. cit., Highlights.

these *other tribunals* have the tools necessary for these Federal and State adjudication *tribunals* to make disability determinations with the precisions that the nation deserve. The SSA programs, if not *Due Process* should require nothing less.

The value of the State reconsideration stage as part of these *other tribunals* cannot be understated in an organization in search of greater efficiencies. As stated, the GAO has recognized the reconsideration evidentiary hearing as a *Due Process* event. However, per a December 7, 2007 GAO report, "we did not calculate backlogs for the reconsideration stage since SSA could not provide data that would allow us to do so." The GAO went on to recommend that "SSA monitor the reconsideration stage for backlogs and better plan, execute, and evaluate initiatives to address backlogs."[137] The GAO noted in its December 7, 2007 *Conclusions*:

"SSA has long been confronted with the difficult challenge of weighing the nature and severity of individual disabilities for people who apply for benefits from two very complex programs....Unfortunately, SSA also has a history of implementing initiatives to improve claims processing that have been poorly executed and therefore compounded its problems."[138]

However, the importance of the reconsideration stage and the State Agency participation was borne out when the GAO outlined SSA's strategy on March 29, 2004. The GAO noted that SSA had not kept current with its continuing disability reviews in 2003.

"[T]his situation will continue in fiscal year 2004, despite the potential savings of $10 for every $1 invested in conducting continuing disability reviews. However, in reducing the focus on CDRs, not only is SSA forgoing cost savings, but the agency is also

[137] GAO, *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs,* Obit. cit., footnote 1 at page 2 and Highlights Page.

[138] Id., 50.

compromising the integrity of its disability programs by potentially paying benefits to disability beneficiaries who are no longer eligible to receive them." [139]

SSA "having acquired a first-generation computer in 1956, was a leader in the early use of computers and automated information processing systems."[140] On January 23, 1987, the Commissioner of Social Security wrote the Comptroller General and recognized that, "[t]he fundamental goals of any organization are to effectively management in today's environment and to prepare to meet the challenges of the future," adding – "As you have seen in your review, SSA is in the midst of a complete overhaul of its computer system and operational environment. We are extracting the Agency from the inefficiencies of obsolete operating systems and processes."[141]

On April 2, 1987, the GAO noted problems "not clearly visible to the public." Such problems "contributed to crisis situations in the past, and could interfere with its ability to effectively deliver services in the future." The GAO recommended a number of ways to "fix" the problems and indicated that "SSA needs…better computer modernization equipment."[142] By May 2, 2002, the GAO was finding SSA to be at a relatively low level of maturity in enterprise architecture management."[143] In order for the *other tribunals* to operate effectively, and for that matter for the reconsideration level to be properly

[139] GAO, *Social Security Disability: Commissioner Proposes Strategy to Improve the Claims Process, But Faces Implementation Challenges.* Obit. cit., 10.

[140] GAO, *Increased Efficiency Predicted If Information Processing Systems of Social Security Administration are Redesigned,* Obit. cit, 8.

[141] GAO, *Stable Leadership and Better Management Needed to Improve Effectiveness*, HRD-87-39 (Washington D.C.: March 18, 1987), 223.

[142] GAO, *Management of the Social Security Administration*, T-HRD-87-6 (Washington D.C.: Apr. 2, 1987), 1.

[143] GAO, *Social Security Administration: Agency Must Position Itself Now to Meet Profound Challenges*, 02-289T (Washington D.C.: May 2, 2002), 21.

monitored – this situation needs to be taken on. Indeed, SSA in commenting to a January 9, 2009 report where the GAO recommended improving notices to denied claimants, pointed out that the "recommended changes would also require some programming of the States' legacy systems."[144] Accordingly, improvement would be necessary in the computer networks at both Federal and State Disability Determination levels to improve case processing. Indeed, a March 24, 2009 GAO report shows, "SSI and DI program benefits account for less than 20 percent of the total benefit payments made by SSA; they consume nearly 55 percent of the annual administrative resources." [145]

To determine quantity of needed resources, there is a need to account for the quantity and location of goods within the stream of commerce. However, in 1989, the GAO noted, "[b]ecause SSA does not have a continuous database for case histories, we could not determine the number of cases approved by DDSs at the reconsideration stage."[146] On December 7, 2007, the GAO recommended that "SSA monitor the reconsideration stage for backlogs and better plan, execute, and evaluate initiatives for backlogs." The GAO recommended the Social Security Commissioner establish a *target pending* at the reconsideration stage as the agency does at other stages, to allow identification of backlog and monitoring of backlogs." [147] The GAO noted that "we could not calculate backlogs for the reconsideration stage since SSA could not provide data that would allow us to do

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[144] GAO, *Social Security Administration: Improving Notices to Denied Claimants*, Obit. cit, 8.

[145] GAO, *Social Security Administration: Further Actions Needed to Address Disability Claims and Service Delivery Challenges*, 09-511T (Washington D.C.: Mar. 24, 2009).

[146] GAO, *Social Security: Selective Face-to-Face Interviews with Disability Claimants Could Reduce Appeals*, Obit. cit.

[147] GAO, *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs*, Obit. cit., Highlights page, 78.

so."[148] In this report, the GAO noted that taking on "the disability claims backlog will depend on adequate and timely agency funding."[149]

Were SSA to have established *target pending* at reconsideration level and monitored this level of State decision-making, then this level a critical in cessations, which SSA has informed the GAO is worth a ten dollar return on every dollar spent – then the best case may be made for increased DDS resources for funding to reduce backlog. However, SSA's response to establishing reconsideration *target pending*, was in part, "we do not believe this should be an agency's target/ goal."[150] Nonetheless, Congress was not so workload specific in its fiscal allocations:

"SSA's efforts to reduce the hearings backlog may be supported by additional funds through recent legislation. Specifically, the *American Recovery and Reinvestment Act of 2009* (ARRA) allocated $500 million to SSA to assist with processing workloads and related technology acquisitions." SSA has not yet determined how it will use this money for its various workloads."[151]

As such, the Agency's determination of how *ARRA* funding is to be utilized, underscores the need for competent data with respect to the workloads, not just at the hearings level, but at the State reconsideration level as well. It would be in keeping with an Agency which was at the forefront of computer systems in 1956. This is in harmony with the Founders' principle that the States and the National *tribunals* can work in tandem and the recognition of these *other tribunals* as delegated by Congress. The keeping of data at reconsideration level would lend great support to the operations of this

[148] *Id.* page 2, footnote 1.

[149] *Id*, 35, 36.

[150] *Id*., 76.

[151] GAO, *Social Security Administration: Further Actions Needed to Address Disability Claims and Service Delivery Challenges*, Obit. cit., 14.

other tribunal, as such data would be of use to ascertain funding and resources which could be best allocated at the State reconsideration level to prevent backlogs from resulting at that level and to assist in its role of optimally pre-empting backlogging further up the "pipe line." Public Policy would demand nothing less. This is not to go so far as to say that such public policy may be inferred from GAO reports' recommendations that SSA maintain such data and to issue "target pending" goals at redetermination level; an Agency is not required to adopt the GAO's recommendations. Rather, this public policy is found in Congress' sense of value in the DDS reconsideration level, in that Congess has delegated the State reconsideration level the responsibility for *Due Process* evidentiary cessation hearings.

SSA has established the value of in-person reconsideration where claimants are afforded opportunity to present new evidence and speak with State Agency DDS reconsideration adjudicators about their cases. SSA's studies have proven that such in-person reconsideration settings enable applicants to be informed of needed medical information and resolve a considerable number of cases so as to reduce numbers of Administrative Law Judge hearing requests. Moreover, reconsideration cessation evidentiary hearings, as recently recognized by SSA, have a ten dollar return for each dollar spent. As such, were SSA to "take to heart" the GAO's recommendations with respect to maintaining data on the reconsideration stage, SSA would be acting consistent with public policy, while at the same time - drawing data useful in determining how much in terms of dollars would be required at the State reconsideration level. Further, such "taking to heart" – may amount to economically-sound management practice that could determine the extent to which the State reconsideration process brings in terms of

cost savings to the Social Security Trust fund. In terms of cessations alone, SSA has recognized there is a cost savings of ten dollars for every dollar spent. Were SSA to maintain data at the reconsideration level, the Agency would be better positioned to determine the cost savings to the program were face-to-face State Agency reconsiderations conducted in initial disability claims as well. As touched upon, SSA-initiated State Agency in-person reconsideration demonstrations resulted in reduced Administrative Law Judge hearing requests even in denied claims. This would be indicative of enhanced customer satisfaction as a result of an applicant seeing an adjudicator face-to-face more promptly than having to await for an Administrative Law Judge hearing. Thus SSA programs would be "national" programs in as the independent consultant has recommended.

The implementation of such a schema would be in harmony with SSA's mission as the GAO sees it:

> "In administering the Nation's major social insurance program programs, SSA's primary responsibility is to serve the public and its eligible beneficiaries. SSA's major goals are promptness and accuracy – the right check, to the right person, at the right address, on time."[152]

Maintaining reconsideration data would not only serve useful in determining the resource allotments necessary to support a quality focused culture, improve the disability decision-making process at this level and assist it in attaining "quality with multiple dimensions, such as accuracy, timeliness, efficiency, customer service and *Due Process*" in harmony with the consulting firms recommendation that SSA "adopt a broad, modern view of quality management [that] encompasses all of the efforts of an organization to

[152] GAO, *Increased Efficiency Predicated If Information Processing Systems of Social Security Administration are Redesigned*, Obit. cit., 6.

produce quality products," but it would be in keeping with the consulting firm's specific recommendation that SSA "ensure that the disability programs are national programs. This should include a measurement system that can identify variation and a systematic effort to address variation when it is identified."[153] In the absence of the reconsideration data which would include absent "target pending" data, SSA would be unable to identify variation at the reconsideration levels within the 54 individual State Agency reconsideration levels and take systematic effort to address such variation.

Recognition of the important role that the *other tribunals* at State and Federal Level play in Social Security Administration Disability adjudication warrants attention and monitoring for variations in all levels in the process. Adoption of the quality business model in conformity with that which the consulting firm has recommended – is in order. The pedigree of these *other tribunals* has been unveiled in the immediate research. Such pedigree, might make the case that such *tribunals*, State reconsideration level included, warrant greater attention as to measurement, variation, and resource. This pedigree includes a system of State and Federal *tribunals* working in tandem under authority as Congress has delegated and in keeping with the Founder's Principles. Moreover, the glue that binds them is *Due Process* - something which predates the founding of our Nation. That we may now recognize these Federal Administrative Law Judges and State Agency reconsideration decision-makers as *other tribunals* – provides a narrative which may be useful to champion remedies for concerns which have been touched upon herein.

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[153] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, Obit. cit.

Pedigree or no pedigree, what makes the case for these Federal and State *tribunals* is the services which they provide. To do this, a business model, the likes of which the consultant has recommended - should warrant further consideration with a view towards implementation.

To not adopt a quality perspective by adopting the consulting firm's recommendations is to allow the want of information to remain. This would be to allow the situation in the Federal disability program and Supplemental Insurance programs as the GAO observed it on October 9, 1979 to remain:

"Meaningful program evaluation is limited further because time and accuracy goals for processing claims do not consider the effect of one on the other; not all systems for measuring achievement provide reliable data; and the Social Security Administration has no means of measuring program efficiency."[154]

A viable solution for SSA's inability to measure program efficiency originated in 1989, by a non-federal source but remains to be implemented by the SSA adjudication system. As Nancy E. Gist, Director of the Trial Courts Performance Standards Project wrote in July 1997:

"Developing a common language for describing, classifying and measuring the performance of trial courts was the goal of an 8-year effort, the Trial Court Performance Standards Project, initiated in 1987 by the National Center for State Courts and the Bureau of Justice Assistance. The Trial Court Performance Standards and Measurement System is the result of that effort.

"Crafted by a commission of leading trial judges, court managers, and scholars and demonstrated in trial courts across the Nation, the measurement system is an invaluable resource for enhancing a court's ability to provide fair and efficient adjudication and disposition of cases. Because many trial courts lack the resources to create a mechanism

[154] GAO *Controls over Medical Examinations Necessary for the Social Security Administration to Better Determine Disability* HRD-79-119 (Washington D.C.: Oct. 9, 1979), Cover page. Of note in .the Digest of this report, one finds reference to " … the inherent subjectivity of decisionmaking, total uniformity of decisions may never be achieved."

for self-evaluation, the project is critical to improving the administration of justice on the basis of universally accepted performance standards."[155]

This Project is the basis for what has come to be known as known as CourTools. As CourTools has been described within the immediate study, the measurement tool will be of benefit in measuring program efficiency.

Whether or not SSA will implement CourTools in order to measure program efficiency and allocate resources remains to be seen. By its very nature, it provides an "impact analysis" of legislation and programs upon the tribunals, as well as provides measurements of efficiency.

It remains to be asked whether the immediate research's emphasis upon case weighting as a method of case assignment and human resource assignment is a tool transferrable to the Administrative Law Judge arena. This is a measurement tool which has been mentioned in the GAO reporting going back to 1978, but apparently either unnoticed or unadopted. The reader will recall reference to questionnaire where Administrative Law Judges were inquired as to how their productivity was evaluated and the majority response indicated that they were to make a quota of decisions or be remanded. That same report provided a clue that assignment of human resources without more may not be enough. The report addressed the concerns of an Agency desirous of obtaining 30 additional Administrative Law Judges to handle what its self-termed "increased workload." The GAO noted that in 1974, a member of the Administrative Office of the U.S. Courts prepared a report which was issued by the Administrative Conference of the United States "suggested a possible solution to the above-noted

[155] Nancy Gist, *Forward* Monograph, "Trial Court Performance Standards and Measurement System Implementation Manual" (Williamsburg, Va., National Center for State Courts Jul. 1997).

problem. It recommended that a uniform caseload system be implemented to assure that [Administrative Law Judges] were being assigned to agencies where they could be used most efficiently." "It is hoped that continuation and refinement of this system may eventually be used to develop a uniform weighted caseload system for all agencies. The GAO report added with respect to this plan which is yet to come to full fruition:

> "Such a system, used by the Administrative Office of the U.S. Courts to evaluate the workload of the U.S. district courts, assigns a weight to each type handled by a judge. The weight is based on the amount of time it usually takes to adjudicate that type case. By implementing such a system at each agency employing [Administrative Law Judges], the Congress, the [Office of Personal Management], and other agencies would receive information regarding [Administrative Law Judge] use and productivity on a consistent basis and could make comparisons and with some degree of accuracy determine how best to allocate [Administrative Law Judges].[156]

To a reader, once skeptical with propositions introduced in this paper – *cases become things of value* when they are before these *other tribunals*. These *tribunals* serve not for the resolution of disputes, as in generally-accepted model of the Courts, but serve as testimonials that this Nation has gone beyond determining perimeters of "begging rights," in cases of those unable to work. These *other tribunals* bespeak much of a Nation that has embraced a public policy that values providing for individuals unable to work as a result of severe medical impairments. In addition, these *other tribunals* serve as portals for individuals to receive health care and vocational assistance. Further, such *other tribunals* offer protection to the integrity of the disability determination process, as well as the public trust – in making decisions as to when disability has ceased and quality determinations of disability from the start. Moreover, these Congressionally-delegated *other tribunals* go about all of this, while at the same time, ensuring *Due Process*.

[156] GAO, *Administrative Law Process: Better Management is Needed*, Obit., cit. 41.

These *other tribunals* exceed the Citizenry's expectations of the purposes of the Courts. This wide-product-array of products, which the State and Federal *other tribunals* offer - bears out what Chief Justice Rehnquist has observed with respect to the "dynamics of federalism." Under the Social Security Disability adjudication system, such Federalism "can" and *does* "lead to cooperation and mutual benefit." With this, administrators and adjudicators within such a system should take on the best in terms of quality practices to present their product to their worthy customer - the American citizenry.

It remains to be answered – are these State and Federal *other tribunals* on par with the Courts? Chief Justice John Marshall equates the two:

"Congress can delegate to *the courts or to any other tribunals*…"

Now visionary Elihu Root's words reshape to enable the Bar, Judges, Administrators, and the *Other Tribunals* go forth with enhanced efficacy:

> Consciously "we all treat the business of administering justice"…"primarily as something to be done for the public service. The administration of law is affected by that same general attitude…in which citizens think … of what they can contribute to their country."

APPENDIX I

The Five-Step Sequential Evaluation Process for SSA Disability Adjudication

The Supreme Court has reiterated the SSA regulations and outlined the “five step sequential process” for adjudicating disability under DI and SSI. In sum, The first step determines whether the claimant is engaged in "substantial gainful activity." If he is, benefits are denied. If he is not engaged in such activity, the process moves to the second step, which decides whether the claimant's condition or impairment is "severe" -- *i.e.*, one that significantly limits his physical or mental ability to do basic work activities. If the impairment is not severe, benefits are denied. If the impairment is severe, the third step determines whether the claimant's impairments meet or equal those set forth in the "Listing of Impairments" (listings) contained in the Regulations.

The listings consist of specified impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the listed impairments, he [or she] is conclusively presumed to be disabled and entitled to benefits. If the claimant's impairments are not listed, the process moves to the fourth step, which assesses the individual's "residual functional capacity" (RFC); this assessment measures the claimant's capacity to engage in basic work activities. If the claimant's RFC permits him to perform his [her] prior work, benefits are denied. If the claimant is not capable of doing his {her} past work, a decision is made under the fifth and final step whether, in light of his RFC, age, education, and work experience, he [she] has the capacity to perform other work.). If he [she] does not, benefits are awarded.

Source: *Bowen v. City of New York*, 46 U.S. 467 (1986).

Appendix II: The Continuing Disability Review Evaluation Process

In the *first step* of the CDR evaluation process for adult beneficiaries, an SSA field office representative determines if the beneficiary is working at the level of substantial gainful activity (SGA). A beneficiary who is found to be not working or working but earning less than the SGA level (minus allowable exclusions) has his or her case forwarded to the state Disability Determination Services (DDS)

The *second step* is to determine if the individual's current impairment(s) is included on the current list of disabilities that SSA maintains. The list describes impairments that, by definition, are so severe that they are disabling. If the individual's current impairment(s) does meet or equal a current listing, then the DDS continues the individual's benefits and does not continue with the evaluation process. If the individual's current impairment(s) does not meet or equal a current listing, then the DDS proceeds to step three in the evaluation process.

The *third step* is to determine if improvement in the individual's medical condition has occurred. This improvement is any decrease in the medical severity of the impairment(s) that was present at the time of the most recent favorable medical decision (i.e., the initial decision to award disability benefits or the most recent CDR continuance-- usually referred to as the comparison point decision, or CPD). At this step, the DDS examiner compares the current signs, symptoms, and laboratory findings associated with the beneficiary's impairment(s) to those recorded from the last review. If improvement has not occurred, the disability examiner skips to the fifth step in the evaluation. If improvement has occurred, the disability examiner proceeds to next step, the fourth step.

The *fourth step* is to determine if the improvement found in step three is related to the ability to work. Improvement related to the ability to work is evaluated two different ways, depending on whether the CPD was based on: (1) meeting or equaling a prior listing or (2) a residual functional capacity (RFC) assessment:

* Meeting or equaling the prior listing: In this case, the disability examiner will determine if the beneficiary's same impairment(s) still meets or equals the prior listing. Unlike step two, the examiner compares the beneficiary's condition with the list of impairments in effect at the time he or she was first awarded disability benefits. If the impairment(s) no longer meets or equals the prior listing, then the examiner finds that the improvement is related to the ability to work and proceeds to step six of the evaluation process. If the impairment(s) meets or equals a prior listing, then benefits are continued.

* Residual functional capacity assessment: In this case, the disability examiner compares the beneficiary's previous functional capacity to the current functional capacity for the same impairment. If functional capacity for basic work activities has improved, then the examiner finds that the improvement is related to the ability to work and proceeds to step six of the evaluation process. If the current assessment does not show improvement, then the disability examiner proceeds to step five.

The *fifth* step is to determine whether an exception to medical improvement applies. The law provides for certain limited situations when the DDS may discontinue a recipient's benefits even though medical improvement has not occurred. The specific group I exceptions are (a) the individual is the beneficiary of advances in medical or vocational therapy or technology (related to the ability to work), (b) evidence shows that the individual has undergone vocational therapy (related to the ability to work), (c) evidence shows that, based on new or improved diagnostic or evaluative techniques, the individual's impairment(s) is not as disabling as it was considered at the time of the CPD, and (d) evidence shows that any prior determination or decision was in error. If an exception applies, the examiner continues through to step six of the evaluation process. If an exception does not apply, benefits are continued.

The *sixth step* is to determine if the current impairments are severe.
At this step, the examiner considers all of the beneficiary's impairments--those present at the previous decision as well as any new impairments found in the current review. If the DDS determines that the beneficiary's current impairment(s) is not severe, benefits are discontinued without further development. If it is determined that the impairment(s) is severe, then the examiner considers the impact of the beneficiary's impairment(s) on his or her ability to function. This consideration will result in a current residual functional capacity (RFC) assessment that shows the beneficiary's ability to do basic work activities and the evaluation continues to the seventh step.

The *seventh step* is to determine whether the beneficiary has the capacity to do the work that he or she did before having a disability.
If the beneficiary has the ability to do past work, then benefits are discontinued. If the beneficiary does not have the ability to do work he or she has done in the past, the evaluation continues to the eighth step.

The *eighth step* is to determine if the beneficiary has the ability to do other work. At this step, the disability examiner considers the complete vocational profile (the beneficiary's age, education, and past relevant work experience) together with the beneficiary's RFC to determine if he or she has the ability to do other work. If the beneficiary has the ability to do other work, disability benefits are discontinued. If he or she does not have the ability to do other work, benefits are continued.

Source: GAO, *Social Security Disability Programs: Clearer Guidance Could Help SSA Apply the Medical Improvement Standard More Consistently*, 07-8 (Washington D.C.: Oct. 3, 2006), 30-32.

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