AN EXAMINATION OF THE PROPOSED "CLOSED RECORD" ADMINISTRATIVE LAW JUDGE HEARING IN THE SOCIAL SECURITY DISABILITY PROGRAM

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AN EXAMINATION OF THE PROPOSED
"CLOSED RECORD" ADMINISTRATIVE
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PROGRAM

FRANK R. LINDH

I. INTRODUCTION

On January 12, 1983, President Reagan approved legislation containing several provisions designed to improve the process whereby the Social Security Administration (SSA) conducts reviews of disability cases for continuing medical eligibility. Among these...
was a requirement for "evidentiary hearings in reconsiderations of disability benefit terminations" beginning "not later than January 1, 1984."³ The President noted that a new hearing will enhance the beneficiary's opportunity to present his or her case, and will give program officials an additional source of information about the beneficiary's present medical condition.⁴

The House-Senate Conferees on this legislation were careful to note that the new requirement for an evidentiary hearing at the reconsideration level in disability termination cases would not change the requirement of existing law for a hearing before an administrative law judge.⁵ But Chairman J.J. Pickle of the House Subcommittee on Social Security, in his remarks on the floor of the House shortly before the Conference Report was approved by that body, cautioned that, with over 155,000 cases "stacked up now waiting" for administrative law judge hearings, it was imperative to consider changes in the adjudicatory process.⁶ "Next year that is one of the

⁴. President's statement on signing H.R. 7093 into law, 19 WEEKLY COMP. PRES. DOC. 39 (Jan. 12, 1983).
⁵. H.R. REP. NO. 285, 97th Cong., 2d Sess., 11, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4373, 4401. The "existing law" referred to in the Conference Report is contained in Section 205(b) of the Social Security Act, which follows:

The Secretary [of Health and Human Services] is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter . . . . Upon request by any such individual . . . , he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

⁶. 128 CONG. REC. H10678 (daily ed. Dec. 21, 1982) (statement of Chairman Pickle). As of October 1, 1983, the pending administrative law judge caseload in SSA
challenges we face," he said.7

In addition to this backlog of pending hearing requests, Chairman Pickle also drew his colleagues' attention to the problem of inconsistent standards of adjudication within SSA. He noted that uniformity of standards was needed between the State agency and administrative law judge hearing levels, "so that we are judging the cases by the same rule book."8

Mr. Pickle's remarks on the bill enacted in early 1983 reflect concerns expressed by his subcommittee throughout the latter half of the 1970's.9 A 1978 study of the Social Security hearings and appeals process undertaken by the National Center for Administrative Justice (CAJ)10 under contract with SSA, and at the urging of the Pickle Subcommittee, found "three major concerns" reflected in the relevant committee hearings and reports. These were, first, "the backlog of cases and the corresponding inability of the current system to handle increasing numbers of appeals"; second, "the increasing frequency with which [administrative law judges] reversed the decisions of the state agencies who make initial and reconsideration decisions in disability cases"; and, third, "the substantial variance in the reversal rates of [administrative law judges]."11

One question which naturally arises from the enactment of a new "evidentiary hearing" requirement at the pre-administrative law judge hearing stage is how this new procedure might help to resolve the three longstanding problems of delay, high reversal rates, and inconsistency among individual administrative law judges in the existing Social Security appeals process. Jerry L. Mashaw (who headed the CAJ study group), suggests in his recent book, Burea...

8. Id.
11. Id. at 1-3.
erotic Justice,\textsuperscript{12} that a number of improvements might be expected to flow from an informal, face-to-face hearing at the reconsideration level. He noted, first, that claimants would be more satisfied when allowed to present their appeals personally, and that the immediacy of the face-to-face encounter with a decisionmaker would increase the perceived fairness of the process. Second, the decisionmaker would also benefit from the additional information gleaned directly from the claimant. This need not require a loss of appropriate objectivity, Mashaw noted, but would simply add a human dimension to what had been a mere claims folder review. As a result, Mashaw anticipated that the reconsideration decision would be strengthened and hence "more likely to stand up on appeal."\textsuperscript{13}

Interestingly, the first House bill to contain a face-to-face hearing requirement for the reconsideration level would have also required that the evidentiary record be closed to the admission of new evidence at the subsequent levels of the appeals process.\textsuperscript{14} This would mean, then, that the administrative law judge hearing and resulting decision would be limited in scope to the record as it was developed below, in any case in which a dissatisfied claimant, following the lower-level hearing, appealed the reconsideration decision to the next level. This "closed record" requirement was not, however, included in the legislation signed by the President in early 1983.

It would seem worthwhile not only to examine the three problems cited by the CAJ six years ago in light of current workload trends, but also to consider, first, the likely effects of the new lower-level hearing on the overall disability appeals process, and, second, how the "closed record" concept, originally linked to the requirement for a lower-level hearing, might further contribute to this improvement.

The CAJ, in its final study report, suggested that the results of the study might help "to refine prior appreciation of the trade-offs involved in pursuing any particular goal," such as the timeliness or consistency of decision-making. "Criticism of the present system," the authors pointed out, "often focuses on one of its failings, such as the backlog of cases, with no apparent understanding that (some rad-


\textsuperscript{13} Id. at 199.

ical breakthrough in technology aside) material improvement in this regard can only be achieved by paying a price—either more resources for handling these cases or a lesser accomplishment of other relevant ends, such as the accuracy, consistency, and perceived fairness of the system. The authors' major conclusion was that any "new procedure that serves one or more of the ends of the system—yielding faster and more accurate decisions—and disserves none of its other ends—as for example, entailing no loss of perceived fairness by claimants and requiring no additional outlays—is as rare as it is desirable."

This observation suggests the need for a cautious approach to analysis of problems and solutions in an adjudicatory system of such magnitude and complexity. Any proposal or—in the case of the new reconsideration hearings—actual change in law designed to improve the SSA hearings and appeals process, must be considered in the context of the overall system. As the CAJ observed, there is "no doubt that the interrelationships among the many functions that comprise this system are so subtle and complex that facile generalization about what will happen to everything else if one feature is changed is impossible."

II. A BRIEF OVERVIEW OF THE SOCIAL SECURITY HEARINGS AND APPEALS PROCESS

In fiscal year 1983, ninety-seven percent of the administrative law judge hearing requests processed by SSA's Office of Hearings and Appeals (OHA) arose in disability cases under titles II and XVI of the Social Security Act. It is therefore customary for professional staff at OHA as well as congressional and other outside stu-

15. CAJ STUDY REPORT, supra note 10, at 6.
16. Id. at 11-12.
17. Id. at xix-xx.
18. The federal fiscal year runs from October 1 through September 30. Thus, fiscal year 1983 consists of the period of October 1, 1982 through September 30, 1983.
19. OHA OPERATIONAL REPORT, FY 1983, supra note 6. Title II of the Social Security Act is the basic insurance program which includes, inter alia, Retirement and Survivors Insurance and Disability Insurance. Title XVI is the Supplemental Security (SSI) program for the Aged, Blind and Disabled, a needs-based program. The disability requirements under titles II and XVI are identical. Thus, a title II claim initially requires a determination of insured status whereas a title XVI claim requires a determination of whether the claimant's income and resources are within statutory limits, but once these threshold determinations are resolved in favor of the claimant, the substantive medical-vocational determination of disability is essentially the same for both types of claims. Special rules, not relevant here, apply to disabled children and disabled surviving spouses.
dents of the process to equate the administrative law judge hearing process with the disability appeals process. This paper follows that general custom.

The adjudication of a claim for disability benefits begins with the filing of an application by the claimant at a local Social Security office. The medical-vocational aspects of the initial determination are made in most cases by a State Disability Determination Services agency. If the claimant is dissatisfied with the results of the state agency's initial determination, he or she may request reconsideration. Prior to the enactment of the new requirement for a face-to-face hearing at the reconsideration level in disability termination cases, the reconsideration process "consist[ed] solely of a review of documentary evidence in the case file by [the state agency's] physicians and staff; the claimant or beneficiary who appeal[ed] an initial determination [did] not actually meet with a decisionmaker until the [administrative law judge] hearing level."22

At the administrative law judge hearing level, the claimant's case is reviewed and the evidence brought up to date, and the claimant is given an opportunity for a hearing before an administrative law judge appointed under the Administrative Procedure Act. If

20. The rules governing the relationship of these state agencies with SSA may be found at 20 C.F.R. pt. 404 Q (1983) (title II cases); and id. pt. 416 J (for title XVI cases).

21. The rules governing requests for administrative review—including reconsideration, administrative law judge hearings and Appeals Council review—may be found at 20 C.F.R. pt. 404 J (for title II cases); and id. pt. 416 N (for title XVI cases). The reconsideration process, it should be noted, was created by regulation, not by the Social Security Act itself. For an account of its origins and an analysis of the legal issues surrounding its creation, see Horsky and Mahin, The Operation of the Social Security Administration Hearing and Decisional Machinery 401-02 (1960) (mimeo) (hereinafter cited as Horsky Report).


23. 5 U.S.C. § 554 (1982). The core Social Security Act provisions regarding "notice and opportunity for a hearing" actually pre-dated by more than 10 years the Administrative Procedure Act, but as Robert G. Dixon, Jr. and others have pointed out, section 205(b) of the Social Security Act is regarded as requiring an APA-appointed administrative law judge to conduct the hearings required by that section. See R.G. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 146 (1973).

An interesting legal issue is whether SSA hearings are required to conform to the APA requirements, even assuming that the presiding officials must be APA-appointed administrative law judges. In Richardson v. Perales, 402 U.S. 389 (1971), the Supreme Court found it unnecessary to "decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act." Id., at 409. However, Secretary of Health and Human Services, Margaret M. Heckler, in the preamble to the Department's regulations governing the Equal Access to
the claimant is still dissatisfied after receiving the administrative law judge's decision, he or she can request review by the Appeals Council, SSA's highest administrative adjudicatory body. Finally, the claimant who is dissatisfied with the Appeals Council's decision can file a civil action in a United States district court under section 205(g) of the Social Security Act.24

Perhaps the most important statistical trend in disability adjudication under the Social Security Act is the almost steady increase since the mid-1960's of the proportion of claims allowed at the administrative law judge hearing level as compared with the two state agency levels. The chart below, prepared by SSA's Office of Disability, shows this trend for title II cases since 1965. This trend was cited repeatedly in legislative documents in the mid-1970's, when congressional concern over actuarial deficits in the disability trust fund was especially strong.25

Justice Act (the EAJA), has stated that “adjudications of claims under the Social Security programs are not covered [by the EAJA] because . . . they are not 'required to be under 5 U.S.C. 554' as required by § 13.3 [of the Secretary's EAJA regulations, 45 C.F.R. § 13.3 (1983)].” 48 Fed. Reg. 45,251 (1983) (emphasis added).

24. 42 U.S.C. § 405(g) (Supp. V 1981). There has been discussion over a number of years about the possibility of eliminating district court jurisdiction over Social Security cases and instead establishing a specialized Article I Social Security Court. For an interesting debate over both the proposal and the underlying problems with the judicial review process, see Ogilvy, The Social Security Court Proposal: A Critique, 9 J. LEGIS. 229 (1982); and Arner, The Social Security Court Proposal: An Answer to a Critique 10 J. LEGIS. 324 (1983).

25. See, e.g., Delays in Social Security Appeals: 1975 Hearings, supra note 9. In a background paper prepared by the Social Security Subcommittee staff, that report stated:

The present “crisis” in the social security appeals process is linked to the tremendous backlog of disability hearings and the resultant delay that beneficiaries encounter in going through the process of exhausting their administrative remedies. . . .

Equally important as speed of processing of cases, is the question of the quality of adjudication. The rate of reversal of initial denials of disability has become so substantial in recent years that it has been cited by the Administration as one of the reasons for the growing actuarial deficit in the disability insurance system.

Id., at 8 (emphasis in original). See also LEGISLATIVE ISSUE PAPER, supra note 9: “Over the years, the number of cases reversed on appeal has been increasing and the Social Security Administration has stated that reversals on appeal are playing a growing role in the actuarial deficiency in the disability insurance program.”
DISABLED WORKER AWARDS
BY LEVEL OF ADJUDICATION

<table>
<thead>
<tr>
<th>Year</th>
<th>Administrative Law Judge Allowances</th>
<th>Reconsideration Allowances</th>
<th>Initial Allowances</th>
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III. SSA's Existing Administrative Law Judge Hearing System: Its Accomplishments and Its Weaknesses

A. The System's Accomplishments

The administrative law judge hearing component of SSA "is probably the largest adjudicative agency in the western world." In fiscal year 1983, more than 360,000 requests for hearings before administrative law judges were received by OHA. The disability programs administered by SSA, the Supreme Court has noted, "are of a size and extent difficult to comprehend." At the present time, more than two-thirds of the nearly 1200 administrative law judges in the federal government are employed by SSA.

The brief for the government in *Heckler v. Day*, a case involving court-imposed time limits on the Social Security administrative law judge hearing process, which was recently argued before the Supreme Court, describes the strides made by SSA in meeting its extraordinary administrative law judge hearing workloads over the past decade. Total hearing requests grew from 72,000 in fiscal year 1973 to more than 320,000 in fiscal year 1982. During this time period, SSA increased the size of its administrative law judge corps from 420 to nearly 800, while more than doubling the number of support staff who assist the administrative law judges in the 130 local hearing offices nationwide. These and other initiatives allowed SSA to absorb a more than fourfold increase in its caseload without substantially increasing the average processing time of cases from the 1973 level of 174 days.

If the administrative efficiency achieved by SSA's administrative law judge hearing process is an important attribute of success in an adjudicatory system of this magnitude, so, too, is the perceived fairness of the appeals process among claimants and their represent-
atives. "The headline," according to the CAJ study, "is that claim­
ants generally perceive their hearings to be fair and adequate." That report concludes that the administrative law judge hearing pro­cess as it is presently administered in SSA is a useful means of mak­ing the disability decisionmaking process "more acceptable" to claimants and beneficiaries who appeal adverse determinations.

Edwin Yourman, writing in 1975, acknowledged that the administra­tive law judges employed by SSA were "able, conscientious and ef­fective" in carrying out their statutory responsibilities.

These favorable, recent assessments of the effectiveness of SSA's administrative law judge hearing process appear to confirm that it has largely succeeded in accomplishing the mission set out for the hearing process by the original Social Security Board under Arthur J. Altmeyer in 1940, more than 15 years before the disability provi­sions were added to the Social Security Act. In a report authored by Ralph F. Fuchs, the Board stated its expectation that the "value of the hearing process" in the original Old-Age and Survivors Insur­ance program would arise, first, from the claimant's ability in such a process "to state his contentions openly," and, second, from the abil­ity of the hearing official to arrive at an independent judgment on the merits of the claim which had been denied at the lower level.

In his recent book on the overall SSA disability adjudication system, Mashaw concludes that the administrative law judge hearing process has allowed SSA to incorporate the advantages of individu­alized attention to claimants while still efficiently processing ex­tremely large numbers of claims at the initial and reconsideration levels. It is the administrative law judge hearing process, according to Mashaw, that has successfully fulfilled an essential humanizing

32. CAJ STUDY REPORT, supra note 10, at 4.
33. Id. at 28.
35. FEDERAL SECURITY AGENCY, SOCIAL SECURITY BOARD, BASIC PROVISIONS ADOPTED BY THE SOCIAL SECURITY BOARD FOR THE HEARING AND REVIEW OF OLD­AGE AND SURVIVORS INSURANCE CLAIMS, WITH A DISCUSSION OF CERTAIN ADMINIS­TRATIVE PROBLEMS AND LEGAL CONSIDERATIONS 6 (1940) [hereinafter cited as the FUCHS REPORT]. The Fuchs Report also gives an account of the "referees" the Board envisioned who would conduct the hearings, which interestingly does not appear to differ significantly from today's administrative law judges: "The desirability of a high type of personnel in the referees' positions is apparent. . . . Legal training and experience will be very valuable if not indispensible. Above all, the ability to inspire confidence, which is a product of personality and broad experience, is a prerequisite to successful functioning." Id. at 41.
36. MASHAW, BUREAUCRATIC JUSTICE, supra note 12, at 214.
function in the process of adjudicating disability claims within SSA.37 It has done so despite remarkable increases in workloads and complex program changes that could not have been foreseen by its depression-era founders.

B. The System's Weaknesses.

1. The Problem of Delay

Undoubtedly, the most widely discussed problem in the Social Security administrative law judge hearing process is the problem of delay. Countless hours of congressional committee time have been taken up with this question.38 So, too, has the time of the courts,39 in a series of class actions in which Social Security and SSI claimants have successfully obtained court-ordered time limits on the processing of appeals,40 and, in many of these cases, the payment of interim benefits to claimants whose appeals are not decided in accordance with the time limits.41

37. Mashaw postulates several "process values" to which any successful system of adjudication must attend, even if its decisions are always accurate. These include: "equality," "transparency," "participation," and "humaneness." Id. at 88-97. Having served for many years as the first level where the claimant can meet face-to-face with a decisionmaker, the administrative law judge hearing process has clearly played a significant role in actualizing some of these "process values." For example, Mashaw stresses the importance of the "transparency" of the decisionmaking process. He notes that Franz Kafka, whose novel, The Trial, spawned a new word ("kafkasque") to describe non-transparent, alienating decisional processes, "gained many of his impressions of administrative processes as a bureaucrat in an agency dispensing disability benefits." Id. at 91 n.9 (referring to F. KAFKA, THE TRIAL (3d ed. 1956)). The statutory guarantee of "reasonable notice and opportunity for a hearing" provided to Social Security claimants in the form of an administrative law judge hearing has contributed immeasurably to the "transparency" of the decisionmaking process, writes Mashaw, especially in disability cases which by their nature involve sensitive, personal determinations about the effects of various medical impairments on the claimant's ability to work, and in which, before the recent introduction of the reconsideration-level hearing, there was no face-to-face contact in the early stages of the decisionmaking process. Id. at 90-92.


39. Most recently, the United States Supreme Court took up the issue in the case of Heckler v. Day, No. 81-1938 (argued Dec. 5, 1983).


41. One of the cases in which payment of interim benefits was part of the relief ordered by the court is Day v. Schweiker, 685 F.2d 19, 21 (2d Cir. 1982), cert granted sub nom. Heckler v. Day, 103 S.Ct. 1873 (1983) (No. 81-1983). The issue was briefed by the parties in the Supreme Court and will presumably be addressed in the Court's forthcoming decision.
As the government's brief in Day implicitly concedes, delay at the administrative law judge hearing level within SSA has been an intractable problem for over a decade. The claimant who today requests an administrative law judge hearing will wait an average of about 185 days for the issuance of a hearing decision. At the close of fiscal year 1983, nearly one-fifth of SSA's pending administrative law judge hearing cases were undecided after 180 days. Over 5,500 cases had been pending for over 365 days.

In Day, the lower courts found that processing times in excess of 180 days constituted a violation of the statutory requirement for a "reasonable notice and opportunity for a hearing." The gist of the government's argument before the Supreme Court in Day was that, in the absence of any findings of "bad faith or dilatory motive on the part of HHS," the existing processing times "are such an entrenched feature—and direct and foreseeable consequence—of the conscientious implementation of the Social Security Act by Congress and the Secretary . . . that the normal processing period . . . is by definition 'reasonable' within the meaning of the statute." Still, the fact remains that average processing times in excess of six months in an administrative hearing process are extremely long, especially in light of the possibly destitute or near-destitute circumstances of many disability claimants.

In a July 1974 report, the staff of the Committee on Ways and Means commented on this "appeals crisis" as follows:

There is a substantial question as to whether the multitiered Social Security appeals procedure can withstand the current workloads under Social Security and SSI . . . .

A Harrison Subcommittee admonition in 1960 seems still pertinent today. It stated, in answer to the Department's assertion that the many reviews and re-reviews of decisions were necessary to assure uniformity in the operation of a nationwide program, that the "question of whether a claimant becomes exhausted in the process of exhausting his administrative remedies is always a real one."
2. The Problem of Variations in Allowance Rates Among Administrative Law Judges

Both the CAJ\textsuperscript{50} and the late Professor Robert G. Dixon, Jr.,\textsuperscript{51} in their respective analyses of the Social Security administrative law judge hearing process, remarked that its greatest weakness is the inconsistency of results among individual administrative law judges. Both studies noted that administrative law judge production statistics revealed extreme disparities among the administrative law judges in their reversal rates, not only nationally but also on a regional basis and even in particular hearing offices.\textsuperscript{52} Dixon termed this variation "striking and disturbing"\textsuperscript{53} in his analysis of 1971 data. Fiscal year 1983 data, as shown in the chart below, continue to show a large degree of inter-judge variance in allowance rates.\textsuperscript{54} Thus, at the same time that "SSA has been able to absorb the more than four-fold increase in its hearing caseload," as the government boasted in the Day brief,\textsuperscript{55} it has not succeeded in appreciably reducing the disparity in case outcomes among the administrative law judges.\textsuperscript{56}

"One of the commonest definitions of an arbitrary adjudicatory system," Mashaw observes, "is one in which the person who decides a particular controversy is more important than the merits of the case."\textsuperscript{57} Moreover, according the CAJ study report, "[t]he evidence is persuasive that the interjudge dispersion in reversal rates is truly a product of subjective factors, probably relating primarily to the interpretative role of the administrative law judge rather than the in-

\footnotesize{50. CAJ STUDY REPORT, supra note 10, at 42.}
\footnotesize{51. See, e.g., Delays in Social Security Appeals: 1975 Hearings, supra note 9, at 117 (statement of Professor Dixon).}
\footnotesize{52. R.G. DIXON, supra note 23, at 76. The term "allowance rate" is probably more appropriate than the term "reversal rate," since an administrative law judge on an open record does not so much reverse the lower level decision as he or she does allow the claim based on his or her own de novo review of the case.}
\footnotesize{53. Id. at 76-77.}
\footnotesize{54. SSA, Office of Hearings and Appeals, Division of Systems and Statistics (1984) (mimeo).}
\footnotesize{55. See supra note 31 and accompanying text.}
\footnotesize{56. CAJ STUDY REPORT, supra note 10, at 42.}
\footnotesize{57. MASHAW, BUREAUCRATIC JUSTICE, supra note 12, at 73.}
ALLOWANCE RATES PER ADMINISTRATIVE LAW JUDGE,* FISCAL YEAR 1983

- Only includes administrative law judges on duty and fully experienced the entire year.

[40] ± 1 Standard Deviation [66]

Not shown: one judge with a 96% reversal rate.
vestigative one.⁵⁸ That report concludes that "a claimant's success at the appeal stage is substantially affected by the identity of the presiding [administrative law judge]."⁵⁹ Thus, the wide variation in allowance rates among SSA's administrative law judges, as Dixon emphasized, "raises questions of equal dispensation of justice."⁶⁰

3. The Problem of Error-Prone Allowances

"[I]t seems a priori," according to the CAJ study report, "that objection to the marked interjudge variance in reversal rates is more soundly based" than objection to "the frequency of [administrative law judge] reversal of state agency determinations," which "raises consistency issues that are at best problematic."⁶¹ Nevertheless, the current administrative law judge allowance rate, which is in excess of fifty-five percent, "not only fails to inspire confidence in the system," as Dixon wrote at a time when the allowance rate was less than fifty percent, "but encourages more requests for hearings because odds are so good."⁶² In its 1974 Report on the Disability Insurance Program, the staff of the House Committee on Ways and Means wrote:

Commentators on the program have pointed out that perseverance in pushing an appeal may be the most important ingredient in success in the borderline cases and that Supreme Court Justice Blackmun's statement in the *Perales* case that a 44.2-percent hearing examiner reversal rate attests to "the fairness of the system" does not fully reflect the unevenness that exists in the system.⁶³

Congressional concern over the high rate of allowances at the administrative law judge hearing level, coupled with the lack of meaningful agency review of allowance decisions,⁶⁴ culminated in an amendment to the Social Security Disability Amendments of 1980, introduced by then-Senator Henry Bellmon on the floor of the

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58. CAJ STUDY REPORT, supra note 10, at 21.
60. CAJ STUDY REPORT, supra note 10, at 21.
61. R.G. DIXON, supra note 23, at 40
63. The Social Security Subcommittee had criticized SSA for several years prior to enactment of the Bellmon Amendment because of SSA's failure to review administrative law judge allowance decisions. See, e.g., LEGISLATIVE ISSUE PAPER, 1976 supra note 9, at 31; Disability Insurance Program: Public Hearings Before the House Subcom. on Social Security of the Comm. on Ways and Means, 94th Cong., 2d Sess. 63 (1976); Disability Insurance Legislation: Hearings Before the House Subcomm. on Social Security of the Comm. on Ways and Means on Proposals to Improve the Disability Insurance Program, 96th Cong., 1st Sess. 223-24 (1979) (statement of Chairman Pickle).
Senate. In a 1982 report on the initial phase of the review, the Secretary of Health and Human Services (HHS) noted that the amendment arose out of congressional concerns over the high—and growing—rate of allowances by administrative law judges.

The initial Bellmon report compared the Appeals Council's views on cases decided by administrative law judges with high, medium and low allowance rates. The report found that the Appeals Council agreed with the allowance decisions of the medium and low allowance groups more than two-thirds of the time, but that the Appeals Council agreed with the allowance decisions of the high-allowance administrative law judges in only fifty-two percent of the cases. The report concluded that, taking the Appeals Council decision as "correct," it was clear that the most error-prone decisions were the allowance decisions of high-allowing administrative law judges. Accordingly, HHS reported that an ongoing program of own-motion review under the Bellmon amendment was initiated on October 1, 1981, and that the focus of that review would be on administrative

64. Act of Jan. 12, supra note 1, § 3 (codified at 42 U.S.C.A. § 421(h) (West 1983)).
65. SECRETARY OF HEALTH AND HUMAN SERVICES, IMPLEMENTATION OF SECTION 304(G) OF PUBLIC LAW 96-265, "SOCIAL SECURITY DISABILITY AMENDMENTS OF 1980": REPORT TO THE CONGRESS (1982) [hereinafter cited as BELLMON REPORT]. "This report was prepared in response to the congressional requirement to initiate a review of disability decisions at the hearing level and to report on that review." Id. at 1.
66. Id.
67. The report divided the three groups as follows:

<table>
<thead>
<tr>
<th>Allowance Rate Group</th>
<th>ALJ Allowance Percentage</th>
<th>ALJ Median Allowance Rate</th>
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<tr>
<td>Low Allowance Rate</td>
<td>0-55%</td>
<td>47%</td>
</tr>
<tr>
<td>Medium Allowance Rate</td>
<td>56-70%</td>
<td>63%</td>
</tr>
<tr>
<td>High Allowance Rate</td>
<td>71-100%</td>
<td>77%</td>
</tr>
</tbody>
</table>

Id. at 21.
68. Id. at 23. These findings are consistent with those of a 1980 article by Deborah A. Chassman and Howard Rolston, former OHA employees who developed and operated the agency's first quality assurance system. See Chassman & Rolston, Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process, 65 CORNELL L. REV. 801 (1980). In their article, Chassman and Rolston noted that:

Simple statistical tests reveal that the error rate for sample cases of [administrative law judges] with extremely high or extremely low allowance rates is higher than for other cases. This is particularly true for the allowance decisions of [administrative law judges] with high allowance rates. This suggests that in some instances the outcome of a claimant's case depends on the luck of the draw rather than the merits of the claim. Appeals Council review of such cases would enhance the fundamental fairness of the system precisely where it has deteriorated.

Id. at 818 (emphasis added) (footnote omitted).
law judge allowance decisions. The review is conducted by the Appeals Council under its longstanding authority to review any administrative law judge decision on its own motion.

Data generated by this ongoing own-motion review by the Appeals Council suggest not only that high-allowance administrative law judges as a group are more error-prone than their peers, but also that allowance decisions themselves are more error-prone than denial decisions at the administrative law judge hearing level. This conclusion is reached by comparing the rate at which the Appeals Council exercises its own-motion review authority in cases where the administrative law judge has allowed benefits with the rate at which the Council grants review at the request of claimants who have received unfavorable administrative law judge decisions. During fiscal year 1983, own-motion review was taken in over seventeen percent of the cases considered by the Council under the Bellmon amendment, as compared with a grant-review rate of only 8.6 percent in cases where claimants appealed unfavorable administrative law judge decisions. These data confirm the impression long held

69. Bellmon Report, supra note 65, at 23. The focus of the ongoing Bellmon review on the decisions of administrative law judges with high allowance rates was challenged by administrative law judges as an infringement of their decisional independence under the Administrative Procedure Act. Association of Administrative Law Judges in the Department of Health and Human Services, Inc. v. Schweiker, No. 83-124 (D.D.C. filed Jan. 19, 1983) (Judge Joyce Hens Green presiding). Judge Green's decision was pending as this article went to press.


71. The regulatory criteria governing Appeals Council determinations as to whether or not to review an administrative law judge decision are identical for own-motion review and claimant-initiated review. See Cases the Appeals Council Will Review, 20 C.F.R. §§ 404.970, 416.1470 (1983). Thus, assuming the Council applies these criteria impartially, it is appropriate to compare own-motion rates for allowance decisions with grant-review rates for denial decisions to arrive at an approximation of the relative error-proneness of the two types of decisions. It is important to note that, when the Appeals Council either grants a claimant's request for review or reviews a case on its own motion, that action alone does not constitute a reversal of the administrative law judge's decision. For example, in fiscal year 1983, the Council vacated the administrative law judge's decision and remanded in nearly 5,000 cases and reversed the administrative law judges in approximately 4,500 other cases. OHA Operational Report, FY 1983, supra note 6.


73. Key Workload Indicators, supra note 6. Even if one assumes some partiality on the part of the Appeals Council towards finding fault with allowance decisions during this time, perhaps in reaction to the Bellmon Amendment's implicit criticism of the Council's failure to exercise its own-motion authority for a number of years prior to the 1980 amendments, the difference between the own-motion and grant-review rates appears to be too great to be attributed entirely to such a bias.
by the state agencies and others that administrative law judges as a group tend to err on the side of allowances.74

IV. RELATIONSHIP OF THE “OPEN FILE” CONCEPT TO THE PROBLEMS IN THE ADMINISTRATIVE LAW JUDGE HEARING PROCESS

At the suggestion of Congress, SSA’s report on the initial implementation of the Bellmon review considered the effect of additional evidence submitted at the administrative law judge hearing level. In this portion of the study, a group of administrative law judges was asked to review the same 1,000 cases that had previously been reviewed by another group of administrative law judges, except that the cases in the second review were stripped of any evidence which had been submitted after the reconsideration level. The study found that the administrative law judges who reviewed the cases without the added evidence would have allowed almost fifty percent fewer cases than were allowed by the administrative law judges who had reviewed the same cases with the additional evidence. In the great majority of the cases, the additional evidence related to a medical condition that had been alleged by the claimant and considered by the decisionmaker at the lower level, not to a new or worsened condition. The study concluded that “additional evidence submitted after the [state agency] reconsideration decision . . . made a significant difference in [administrative law judge] allowance rates.”75

74. “The system encourages [the administrative law judges] to be Robin Hoods and give away the king’s deer.” Mashaw, Bureaucratic Justice, supra note 12, at 73 (quoting Staff of the Subcomm. on Social Security, 94th Cong., 2d Sess., Disability Insurance—Legislative Issue Paper 35 (1976)).

75. Bellmon Report, supra note 65, at 27. The Report explains this phase of the study as follows:

The third phase of the initial review was designed to determine the effect on [administrative law judge] decisions of additional evidence submitted after the [state agency] reconsideration decision. . . . Each case was revised to remove any evidence added after the [state agency] reconsideration decision. The case folders, stripped of all information gathered in the hearings process, were distributed to another representative group of 48 [administrative law judges] for a complete readjudication. . . . The differences in decisions on these 1,000 cases—adjudicated both with [in the second phase of the study] and without [in the third phase] post-reconsideration evidence—should be, in the aggregate, attributable to the submission of additional evidence after the reconsideration level. . . . [A]dditional evidence made a significant difference in [administrative law judge] allowance rates. The overall second phase allowance rate of 46 percent dropped to 31 percent when all additional evidence was removed. . . .

Id.
This portion of the Bellmon study clearly suggests that new evidence about pre-existing medical conditions has a profound impact on administrative law judge allowance rates. Moreover, the CAJ study in 1978 found "great variation in [individual administrative law judge] development effort."76 Taken together, the results of both studies indicate, first, that individual idiosyncrasies among administrative law judges with regard to the development of new evidence is an important factor in the wide variation in their individual allowance rates, and, second, that the admission by administrative law judges of new evidence not available at the state agency levels is a major cause of the high overall administrative law judge allowance rate.

The link between the open file concept and the three problems of delay, discrepancies in outcome, and high allowance rates at the administrative law judge hearing level, then, is rather clear. First, the admission of new evidence by administrative law judges, whether because of their own development efforts or because of submittal by claimants and their representatives, appears to be responsible for a great many of the administrative law judge reversals of lower level denials. Except where the new evidence pertains to a new or worsening condition, which the Bellmon report suggests is not all that common, the allowance of a claim by an administrative law judge on the basis of new evidence would presumably be unnecessary had the lower-level decisionmaker had the opportunity to consider that same evidence. By raising the odds of an allowance on appeal, the open file in turn encourages appeals and contributes to the problem of backlogs and delays in the appeals process. Finally, different approaches by individual administrative law judges to the task of case development at their level appear to be responsible for a fairly substantial amount of the variation in individual administrative law judge allowance rates.

V. THE "CLOSED RECORD" ADMINISTRATIVE LAW JUDGE HEARING

A. Origins of the Concept

On Friday, September 19, 1975, the Subcommittee on Social Security held one of a series of hearings on the subject of "delays in Social Security appeals." During that hearing, Representative Archer of Texas asked a panel of expert witnesses whether, if they

76. CAJ STUDY REPORT, supra note 10, at 52.
were "starting from scratch," they would design the disability appeals process in its present form, or whether a different approach might yield more just and equitable results, not just for claimants but for contributors to the trust fund as well.\footnote{Delays in Social Security Appeals: 1975 Hearings, supra note 9, at 155. Unfortunately, the record shows that a recess was called just after Mr. Archer asked his question, before the panel could respond. After the recess, Representative Steiger said, "We were anxiously awaiting the answer to Bill Archer's thought-provoking questions." \textit{Id}. The responses, however, went off on the issue of federal versus state disability determination units rather than the basic structure of the appeals process which seems to have been at the root of Mr. Archer's question. \textit{See id}.}

One month later, in the same series of hearings, Mr. Archer suggested an answer to his earlier question in a question he asked then-SSA Commissioner Cardwell regarding the Commissioner's opinion about a suggestion "to close the record" at some point in the process. "Some people from Texas said this would get rid of a big, big share of the problem," said Mr. Archer.\footnote{\textit{Id} at 531.} "In a way," responded Commissioner Cardwell, "the answer we would give to your question if we were starting from scratch dovetails with that very question."\footnote{\textit{Id}} Cardwell acknowledged that the existing "open record arrangement" produced marked inconsistencies from level to level within the appeals process, and that "these judgments are going in every direction."\footnote{\textit{Id}}

Representative Conable joined the colloquy at this point, and it continued as follows:

Mr. Conable: If you are going to close the record, you will have to be careful about what gets into the record. The reason you keep the record open is to protect a process that is not all that carefully constructed, really.

Mr. Cardwell: I agree. I think it puts an added burden on the thoroughness and efficiency of the basic adjudication of claims, and this would have to be examined.

Mr. Archer: But you cannot expect the decision at the lower level to be in conformity with the decisions as you go up the ladder of appeals, if you are dealing with different facts.
Mr. Cardwell: That is right. The facts keep changing in the present system, and very often you have an initial determination at what appears to be the final hearing process, because that hearing officer will be hearing facts that no one else has had an opportunity to consider.

Mr. Archer: If the initial decision is not based on all of the facts, then there is something lacking. We should not have any decisions not based on all of the available facts, and it just seems to me this may be the key to solving a lot of the problem.

If the initial process does not bring into focus all of the facts, then we are not doing our job under the law because there are a lot of people who do not appeal, who are being subjected to a decision, where all of the facts are not present. We want to do justice to all of the people covered by these laws. But once there is an opportunity for all of the facts to come in, it seems to me a very strong argument could be made that the record ought to be closed at some point, so you do not have to continue to embellish and add to this record. As long as you do, it seems to me no matter what other steps we take, we will have this tremendous difference between the decisions that are rendered at a higher level, and the decisions rendered at a lower level. 81

B. "Closed Record" Legislation

In the 1980 Amendments, Congress took an initial step in the direction advocated by Mr. Archer by amending the Social Security Act to provide that an application for benefits is valid only if the claimant "satisfies the requirements for such benefits" as of the date of the administrative law judge hearing decision, at the latest. 82

81. Id. at 531-32. (emphasis added).


An application for any monthly benefits under this section filed before the first month in which the applicant satisfies the requirements for such benefits shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits
most three years later, SSA published proposed regulations to implement that provision. The preamble to the proposed regulations explained that Congress, in enacting the provision, had given the Secretary of Health and Human Services the authority to limit the Appeals Council’s review of administrative law judge decisions to the evidence that had been considered by the administrative law judge.83

On May 26, 1982, the House Ways and Means Committee approved a bill which took even more decisive action to curtail the open file concept in Social Security disability claims adjudication. The bill, entitled “Disability Amendments of 1982,” was intended, among other things, “to strengthen the reconsideration process by providing for the earlier introduction of evidence, [and] to provide for more uniformity in decisionmaking at all levels of adjudication.”84 The Committee Report described the existing disability appeals process, in which “cases have been able to be taken up ‘de novo’ at each administrative level,” and noted that the 1980 amendments had taken a “first step . . . to reform this process by ‘closing the record’ at the [administrative law judge] level.” Citing its concern over “the deliberate withholding” of “available evidence from treating physicians and specialists consulted independently by claimants” until they reached the administrative law judge hearing level,85 the Committee approved a two-part reform particularly aimed at improving the reconsideration level of the appeals process. The bill provided, first, for a face-to-face hearing at the reconsideration level (much like the procedure later established by P.L. 97-455), and, second, a “modified closed record requirement”86 under which new evidence of a previously alleged impairment would not be admissible at the administrative law judge hearing level, but would instead be remanded to the reconsideration level.87

83. 48 Fed. Reg. 21,968 (1983). As of the date of this writing, final regulations to implement this provision have not been issued.
84. DISABILITY AMENDMENTS, supra note 14, at 1.
85. Id. at 11.
86. Id.
87. Id. at 12. The bill “modified” a more stringent closed-record requirement which had been introduced by Representatives Pickle and Archer in H.R. 5700. Section 5 of that bill would have provided simply that “[n]o documentary evidence submitted on or after the date of a decision on reconsideration . . . shall be considered in connection

before the Secretary makes a final decision on the application and no request under section 205(b) for notice and opportunity for a hearing thereon is made or, if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Secretary).
"The amendment," the Committee explained, "was purposely designed to get attorneys and other representatives to proffer relevant and available material which is essential to a decision on the best evidence at reconsideration."88 A dozen members of the Committee, however, took issue with the approach adopted by the Committee majority. In their "Separate Views," published with the Committee's report on the bill, these members wrote:

Making the reconsideration level a more meaningful step in the disability determination process is a sound goal. To the extent that cases are resolved at this stage, the system will be improved. Closing the record at this stage, however, as Section 5 would do, is an unfair and inefficient means of improving the process at the State level. The whole purpose of the hearing by an Administrative Law Judge is to provide an independent check and balance to executive discretion under the law. If the hearing before the Administrative Law Judge is to have any meaning at all, the individual's [sic] appealing the State agency decision must be allowed to present all of their evidence.89

As it turned out, the 97th Congress did not act on the Ways and Means Committee bill. Instead, in response to a growing public outcry over the number of terminations resulting from the 1980 Amendments, Congress enacted the provisions of P.L. 97-455, requiring reconsideration hearings and permitting benefit continuation through the administrative law judge hearing level in disability termination cases. The major reforms, as Mr. Pickle said, were left for "next year." Neither the full Ways and Means Committee nor the Social Security Subcommittee has since then resurrected the discussion of whether the face-to-face reconsideration hearing should be the last de novo stage in the Social Security appeals process, thereby making the administrative law judge hearing a "closed record" proceeding.90

with entitlement to benefits. . . ." Id. Besides adding the requirement that the closed record would apply only when the claimant had had an opportunity for an evidentiary hearing at the reconsideration level, the bill approved by the full Ways and Means Committee also permitted the administrative law judge to admit "evidence of new and worsening conditions." Id. Further, the Committee's bill also included "[a] specific provision . . . requiring both written and oral notice to the claimant that it was essential to get available evidence into the record at reconsideration and that the individual might wish to obtain an attorney or other representative." Id.

88. Id.
89. Id. at 82. (emphasis added).
90. In late 1983, the Ways and Means Committee reported out a bill entitled "Social Security Disability Benefits Reform Act of 1983." House Comm. on Ways and
VI. **THE NEED FOR A "CLOSED RECORD" FOLLOWING THE LOWER-LEVEL EVIDENTIARY HEARING**

Several observations can be made about the relationship of the various statistical trends and problems in the Social Security disability appeals process. It is clear, first of all, that as the proportion of allowances which occurs at the administrative law judge level has mushroomed from less than five percent in the mid-1960's to roughly one-third in the early 1980's, so, too, has the number of appeals and the resulting problem of case backlogs and delays. It is also clear that the open file concept plays an important, if indeterminate, role in the large number of allowances which occur on appeal. Finally, the decisionmaking process as it is presently structured appears to tend towards erroneous denials (or "false negative" decisions) at the lower level (due to lack of complete development) but towards erroneous allowances (or "false positive" decisions) at the administrative law judge hearing level.

Reforms are obviously needed which will, first, allow the disa-

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The disability insurance program has attracted substantial Congressional attention over the last two years, primarily because of the numbers of beneficiaries whose benefits have been terminated. The review of current beneficiaries that has produced these terminations was mandated by Congress, but was accelerated in pace in March, 1981. There has been no suggestion that those receiving disability benefits should never be examined again, but the committee believes that the process over the last several years has resulted in erroneous termination of benefits for at least some people. . . . The overall purpose of the bill is, first, to clarify statutory guidelines for the determination process to insure that no beneficiary loses eligibility for benefits as a result of careless or arbitrary decision-making by the Federal government. Second, the bill is intended to provide a more humane and understandable application and appeal process for disability applicants and beneficiaries appealing termination of their benefits. Finally, the bill seeks to standardize the Social Security Administration's policy-making procedures through the notice and comment procedures of the Administrative Procedures [sic] Act, and to make those procedures conform with the standard practices of Federal law, through acquiescence in Federal Court of Appeals rulings.

Id. at 410. The major provision of the bill with regard to the structure of the decision-making process was to eliminate the reconsideration level as it is now known and require face-to-face hearings in the state agencies at the initial determination stage in benefit termination cases. The bill also required SSA "to initiate demonstration projects with respect to face-to-face evidentiary meetings at the initial level of state agency determinations for new applicants. . . ." Id. at 423. The bill was silent on the issue of closing the record following the first face-to-face hearing stage. On March 27, 1984, the House of Representatives passed the bill by the extraordinary vote of 410 to 1. 130 Cong. Rec. H1956-93. The Senate had not yet acted on any comparable legislation as this article went to press.
bility adjudication process to do a better job of distinguishing eligible from ineligible claims at the early decisional stages, and, second, make it less likely to have the lower-level determination reversed on appeal. To the extent that face-to-face contact will help bring about the first of these improvements, the new reconsideration level hearings should greatly reduce the incidence of "false negatives" in state agency decisions in the termination cases in which the new procedure will be available.91 The latter improvement, however, is unlikely under the existing open file system, notwithstanding any improvements in the lower-level decisionmaking process.92

"Very few reforms will improve all dimensions of the process at once," cautioned the CAJ study report. "Every change requires a trade-off among relevant values."93 The change to a more personalized lower level determination, as a result of the new face-to-face reconsideration process, itself represents a compromise between a concern over the fairness and quality of the lower-level decisions and the need for speedy and economical adjudication of vast numbers of cases. In enacting P.L. 97-455, Congress has clearly determined that, at least with respect to termination cases, it is worth the time, expense, and administrative difficulty involved in providing individualized hearings, to require such a procedure at an early stage of the process.

The change from the present open file system to an appeals pro-

91. In a congressional hearing in June 1983, a Social Security Administration official reported that, in a pilot test of the new face-to-face reconsideration procedure, the reconsideration allowance rate was thirty-eight percent. Social Security Disability Insurance: Hearing Before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, 98th Cong., 1st Sess. 69 (1983). The statement was made by then-Associate Commissioner for Hearings and Appeals Louis B. Hays in response to a question from Subcommittee Chairman Pickle. This is in stark contrast to the usual reconsideration allowance rate of twenty percent or less by the state agencies. Key Workload Indicators, supra note 6. These data confirm Mashaw's expectation that, in response to a face-to-face encounter with a claimant, "the number of claims granted by state agencies should go up." Mashaw, Bureaucratic Justice, supra note 12, at 199.

92. It is far from certain, for example, that a lower proportion of administrative law judge allowances will occur in the cases which are not favorably reconsidered as a result of the face-to-face hearing. The danger implicit in the somewhat experimental use of an evidentiary hearing process at the reconsideration level in termination cases is that it will simply result in a greater overall number of allowances. It is conceivable, in other words, that the greater latitude given the state agency hearing officer under the new process (as compared with the lesser discretion given the normal state agency claims examiner under the old process) will result in a higher reconsideration allowance rate but that administrative law judges will continue to allow roughly sixty percent of the cases they receive.

93. CAJ Study Report, supra note 10, at xix.
cess with a more restricted right to submit new evidence to an administrative law judge, as the 1982 Ways and Means Committee bill required, would likewise involve a trade-off. In this instance, the trade-off would be a reduction in inter- as well as intra-stage inconsistency in case outcomes, resulting in a speedier and less congested appeals process, as against a lesser opportunity for the claimant to prove his or her case on appeal, which could erode the perceived fairness of the process.

The 1982 Ways and Means bill struck what appears to have been a reasonable balance among these various considerations by linking the reconsideration hearing with a closed record requirement for the subsequent levels of the appeals process. The trade-off in the bill was that, in return for a much-improved opportunity to present one's case at the reconsideration level, any further appeals would have to be taken solely on the basis of the case record as it was perfected at the lower level. Experience would suggest that, by severing the reconsideration hearing from the closed record requirement, as it did in P.L. 97-455, Congress has set the stage for an actuarial "worst case" scenario: an increased tendency towards allowances at the lower level with no corresponding decrease in allowances by the administrative law judges. Thus, if, as many commentators would suggest, SSA extends the face-to-face reconsideration hearing to non-termination cases, the disability trust fund deficiencies of the mid-1970's might well return to haunt both SSA and the Congress in the mid-1980's.

VII. PRACTICAL IMPLICATIONS OF A "CLOSED RECORD" ADMINISTRATIVE LAW JUDGE HEARING

Perhaps the strongest argument against a closed record administrative law judge hearing is that on its face it seems contradictory to speak of an evidentiary hearing at which the decisionmaker is foreclosed from admitting new evidence which is apparently relevant in deciding the case. In his Administrative Law Treatise, 94 Professor Davis analyzes the development of the law with regard to administrative hearing processes, but nowhere does the question of a closed record hearing arise. At both a theoretical and a practical level, the idea of such a hearing seems anamolous. What would be left to discuss at such a hearing? Recalling that the question at issue would be the ability of the claimant to work in spite of his or her medical impairments, would any purpose even be served by the claimant's

attendance, assuming that the administrative law judge could not go beyond the evidentiary record developed below? Or would it suffice for the claimant's counsel to submit written arguments and make a brief oral argument? In short, would not the administrative law judge hearing quickly become anachronistic and merely repetitive of the paper-review type of process which now occurs at the Appeals Council level?

These questions suggest the potential complexity underlying any proposal to "close the record." Obviously, there are many possible gradations between a *de novo* hearing on a completely open record, and a totally closed-record hearing where, in effect, only legal issues would be open for discussion. The 1982 Ways and Means Committee bill explicitly exempted from the closed record requirement evidence pertaining to new or worsening medical impairments. Other exemptions, such as evidence deduced by careful questioning of the claimant as to his or her daily habits, were arguably implicit in that legislation. The target of the bill appears to have been documentary evidence which was, or could have been, available at the reconsideration level which is either consciously or unconsciously withheld by the claimant until the administrative law judge hearing. Although the exact extent of this phenomenon is unknown, the Secretary's Bellmon report indicates that, whatever its extent, the introduction of new documentary evidence at the administrative law judge hearing level does have a profound impact on case outcomes.\(^95\)

An integral aspect of the closed record requirement in the 1982 legislation was an apparently liberal remand authority, whereby the administrative law judges could direct that an imperfectly developed record be more thoroughly worked up by the state staff.\(^96\) Presumably, in any case remanded by the administrative law judge the state would have to provide an opportunity for further face-to-face hearing before returning the case to the administrative law judge for decision. (Cases favorably disposed of by the state agency on remand might, of course, simply be processed for payment without going back up to the administrative law judge.) Perhaps to prevent abuse, the state agencies could be authorized to ask for Appeals Council review of remand orders they believe to be unnecessary or excessive. But a liberal remand authority would appear to be necessary to pre-

\(^95\) See *supra* note 75 and accompanying text.

\(^96\) According to the Committee Report, the bill required that "if the claimant wished [this newly offered] material to be part of the record, . . . the case be remanded to the reconsideration level. . . ." H.R. REP. No. 588, 97th Cong. 2d Sess. 12 (1982).
serve the fairness of the system. Thus, a case could be returned by the administrative law judge to the state agency for further development or an additional reconsideration-level hearing, not only when the administrative law judge perceives a deficiency in the record as it was developed below but also when the claimant asks to admit new evidence into the record at the administrative law judge hearing.

It should be emphasized that a closed record would not foreclose the administrative law judge from making an independent judgment on the facts of the case. He or she would not, in other words, be limited to reversing only those lower level decisions which were not supported by substantial evidence, as are the federal district courts under section 205(g) of the Social Security Act. Thus, the claimant’s in-person appearance and credibility would retain much of their present importance in the administrative law judge hearing and decisionmaking process. It would be a mistake, therefore, to assume that the restrictions imposed by a closed record on the claimant’s ability to submit new evidence to the administrative law judge would deprive the administrative law judge hearing process of its vitality and significance in the eyes of claimants and their representatives.

Finally, it would appear that, from an administrative standpoint, the closed record could shift a considerable workload from the administrative law judges and their staffs to the state agencies, since there would no longer be a need for extensive case development at the administrative law judge hearing level. This would presumably help to offset some of the large administrative costs likely to be required to provide individualized hearings at the reconsideration level.

VIII. CONCLUSION

The Ways and Means Committee members who submitted separate views on the closed record provision of H.R. 6181 in 1982 suggested that “some mistakes and omissions are going to be made at the State level,” due in part to the fact that few claimants have representation at that level and in part to simple error by “[o]verworked and underfinanced State agencies.” “By allowing the record to remain open to additional evidence through the [administrative law judge] hearing,” they concluded, “tragic mistakes can be avoided.”

The problem with the closed record requirement, they believed, was

98. Id. at 81.
that it would cure the problems in the system by making it more
difficult for beneficiaries to contest a termination of benefits. "Re­
stricting the right to appeal the decision made by the State agency" 
they reasoned, "is not the way to improve the system at the State 
level."99

In the wake of the justifiable public concern over the large
number of apparently erroneous disability benefit terminations 
under the 1980 amendments, it is difficult to take issue with a cau­
tious or even skeptical view of the ability of the state agencies to 
produce accurate, fair, replicable decisions on the disability claims 
sent to them by SSA for either a first-time decision or a later review. 
On this score, the dissenters on the Ways and Means Committee in 
1982 would appear to be today's majority. But the underlying 
problems with the disability appeals process, as exemplified by the 
problems of delay, variance and the tendency towards erroneous al­
lowances at the administrative law judge hearing level, remain, and 
require serious corrective action on the part of Congress.

Although not wholly free from doubt as to its workability and 
fairness, the idea of a closed record administrative law judge hearing 
_after an opportunity for an evidentiary hearing at the reconsideration level_ clearly has the potential for improving the consistency and 
replicability of decisionmaking not only at the administrative law 
judge hearing level but also in the state agencies. Once the reconsid­
eration-level hearing process is fully operational and has any "bugs" 
worked out (conservatively, that might be at the end of calendar year 
1984), it would be reasonable to implement the closed record system 
on a trial basis.100 To do so would be entirely consistent with the 
pledge made by the original Social Security Board that a continual 
effort be made to "preserve an attitude of self-criticism" and to im­
prove the SSA hearing process on the basis of operational

99. _Id._ at 82.

100. The closed record provisions of H.R. 6181 were limited to benefit termination 
cases, in which the reconsideration-level hearing would have been (and, under Pub. L. 
No. 97-455, is) required. "This provision in the bill will provide a real test as to the 
effectiveness and fairness of a face-to-face reconsideration and the closing of the record, 
and if it proves successful it could, over time, be extended to the reconsideration process 
of initial claims," according to the Committee Report. _H. R. Rep._ No. 588, 97th Cong., 
2d Sess. 13 (1982). Arguably, termination cases are not an appropriate place to begin 
testing the effectiveness and fairness of the closed record administrative law judge hear­
ing, since a beneficiary who faces termination of benefits is likely to be particularly traum­
atized by that prospect and may require more, not less, consideration than a person 
applying for benefits for the first time. A more appropriate approach might be to extend 
the face-to-face hearing requirement to new application cases and then test the closed 
record in _those_ cases before using it in termination cases.
experience.¹⁰¹