The Effect of Representation in Nonadversary Proceedings -- A Study of Three Disability Programs

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THE EFFECT OF REPRESENTATION IN NONADVERSARY PROCEEDINGS—A STUDY OF THREE DISABILITY PROGRAMS

William D. Popkin†

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† Professor of Law, Indiana University School of Law (Bloomington). A.B. 1958, Harvard University; LL.B. 1961, Harvard University.
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INTRODUCTION

This Article studies the effect of representation on decision-making in three disability programs that resolve claims by non-adversary procedures. Statements that lawyers help claimants generally rest on the assumption that disputes are resolved in an adversary setting. But a large number of public welfare claims are decided by informal, nonadversary procedures. One hearing examiner has described the threefold role of the administrative judge in these proceedings:

It seems strange, but we use the terminology that we 'wear three hats.' We put on the first hat, and we represent the claimant, we...

---

1 The "great role of the defense lawyer . . . is to keep the trial process in balance so that the adversary system can function." H. KALVEN & H. ZEISEL, THE AMERICAN JURY 372 (1966). If counsel on each side were equally competent, an empirical study would not detect any helpful effect of counsel. That is why Kalven and Zeisel found that superior counsel for the criminal accused produced a jury acquittal where the judge would have convicted in only one percent of the cases they studied. Id. at 371-72. In the vast majority of cases, counsel were evenly balanced. Id. at 372.

2 For example, in fiscal 1974, 1,237,000 claims were received from former workers for Social Security disability benefits. The total number of claims in fiscal 1974 for Supplemental Security Income, after subtracting duplicate claims and claims incorrectly reported, was 1,531,052. ANNUAL REPORT OF THE SOCIAL SECURITY ADMINISTRATION FOR FISCAL YEAR 1974, at 11, 23 (House Ways and Means Comm. Print, 94th Cong., 1st Sess. 1975).
present all the testimony on his behalf, and drag it out of him by questioning. We then represent the government, the Social Security Administration, and search the law—that's the second hat. We search our minds, and we search whatever other records are available, we search the evidence, and we present the best case that the government has. Then we turn around and put on the third hat, and we decide which evidence is most favorable, and in whose behalf.  

In this nonadversary setting, representatives might not help the claimant win. In fact, a view commonly encountered among administrators is that the agency adequately protects the claimant's interest. Lawyers, they claim, only disrupt these informal, cooperative proceedings by insisting on the use of adversary procedures that increase administrative costs without any benefit to the client. Moreover, utilizing counsel may increase the claimant's costs; many consider this a major problem in income maintenance programs.

Most lawyers are likely to share another view: vigorous advocacy will increase the claimant's chance of prevailing. Proponents of this position view administrative decisionmakers as naturally biased in favor of their agencies, and consider the nonadversary process incapable of counteracting this bias.

The data in this study show that represented clients usually
have an advantage over unrepresented clients even in informal, nonadversary proceedings. The results were analyzed to discover the relationships between representation and the various procedures used in different programs, such as the use of outside experts to advise the agency on the merits of the claim, the ability of the claimant to present new evidence on appeal, and the use of hearings. Small sample sizes and the inaccessibility of data, however, prevented complete analysis of the interactions among these variables.

This Article also attempts to develop a framework for deciding whether representation should be encouraged or discouraged. The study concludes by outlining the significant policy issues involved in deciding whether to encourage representation in the nonadversary process, and explains what empirical data and value judgments are relevant to the resolution of these issues.

I

SUBSTANTIVE AND PROCEDURAL FEATURES OF THE PROGRAMS STUDIED

A. Outline of the Programs Studied

1. Federal Employees’ Compensation Act: Substantive Features

The Federal Employees’ Compensation Act (FECA) is a workers’ compensation program providing benefits to federal employees suffering from job-related disabilities. Disability occurs when the worker either suffers a loss of wage-earning capacity or incurs a disability that is listed on the statutory schedule. Once a “schedular” impairment is proven, the statute automatically provides for the payment of benefits for a specified number of weeks. Proof of loss of wage-earning capacity is much more dif-

---

8 See Tables 1A & 1B infra.
9 See Tables 2A-5 infra.
12 For example, in FECA the number of weeks for total impairment of the arm is 312, for the leg, 288, and for the hand, 244. 5 U.S.C. § 8107(c)(1)-(3) (1970). Partial impairment of a part of the body results in recovery for the percentage of impairment times the number of weeks provided for total impairment of that part of the body. Id. § 8107(c)(19).
difficult than proving a "schedular" impairment. The worker whose
disability is "unscheduled" must not only prove the existence of an
impairment but also the effect that impairment has on ability to
work in the relevant labor market. Benefits in either case are not
paid until it is clear that there will be no further improvement in
the claimant's condition. Prior to that time, the claimant is eligible
for temporary disability benefits.

Workers' compensation programs differ from other disability
programs in that the impairment must be job-related. For exam-
ple, a claimant with heart trouble must prove that his disabling
condition originated with or was aggravated by his work. However,
it is generally believed that the agencies administering the
FECA program give the claimant the benefit of the doubt.

2. Federal Employees' Compensation Act: Procedural Features

An FECA claim is filed at a district office of the Office of
Workers Compensation Programs (OWCP). The responsibility
for developing the facts and deciding a claim rests with a claims
examiner, who is typically neither an attorney nor a doctor.

13 In FECA, the claimant's local community is the relevant job market. Alexander A.
14 20 C.F.R. § 10.301(b) (1976).
15 See 5 U.S.C. § 8102(a) (1970). The statutory phrase in FECA is "performance of
duty," but it has the same meaning as "arising out of and in the course of employment." A.
Larson, The Law of Workmen's Compensation § 1.10 (1972). These programs are fi-
nanced by employers, whose liability varies with their accident experience. This cost is
supposed to induce safety precautions. A work-connection requirement, therefore, seems
fair, and may even be a constitutional requirement. Compare Bountiful Brick Co. v. Giles,
In FECA, benefits are charged to the employing agency's budget (5 U.S.C. § 8147(b)
(1970)), but the cost is not analogous to an insurance premium on a private sector em-
ployer.
may arise are the following: (1) satisfaction of time periods for filing notices and claims; (2)
etitlement to a lump sum award commuting periodic payments; (3) coverage for medical
expenses when treatment is not by a doctor; (4) interpretation of foreign workers' compensa-
tion laws that determine ceilings on FECA benefits for certain foreign employees; (5)
etitlement to benefits under more than one program; (6) termination of a medical im-
pairment. See Chart 8 infra, at note g.
17 M. Gilhooley, The Federal Employees' Compensation Act 8 (Jan. 20, 1972) (unpub-
lished manuscript prepared for the Administrative Conference of the United States)
[hereinafter cited as Gilhooley-FECA].
18 20 C.F.R. § 10.106 (1976). OWCP replaces the Office of Federal Employees' Com-
pensation and its predecessor, the Bureau of Employees Compensation. Id. §§ 1.5-6.
19 Id. § 10.130.
20 Gilhooley-FECA, supra note 17, at 11.
Medical and vocational experts on the staff of OWCP and from outside the agency can be called upon to help the claims examiner decide a case.\textsuperscript{21} The claimant has no right to a hearing at the initial stage of the proceedings, although a face-to-face meeting between the claims examiner and the claimant occasionally takes place.\textsuperscript{22} The proceedings are nonadversary;\textsuperscript{23} neither the employing nor the decisionmaking agency appears in opposition to the claimant.

A dissatisfied claimant may ask the Division of Hearings and Review (DHR) in the National Office of OWCP to reconsider the claim and grant a hearing,\textsuperscript{24} but need not do so to obtain further review. Decisionmakers at this stage are not lawyers or doctors.\textsuperscript{25} They can, however, obtain technical advice from experts on the staff or from outside the agency.\textsuperscript{26} DHR will accept new evidence and will conduct hearings at a place convenient for the claimant if he so requests.\textsuperscript{27} The claimant is usually the only witness at the hearings. Cross-examination is allowed, but the experts who provided advice to the agency are not made available for cross-examination. The proceedings are nonadversary.

If the claimant loses at either the claims-examiner or DHR stage, he may appeal to the Employees' Compensation Appeals Board,\textsuperscript{28} whose three members are all lawyers.\textsuperscript{29} The Director of OWCP may request that an appealed case be remanded to OWCP for further consideration; this procedure is used only when the

\textsuperscript{21} Id. at 12-14.
\textsuperscript{22} Id. at 16.
\textsuperscript{23} 20 C.F.R. § 10.140 (1976).
\textsuperscript{24} Gilhooley-FECA, supra note 17, at 18-19; Interview with Gaylord Williams, Director, Division of Hearings and Review, OWCP, in Washington, D.C. (June 21, 1973); Interview with Herbert A. Doyle, Jr., Director, OWCP, in Washington, D.C. (June 21, 1973). The right to a hearing is provided by 5 U.S.C. § 8124(b) (1970) and 20 C.F.R. § 10.131 (1976).
\textsuperscript{25} Gilhooley-FECA, supra note 17, at 18; Interviews cited in note 24 supra.
\textsuperscript{26} 5 U.S.C. § 8123(a) (1970).
\textsuperscript{27} The right to a hearing dates from the 1967 amendments to the FECA—Pub. L. No. 90-83, 81 Stat. 210-11 (codified at 5 U.S.C. § 8124(b) (1970)).
\textsuperscript{28} 20 C.F.R. §§ 501.1-.13 (1976).
\textsuperscript{29} Gilhooley-FECA, supra note 17, at 21; Interview with E. Gerald Lamboley, Chairman of the Employees' Compensation Appeals Board, in Washington, D.C. (June 21, 1973).
Chart 1
Outline of Decisionmaking in the FECA Program

**Agency:** District Offices of OWCP.
**Number of claims processed:** 22,450 (fiscal 1972).<sup>a</sup>
**Percentage won:**<sup>b</sup>
**Appeal to:** Nat'l Office of OWCP or Employees' Compensation Appeals Board.

---

**Agency:** DHR, Nat'l Office of OWCP.
**Number of appeals processed:** 599 (fiscal 1973).
**Percentage won:** 70%<sup>c</sup>
**Appeal to:** Employees' Compensation Appeals Board.
**Source of data:** Office of Federal Employees' Compensation, Fiscal Year Report of Division of Hearings and Review (July 31, 1973).

---

**Attorney in office of Solicitor, Dep't of Labor:** Reviews all cases appealed, and may recommend remand to National Office of OWCP.

---

**Agency:** Employees' Compensation Appeals Board.
**Number of appeals processed:** 112 (fiscal 1971)<sup>d</sup>
**Percentage won:** 27%<sup>e</sup>
**Appeal to:** No judicial review.
**Source of data:** Gilhooley-FECA, supra note 17.

---

<sup>a</sup> The agency processed 113,655 notices of injury, but most of them were noncompensable (73,613), covered by leave time (16,142), or not followed up by a claim (1,450).

<sup>b</sup> The agency disapproved only 2,670 claims in fiscal 1972, but the figure is misleading. All allowances, even if they are only for medical expenses or simply less than the claimant seeks, are recorded as approvals in the agency's statistics.

<sup>c</sup> "Wins" include 78 remands, which is 19% of the total number of wins (N=417). Claimants abandoned an additional 115 cases.

<sup>d</sup> The Board also decided two cases in which attorneys sought higher fees than DHR allowed. These cases have been excluded from the statistics.

<sup>e</sup> "Wins" include remands. Agency figures do not distinguish between outright wins and remands.
facts are not fully developed, or when opinions of experts are unexplained or in substantial conflict.\textsuperscript{30}

Cases that reach the Board are reviewed on the record. The Board will not accept new evidence but does allow oral argument.\textsuperscript{31} In each case, one Board member takes primary responsibility for analyzing the germane factual and legal disputes without the help of legal assistants.\textsuperscript{32} Although a Department of Labor attorney defends OWCP's decision,\textsuperscript{33} the Board independently analyzes the record to determine the merits of the claim. There is no right to judicial review of the Board's decisions.\textsuperscript{34}

3. Social Security: Substantive Features

The Social Security program provides benefits to totally disabled individuals whose disability can be expected to result in death or to last at least twelve months.\textsuperscript{35} There is no requirement that the disability be job-related; the claimant must, however, have worked long enough in jobs covered by the Social Security program to have obtained "insured status."\textsuperscript{36}

In every disability case the Social Security Administration (SSA) must determine if the claimant, given his disability, can nevertheless find substantial gainful employment.\textsuperscript{37} The complex-

\textsuperscript{30} Interview with E. Gerald Lamboley, \textit{supra} note 29. In practice, the Attorney in the Solicitor's Office of the Department of Labor responsible for representing OWCP before the Board decides when to request a remand.

\textsuperscript{31} 20 C.F.R. §§ 501.2(c), .5 (1976). The Board's office is in Washington, D.C., however, and members do not travel to hear oral arguments.

\textsuperscript{32} Interview with E. Gerald Lamboley, \textit{supra} note 29.

\textsuperscript{33} This is the only adversary stage of any program in the study.

\textsuperscript{34} 5 U.S.C. § 8128 (1970). The Board is the only agency studied that publishes its opinions.

\textsuperscript{35} 42 U.S.C. § 423(a), (d) (1970). Social Security also provides benefits to certain disabled dependents of eligible workers: surviving disabled spouses at least 50 years old (\textit{id.} § 402(e), (f) (1970 & Supp. V 1975)), and children who become disabled prior to reaching age 18 (\textit{id.} § 402(d)).

\textsuperscript{36} 42 U.S.C. §§ 414, 423(c)(1) (Supp. V 1975). The period is a number of calendar quarters in employment covered by the Social Security program out of a longer period immediately prior to the onset of disability. If a claimant is out of work for a long time, he may lose his insured status. In such cases, he may try to prove that the onset of disability occurred at an earlier date when he was insured. He may also try to prove earlier onset to obtain benefits for a longer time. \textit{See id.} §§ 414, 423(a)(1), (c)(1).

\textsuperscript{37} The current definition of disability provides:

[A]n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which
it of this test is illustrated by comparing it to the workers' compensation standard for proving disability. First, the claimant's residence does not limit the geographical area for identifying the job market. Second, there are no benefits for partial disability. Third, there is no statutory schedule mandating payment once a particular medical impairment is proven.

SSA has nonetheless adopted two regulations which simplify the determination of disability. An unemployed worker is considered totally disabled if he has worked for a long time in an unskilled job and lacks the education and training to perform a more sedentary task. The Administration has also issued a list of medical impairments that give rise to a presumption of total disability unless the worker is engaged in substantial gainful activity.

4. Social Security: Procedural Features

Nonadversary procedures govern at all stages of decisionmaking. Claims are filed in a district office of SSA, which decides whether the claimant has insured status. State agencies under

exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence . . . "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.


41 20 C.F.R. § 404.1502(c) (1976).

42 Id. § 404.1502(a). A dispute may also arise over whether the claimant has cooperated with the agency in accepting treatment and rehabilitation (42 U.S.C. §§ 422(b), 423 (d)(5) (1970 & Supp. V 1975)) or cooperated in obtaining evidence (20 C.F.R. § 404.1530 (1976)), both of which are conditions of eligibility.


44 In fiscal 1974, 205,120 applications were denied for technical reasons, including failure to meet insured status and withdrawal of applications. Memorandum from Edwin Simmons, Bureau of Disability Insurance, to William D. Popkin (July 9, 1976).
contract with SSA make the initial determination of disability.\textsuperscript{45} To insure quality control, the Bureau of Disability Insurance of SSA reviews 5\% of the state agencies' decisions.\textsuperscript{46} The Bureau can also deny a claim outright.\textsuperscript{47}

A doctor and, where available, a vocational specialist make the initial decision.\textsuperscript{48} The agency may arrange for consultative examinations by outside doctors;\textsuperscript{49} consultation with outside vocational specialists is also possible, but is "sporadic."\textsuperscript{50} There is no right to a hearing at this stage.\textsuperscript{51}

An unsuccessful claimant begins the appeal process by requesting reconsideration by the agency that made the initial decision.\textsuperscript{52} New evidence of disability may be submitted. The process is identical to the initial stage,\textsuperscript{53} except that the Bureau of Disability Insurance selects a 10\% sample for quality control review.\textsuperscript{54} About 30\% of initially unsuccessful claimants seek reconsideration.\textsuperscript{55}

The claimant who loses at the reconsideration stage may take

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} 42 U.S.C. \textsection 421 (1970). State agencies were expected to have close contacts with the local medical profession. \textit{Staff of House Comm. on Ways and Means, 93d Cong., 2d Sess., Report on the Disability Insurance Program} 17 (Comm. Print 1974) [hereinafter cited as \textit{Staff Report}]. Most of the state agencies are vocational rehabilitation agencies. \textit{Id.}
\item \textsuperscript{46} \textit{Staff Report}, \textit{supra} note 45, at 27-29.
\item \textsuperscript{47} 42 U.S.C. \textsection 421(c) (1970).
\item \textsuperscript{48} Dixon states that the two-man team is "trained in disability evaluation." Dixon, \textit{supra} note 37, at 690. But there is considerable controversy over the availability and qualification of vocational specialists. Some state agencies do not have any on their staffs. \textit{Staff Report}, \textit{supra} note 45, at 233. The specialist’s training is primarily on-the-job but, in some instances, includes a course given at the central office in Baltimore. \textit{Id.} at 99.
\item \textsuperscript{49} 20 C.F.R. \textsection 404.1527 (1976). This occurs in about 19\% of the cases. \textit{Staff Report}, \textit{supra} note 45, at 229 (data for fiscal 1973).
\item \textsuperscript{50} \textit{Staff Report}, \textit{supra} note 45, at 98.
\item \textsuperscript{51} See Dixon, \textit{supra} note 37, at 694.
\item \textsuperscript{52} 20 C.F.R. \textsection\textsection 404.909-.916 (1976). Prior to 1959, such an appeal was not mandatory. \textit{Staff Report}, \textit{supra} note 45, at 244.
\item \textsuperscript{53} See 20 C.F.R. \textsection 404.902 (1976). Consultative examinations are, however, more frequent at the reconsideration stage. \textit{Staff Report}, \textit{supra} note 45, at 229.
\item \textsuperscript{54} \textit{Staff Report}, \textit{supra} note 45, at 90.
\item \textsuperscript{55} In fiscal 1974, 175,336 claims by workers were processed after a request for reconsideration and 60,393 of these were won. Memorandum from Edwin Simmons, \textit{supra} note 44. The win rate appears to be declining. In fiscal 1973, 40\% of the reconsideration claims were won. \textit{Staff Report}, \textit{supra} note 45, at 309. These reconsideration cases do not come solely from the 621,420 fiscal 1974 denials reported for the initial stage; some 1974 appeals resulted from 1973 losses. The 30\% appeal rate is therefore an approximation.
\item The data include determinations on grounds other than disability, such as whether the claimant had insured status. For fiscal 1974, however, the elimination of such cases would not affect the 34\% win rate at the reconsideration level. Of the 175,336 claims, 1,683 involved nondisability issues, of which 640 were affirmed and 1,043 were reversed. Therefore, 173,653 cases involved the claimant's disability in fiscal 1974. Telephone interview with Ms. Audrey Hawkins, Bureau of Disability Insurance (Oct. 27, 1976).
\end{itemize}
\end{footnotesize}
his case to the Bureau of Hearings and Appeals,\textsuperscript{56} which is independent of the Bureau of Disability Insurance. About 50\% of the claimants who lose at the reconsideration stage appeal to the hearing stage,\textsuperscript{57} where new evidence is admissible\textsuperscript{58} and an Administrative Law Judge conducts the proceedings.\textsuperscript{59}

Experts play a major role at the hearing stage. The judge may order consultative examinations\textsuperscript{60} and may ask outside medical advisors and vocational experts to help interpret the record by providing live testimony or by responding to written interrogatories.\textsuperscript{61} Vocational experts play a greater role than medical advisors.\textsuperscript{62}

Persevering claimants who lose at the hearing stage may carry their cases to the Appeals Council of the Bureau of Hearings and Appeals.\textsuperscript{63} The decisionmakers at this level are all lawyers.\textsuperscript{64} An appeal to this level is a prerequisite to judicial review,\textsuperscript{65} but the Council may, in its discretion, deny a request for review.\textsuperscript{66} The Appeals Council may also review allowances of claims by the Bureau of Hearings and Appeals on its own motion.\textsuperscript{67}

The Council may accept new evidence in unusual cases.\textsuperscript{68}

\begin{footnotes}
\item[57] The 50\% figure is an estimate. In fiscal 1973, 53,368 appeals by workers and dependents were processed. Memorandum from Philip W. Fensterer, Deputy Assistant Bureau Director, Appeals Operation, Bureau of Hearings and Appeals, to William D. Popkin (July 9, 1976). The reconsideration losses numbered 94,900 in fiscal 1973 and 101,300 in fiscal 1972. STAFF REPORT, supra note 45, at 308-09. The 50\% appeal rate assumes no time lag between losing at the reconsideration stage and processing cases at the hearing stage.
\item[58] 20 C.F.R. § 404.927 (1976).
\item[59] Id. § 404.921.
\item[60] Judges ordered consultative examinations in 25\% of the cases in fiscal 1973. STAFF REPORT, supra note 45, at 229.
\item[61] The role of vocational experts and medical advisors is explained in id. at 94-98, 101-05. In fiscal 1973, there were 53,368 decisions in disability cases. Id. at 250. Medical advisors gave written advice in 1,309 cases and live testimony in 2,622 cases. Id. at 105. Vocational experts gave written advice in 399 cases and live testimony in 13,074 cases. Id. at 96.
\item[62] Id. at 96, 105.
\item[64] Interview with Dale Cook, Director, Bureau of Hearings and Appeals, in Arlington, Va. (June 26, 1973).
\item[65] 42 U.S.C. § 405(g) (1970).
\item[67] 20 C.F.R. § 404.947 (1976). The agency has ninety days to decide whether to review a case on its own motion (\textit{id.}), and the claimant has sixty days to request review (\textit{id.} § 404.946). Some cases in which the claim is allowed may be appealed within the sixty-day period because the claimant seeks to establish an earlier date for onset of disability.
\item[68] The regulations provide that new evidence is admissible only if it appears to the Appeals Council that it "may affect its decision." \textit{Id.} §§ 404.943, .949.
\end{footnotes}
CHART 2

Outline of Decisionmaking in the Social Security Program

<table>
<thead>
<tr>
<th>Agency:</th>
<th>State agency under contract with Bureau of Disability Insurance, Social Security Administration.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of claims processed:</td>
<td>1,034,520 (fiscal 1974).^1</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>40%^b</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>Same agency as initial stage.</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Memorandum from Edwin Simmons, supra note 44.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Agency:</th>
<th>Same as initial stage.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of appeals processed:</td>
<td>175,336 (fiscal 1974).</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>34%</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>Bureau of Hearings and Appeals, Social Security Administration.</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Same as initial stage.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Agency:</th>
<th>Bureau of Hearings and Appeals, Social Security Administration.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of appeals processed:</td>
<td>57,774 (fiscal 1975).c</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>55%</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>Appeals Council, Bureau of Hearings and Appeals.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Agency:</th>
<th>Appeals Council, Bureau of Hearings and Appeals.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of appeals processed:</td>
<td>12,131 (fiscal 1975).</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>10%^d</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>Federal courts.</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Same as prior stage.</td>
</tr>
</tbody>
</table>

^a Figures at this stage and at the reconsideration stage include only claims by workers, not by dependents.
^b In 205,120 cases, claims were denied for technical reasons, including failure to meet insured status and withdrawal of applications. In addition, 416,300 claims were denied because the applicant was not disabled.
^c Figures for this stage and the next stage include claims by workers and dependents. An additional 6,141 cases were dismissed for procedural reasons.
^d The win rate is based on the number of appeals processed, after excluding 366 cases dismissed for procedural reasons. The Appeals Council exercised its discretion to deny review in 10,218 cases; these cases are shown as losses on the chart. Claimants won 65% of the 1,913 cases appealed and reviewed on the merits.
Hearings are held only in those extraordinary cases that the Council has ordered removed from the hearing stage. The Council has discretion to allow oral argument. The claimant may appeal to the federal courts if the Appeals Council denies the appeal or refuses to review the case.

5. Veterans Disability Program: Substantive Features

Veterans suffer from none of the stigmas associated with the "welfare poor." Veterans are considered to have "earned" government benefits. This attitude accounts for the provisions giving veterans the benefit of the doubt in disability cases.

The core of the Veterans disability program is the Rating Schedule, which converts almost all vocational disputes into medical ones. This schedule is far more elaborate than workers' compensation schedules, and covers almost all medical impairments. Each medical condition is deemed to cause a specified percentage reduction in wage-earning capacity, and benefits are provided by statute accordingly.

The Rating Schedule is used in two separate benefit programs—the Compensation program and the Pension program. The Compensation program covers only "service-connected" disabilities. Impairments are gauged in 10% inter-

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69 Id. § 404.941 (1976).
70 The regulations do not provide for oral argument. Id. § 404.948. But see Dixon, supra note 37, at 698 n.79 (oral argument may be allowed).
71 See generally G. Steiner, supra note 27, at 237-79; President's Commission on Veterans' Pensions, Veterans' Benefits in the United States 33-61 (1956).
72 See Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518 (1864).
73 E.g., 38 C.F.R. §§ 3.102, 4.3 (1976).
75 The submergence of individual differences into uniform categories has been defended as follows: "[A] mass compensation program cannot be administered by attempting judgment in each case. . . . A social insurance program cannot be turned into a judicial system." 1 President's Commission on Veterans' Pensions, Staff Report VIII, Veterans' Benefits in the United States 242 (1956).
76 38 U.S.C. §§ 314, 334 (1970 & Supp. V 1975). In the Pension program, the claimant must be totally disabled, and benefits are based on need. Id. § 521.
77 Id. §§ 301-362 (Compensation), 501-562 (Pension). The regulations covering both programs are in 38 C.F.R. §§ 3.1-4.150 (1976).
78 38 U.S.C. §§ 331, 353 (1970). "Service-connection" means that the impairment is incurred or aggravated while the claimant is in the service. There is no requirement that the impairment be work-connected. Id. However, the disability cannot arise from misconduct. Id. §§ 310, 331.
vals,79 and most fall in the 10-20% range.80 Service-connection may be the hardest fact for the claimant to prove.81

The Pension program helps needy veterans who become totally and permanently disabled from a nonservice-connected disability.82 There are no benefits for partial disability, but the program's standards of "unemployability" give benefits to many veterans who would not meet the "total disability" standards used in other programs.83

Under both the Compensation and Pension programs a veteran is considered totally disabled if he is "unemployable"84 and achieves a certain percentage disability under the Rating Schedule.85 The definition of "unemployability" is somewhat hazy,86 but apparently an unemployed claimant is often assumed to be unemployable.87 Claimants may also establish "extra-schedular" loss of wage-earning capacity under standards similar to workers' compensation programs.88 Extra-schedular cases are rare,89 however, and officials superior to those who determine ratings must approve the awards.90

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79 Id. § 355.
80 President's Commission on Veterans' Pensions, supra note 71, at 175-77. My sample data confirm this. Of 102 cases in which a compensation claim under the rating schedule was allowed, 51 were for 10% and 23 were for 20%. Claimants often try to prove that an impairment is service-connected, even though the impairment has a zero percent rating. If the impairment later worsens, the veteran may then be entitled to compensation.
81 M. Gilhooley, Veterans' Administration Disability Procedure 18 (Mar. 8, 1972) (unpublished manuscript prepared for the Administrative Conference of the United States) [hereinafter cited as Gilhooley-Veterans].
83 See note 37 and text accompanying note 13 supra.
85 The Rating Schedule percentage that must be achieved before unemployability can be proven varies between the Compensation and Pension programs. See id. §§ 4.16-.17. In the Pension program, a needy veteran aged 65 is eligible regardless of disability. 38 U.S.C. § 502(a) (Supp. V 1975).
86 The regulations dealing with "unemployability" vary inexplicably between the Compensation and Pension programs. The Compensation definition is "unable to secure or follow a substantially gainful occupation." 38 C.F.R. § 4.16(a) (emphasis added). The Pension program definition is "unable to secure and follow a substantially gainful occupation." Id. § 4.17 (emphasis added).
87 Interview with Thomas A. Verrill, Adjudication Officer, Indianapolis field office, in Indianapolis, Ind. (July 30, 1973).
88 See 38 C.F.R. § 3.321(b) (1976).
89 My data show 1% of the sample cases (N=399) at the initial stage won on this ground. See Chart 8 infra, at note a.
90 38 C.F.R. § 3.321(b) (1976).
6. *Veterans Disability Program: Procedural Features*

Compensation and Pension claims are processed by over fifty field offices of the Veterans Administration. The proceedings are nonadversary at all stages.91 Disability decisions are made by Rating Boards of three members. Each Board includes a doctor and a legal specialist; the third member may be either a legal or occupational specialist.92 The Board examines the claimant's medical records from the service, and may order further medical examinations. These are usually performed by Veterans Administration doctors, unless the claimant is bed-ridden or incarcerated.93 The medical member of the Board may also examine the claimant if the claimant consents. Hearings before the Rating Board are rare.94

If the claimant is dissatisfied with the Rating Board decision, he may appeal to the Board of Veterans Appeals, which is part of the Veterans Administration but independent of its field offices.95 The claimant initiates the appeal by filing a Notice of Disagreement. The Notice insures reconsideration of the case by, and the opportunity to present new evidence to, the field office that made the initial decision. If the prior decision is reaffirmed, the agency sends the claimant a Statement of the Case explaining in detail the reasons for the decision.96 The claimant may then submit further evidence, which leads to yet another reconsideration by the field office.

If still unsuccessful, the claimant may then appeal to the Board of Veterans Appeals. The Board sits in three-member panels which, in disability cases, consist of a doctor and two lawyers.97 The Board has available a staff of medical specialists, and can call on doctors outside the agency for advice.98 The claim-

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91 There is a provision for agency appeal to resolve field office conflicts (id. § 19.123), but it is used in "[p]robably less than 100 [cases] in a year." Gilhooley-Veterans, *supra* note 81, at 34.
92 Gilhooley-Veterans, *supra* note 81, at 21 (legal specialists "often, but not always," lawyers).
93 Interview with Thomas A. Verrill, *supra* note 87.
97 Gilhooley-Veterans, *supra* note 81, at 28.
ant can submit new evidence to the Board, but this will almost always result in a remand to the field office. Therefore, new evidence is usually submitted to the field office prior to the appeal. No cross-examination is allowed at the hearings, and there is no judicial review of disability decisions.

### Chart 3

**Outline of Decisionmaking in the Veterans Program**

<table>
<thead>
<tr>
<th>Agency:</th>
<th>Field offices of Veterans Administration.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of claims processed:</td>
<td>Data not maintained by agency.</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>Estimated at 40% for Compensation claims and 80-90% for Pension claims.</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>Board of Veterans Appeals.</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Gilhooley-Veterans, supra note 81, at 25.</td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>Field office of Veterans Administration:</th>
<th>Reconsiders claim when appeal is taken.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cases settled in field:</td>
<td>28,618 (fiscal 1973).</td>
</tr>
<tr>
<td>Percentage of cases settled without Board hearing:</td>
<td>34%</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Annual Report, supra note 98, a 99.</td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>Agency:</th>
<th>Board of Veterans Appeals.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of appeals processed:</td>
<td>29,551 (fiscal 1973).</td>
</tr>
<tr>
<td>Percentage won:</td>
<td>31%</td>
</tr>
<tr>
<td>Appeal to:</td>
<td>No judicial review.</td>
</tr>
<tr>
<td>Source of data:</td>
<td>Annual Report, supra note 98, at 99.</td>
</tr>
</tbody>
</table>

---

- Notice of disagreement was filed in 50,381 cases, but field office reconsideration settled about one-half of these cases. Over 75% of appeals are in disability cases.
- The remaining 66% were either withdrawn or not followed up by an appeal.
- The win rate is based on cases processed on the merits. Appeal was withdrawn in 274 cases in which the appeal had been perfected. Wins include remands; 54% of the wins were remands by the Board.

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\[100\] Gilhooley-Veterans, supra note 81, at 29.

The Board gives the claimant an opportunity for a hearing either in Washington, D.C., or near the claimant's residence. A hearing near the claimant's residence may be held either by a traveling section of the Board or by a Rating Board which will mail the transcript to the Board of Veterans Appeals. 38 C.F.R. § 19.138 (1976). In fiscal 1973, there were a total of 971 hearings, of which 365 were held by traveling sections of the Board and 33 by field offices. Annual Report, supra note 98, at 99.

\[101\] 38 C.F.R. § 19.133(c) (1976).
B. Summary of Nonadversary Procedures

Decisionmaking procedures in the agencies studied share two characteristics. First, their purpose is to insure fairness to the claimant. Second, they are designed to allocate the agency's workload efficiently.

1. Fairness

All three agencies studied take three steps to insure fairness and the appearance of fairness. First, the decisionmaker may consult outside experts as well as agency experts. This reduces both the chances and charges that expert advisors are biased against the claimant. Second, at least one stage of appeal involves review by a body independent of the agency initially deciding the claim. This is especially important when judicial review is not allowed or limited in scope. Third, the decisionmaking process includes at some point an evidentiary hearing.

2. Efficient Design of Decisionmaking

Decisionmaking procedures should be no more complex than necessary to decide effectively the issues presented. As Chart 4 indicates, the agencies studied vary in the training of decisionmakers and in the opportunity for a hearing at different stages. The initial and reconsideration stages are dominated by doctors almost to the exclusion of lawyers, and decisions usually rest on the written record.

After the earlier stages, the agencies provide an opportunity for a hearing and, with one exception, a final administrative review stage. Lawyers dominate these final two stages, almost to the exclusion of doctors. The hearing stage allows the claimant and the

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103 Advice from experts outside the agency is available at every stage of the FECA and Social Security programs, except the final administrative review stage. See text accompanying notes 21, 26, 49, 60, & 61 supra. In the Veterans program, Veterans Administration doctors are used at the initial stage, but outside experts are available at the Board of Veterans Appeals stage. See text accompanying notes 93 & 98 supra.

104 See text accompanying notes 28, 56, & 95 supra.

105 See text accompanying notes 24, 27 (FECA), 56-58 (Social Security), & 99-100 (Veterans) supra.

106 See text accompanying notes 48 (Social Security) & 92 (Veterans; one of three decisionmakers may be a lawyer) supra. In the FECA program, the decisionmakers typically are neither doctors nor lawyers. See text accompanying note 20 supra.

107 See text accompanying notes 22 (FECA), 51 (Social Security), & 94 (Veterans) supra.

108 See text accompanying notes 29 (FECA), 64 (Social Security), & 97 (Veterans) supra. Only in the Social Security program are the judges required to be lawyers, since the hear-
decisionmaker to meet face-to-face, in order to present and discuss the evidence. The final administrative review stage may also provide an opportunity for oral argument.\textsuperscript{109}

### Chart 4

**Summary of Procedural Features by Decisionmaking Stage and Program**

<table>
<thead>
<tr>
<th>Decisionmaking Stage and Program</th>
<th>Training of Decisionmaker</th>
<th>Right to a Hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Doctor</td>
<td>Lawyer</td>
</tr>
<tr>
<td>1. Initial Stage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. FECA</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>b. Social Security</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>c. Veterans</td>
<td>Yes\textsuperscript{a}</td>
<td>Often\textsuperscript{a}</td>
</tr>
<tr>
<td>2. Reconsideration Stage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. FECA\textsuperscript{b}</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>b. Social Security</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>c. Veterans</td>
<td>Yes\textsuperscript{c}</td>
<td>Often\textsuperscript{c}</td>
</tr>
<tr>
<td>3. Hearing Stage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. FECA</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>b. Social Security</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>c. Veterans</td>
<td>Yes\textsuperscript{c}</td>
<td>Yes\textsuperscript{c}</td>
</tr>
<tr>
<td>4. Final Administrative Review Stage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. FECA</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>b. Social Security</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>c. Veterans</td>
<td>N/App</td>
<td>N/App</td>
</tr>
</tbody>
</table>

\textsuperscript{a} One of the three decisionmakers is often a lawyer. No data on the percentage of lawyers are available.

\textsuperscript{b} Review by DHR is classified as a hearing stage, although it also has features of a reconsideration stage, since the decisionmakers are not lawyers and are part of the agency (OWCP) that decides the initial claim. But this stage is classified as a hearing stage because the judges conduct hearings, are not doctors, and hold positions in the National Office of OWCP that make them independent of the field offices.

\textsuperscript{c} Two of the three decisionmakers are lawyers and one is a doctor.

\textsuperscript{d} The Appeals Council of SSA does not usually allow hearings at this stage. Oral argument is a matter of right in the FECA program, and is allowed in the agency's discretion in the Social Security program.

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\textsuperscript{109} Oral argument is a matter of right in the FECA program (see text accompanying note 31 supra), but is only granted in the tribunal's discretion in the Social Security program (see note 70 and accompanying text supra).
The tension between efficiency and fairness is most apparent at the reconsideration stage. Review by the same personnel using the same procedures as the initial stage would be redundant. But an opportunity for a hearing at the reconsideration stage may make the process unduly complicated at too early a point in the decisionmaking process. Providing fair and efficient reconsideration remains the most challenging task for administrators designing nonadversary procedures.\textsuperscript{110}

C. Rules Affecting Representation

The agencies in this study neither prohibit nor encourage representation; for example, they neither pay for free counsel in all cases nor pay the fees of winning counsel. In some instances, however, agencies send notices to claimants that could discourage them from seeking the advice of counsel.\textsuperscript{111}

In addition, certain rules affect the availability of representation, even though that may not be their purpose. First, the government seeks to protect income maintenance claimants by requiring that any counsel fee be approved by the responsible agency.\textsuperscript{112} The effect of this rule on the availability of counsel is uncertain. It may discourage representatives from taking cases; it may, however, encourage claimants to seek representation by eliminating fear of exorbitant fees.\textsuperscript{113} Second, some agencies help representatives collect fees by paying them directly out of past-due awards.\textsuperscript{114} This probably encourages counsel to take cases, since the representative need not fear that his client will fail to pay the fee.

\textsuperscript{110} The Social Security reconsideration stage illustrates this problem. See discussion in notes 160-63 and accompanying text infra.

\textsuperscript{111} See notes 116, 120, 127, and accompanying text infra.

\textsuperscript{112} See notes 118, 123, & 127 infra.

\textsuperscript{113} The demand for lawyers is highly elastic, and influenced by price. B. Christensen, Lawyers for People of Moderate Means 98 (1970). Assurance of reasonable fees should therefore increase claimants' demand for counsel.

Some have suggested that the practice of approving lawyers' fees has discouraged counsel from appearing in Social Security cases. See Staff Report, supra note 45, at 430-32; Viles, The Social Security Administration Versus the Lawyers . . . and Poor People Too (pt. 2), 40 Miss. L.J. 24, 73-74 (1968); Yarowsky, Attorneys' Fees in Social Security Proceedings: A Criticism of the Official Restrictive Design, 17 U. Kan. L. Rev. 79-85 (1968). However, no such effect has been observed in Black Lung cases. Staff Report, supra note 45, at 432. Viles notes a 19% appearance rate for lawyers at the Social Security hearing stage from January 1966 to July 1967 (Viles, supra at 74-75 n.330), while my sample data show a 33% (N=419) appearance rate from June through November 1974. See generally The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973).

\textsuperscript{114} See notes 118, 123, & text accompanying note 127 infra.
1. **FECA**

Claimants may be represented by any person they choose. An applicant for benefits receives the following notice: "Does an employee need an attorney or other representative in order to file a claim for compensation? This is not necessary; however, he may, if he so desires, employ an attorney or other person to represent him." The phrasing of this notice may subtly discourage the use of counsel, even though the agency erects no obstacles.

The notice informing the claimant of the initial decision in his case does not discourage the use of counsel on appeal, although there is no active encouragement. The claimant is simply told that he "may be represented at the hearing by any person authorized . . . in writing." However, a representative may not collect a fee unless it is approved by the agency.  

2. **Social Security**

Claimants may be represented by anyone; however, no mention of the right to representation is made in any form routinely given to claimants who apply for benefits. If a claimant asks about representation, he is given a form suggesting that it may not be necessary:

You have the right to be represented by a person of your choice in any business you might have with the Social Security Administration. This does not mean that you will need a representative. Most people handle their social security affairs themselves with the help of the people in the social security office.

If you wish to be represented, however, the people in your social security office will be glad to work with your representative just as they would work with you.  

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117 Form FL-48 (rev. July 1968) (form sent to claimant at end of initial stage).
118 5 U.S.C. § 8127(b) (1970). The agency does not pay the fee directly to the representative out of the award. Counsel might be encouraged to appear more often if they could be confident of collecting their fees. See Hearings on S. 1322 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 5-7 (1966).
120 Social Security Administration, Dept of HEW, Form SSI-75, Social Security and Your Right to Representation (Sept. 1970). The Claims Manual, distributed to Social Security Administration employees in the district offices, states:
A claimant who loses at the initial stage receives a booklet describing his right to appeal, which states: "You have a right to be represented by a qualified person of your choice in dealing with the Social Security Administration at any stage of your claim." The notice of a right to appeal to the hearing stage also states that representation is allowed, without discouraging the use of counsel: "If you wish, you may be represented by an attorney or by any other individual." A representative may not collect a fee, however, unless the agency determines that it is reasonable.

3. Veterans

Claimants may choose anyone to represent them. As a practical matter, representation is limited to non-attorneys working for recognized veterans organizations, since fees may not exceed $10. The statute also authorizes service organizations to represent applicants if they do so free of charge.

The agency's notice to claimants reflects this pattern of representation. The application for Compensation and Pension benefits states:

Advising Claimant on Right to Representation—If a beneficiary or claimant merely expresses an interest in possibly appointing a representative, give him an SSI-75 "Right to Representation" booklet . . . .

. . . Generally a claimant should be neither encouraged to have or [sic] discouraged from having a representative.

Social Security Administration, Dep't of HEW, Social Security Claims Manual, pt. 3, § 3505 (Nov. 1970) [hereinafter cited as CLAIMS MANUAL].

Social Security Administration, Dep't of HEW, Form SSI-58, Your Right to Question the Decision Made on Your Claim (Oct. 1970).

Social Security Administration, Dep't of HEW, Form BHA-1, Right to Appeal (Mar. 1969).

42 U.S.C. § 406(a) (1970). The statute refers only to attorneys, but the regulations refer to any representative. See 20 C.F.R. § 404.975(b) (1976). The agency will help an attorney collect a reasonable fee by paying him directly up to 25% of a past-due award. 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.975(b) (1976). This is not a ceiling on the amount of the fee. However, there is a ceiling of 25% of past-due benefits for representation in court. 42 U.S.C. § 406(b)(1) (1970).

38 U.S.C. §§ 3402-3404 (1970). This choice is subject, however, to statutory guidelines and to approval by the Administrator. Id. §§ 3401-3404.

These fee limits do not violate a claimant's due process and equal protection rights. Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal.), aff'd mem., 423 U.S. 802 (1975). An attorney in private practice might accept such a case as a favor to a client or in connection with other disability litigation likely to result in a larger fee. Legal Aid offices are not discouraged by lack of a fee, but they have not taken up a large number of veterans' cases. My sample shows no lawyers at the initial stage and five lawyers, including one legal aid lawyer, at the Board of Veterans Appeals stage (N=214).

You may be represented, without charge, by an accredited representative of any organization recognized by the Administrator of Veterans Affairs. While a claimant may also employ an attorney or claims agent recognized by the Veterans Administration to assist him in prosecuting his claim, it is not necessary that he do so. Any attorney or agent so employed may not legally charge any fee other than that allowed and paid by the Veterans Administration, and which is deducted from benefits otherwise payable to the claimant.  

This notice indirectly discourages representation by attorneys, since it states that attorney fees will be deducted from an award without noting that the fees are limited to $10.

The form used to perfect an appeal to the Board of Veterans Appeals is neutral on the use of representatives: "A claimant may be represented in the presentation of his claim by a recognized service organization provided a proper power of attorney is fur-

<table>
<thead>
<tr>
<th>Program</th>
<th>Discouraging Representation</th>
<th>Encouraging Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prohibition</td>
<td>Notice</td>
</tr>
<tr>
<td>FECA</td>
<td>No</td>
<td>b</td>
</tr>
<tr>
<td>Social Security</td>
<td>No</td>
<td>b</td>
</tr>
<tr>
<td>Veterans</td>
<td>No</td>
<td>c</td>
</tr>
</tbody>
</table>

* The agency must approve the reasonableness of fees in all three programs.

nished, or by an attorney provided a proper declaration of representation is furnished."{128}

II

DESIGN OF THE STUDY

A. Selecting the Sample

Accessibility of data dictated the choice of program stages for study.{129} The problems of obtaining data also required a cross-sectional approach—selecting cases from each stage of decision-making without examining what happened to those cases at other stages—rather than a longitudinal approach—analyzing decisions in particular cases as they flow through the decisionmaking process. A longitudinal study proved unmanageable because of the complex organization of the agencies involved.{130} Time constraints

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{128} Form VA 1-9 (May 1973).
{129} For example, the initial stage of the FECA program was not studied because problems would have been encountered in extracting meaningful data from the agency's files. Claimants in the FECA program often make claims for different types of benefits, and, as a result, a large number of documents are presented by the claimant and gathered by the agency to explore the merits of the various claims. A review of the files to determine the issues actually disputed and how the disputes were resolved would have been too time-consuming. At the hearing and final administrative review stages, however, disputes usually focus on one or two important issues; therefore, those stages were included in the study. See also Chart 6 infra, at notes b & c.

{130} An "agency" is really a number of agencies, each of which is concerned only with its own stage of decisionmaking. Thus, studying a case as it flowed through the system would have involved obtaining the cooperation of scores of agency workers. Therefore, the study was unable to determine whether representation at one stage made a difference in appeal rate to a later stage. In one instance, however, longitudinal data were obtained. Data compiled by SSA's Bureau of Hearings and Appeals on the rate of appeals from the hearing stage to the appeals council surprisingly indicate that represented claimants did not appeal more frequently than unrepresented claimants.

Effect of Representation on Appeal Rates from Social Security Hearing Stage

<table>
<thead>
<tr>
<th></th>
<th>Appeal % (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No representative</td>
<td>32 (158)</td>
</tr>
<tr>
<td>Representative</td>
<td>28 (80)</td>
</tr>
<tr>
<td></td>
<td>31 (238)</td>
</tr>
</tbody>
</table>

Significance: (NS)

Confidence interval for representative's tendency to appeal: (-14, + 6)
also limited the number of cases studied. 131

B. Meaning and Relevance of Variables

The following variables were considered in analyzing the effect of representation on agency decisions.

1. Representation

In determining whether the claimant had counsel, it was sometimes possible to identify the representative as an attorney or non-attorney. Thus, even if representation in general brought no advantage at a program stage, it could occasionally be determined that a particular type of representative helped the claimant.

2. Results

Results were classified as either a win or loss whenever the agency made a final disposition. 132 In the FECA hearing and final administrative review stages, where remands are possible, remands were recorded as "wins." 133

3. Procedures Used by Claimant: Hearing Requests, Hearings Held, New Evidence Presented by Claimant

It is important to know whether represented claimants are more likely than unrepresented claimants to insist on various pro-

131 Any future study of decisionmaking processes may benefit from the following warnings concerning the difficulty of obtaining data. First, agencies do not usually maintain records for the purpose of understanding the decisionmaking process. Their major concerns are managing their workload and, in some instances, understanding the population affected by the program. Data relevant to an understanding of decisionmaking could therefore be buried in untabulated form in case opinions. When the information is tabulated, it still may not provide a complete picture of the decisionmaking process, and other parts of the file may have to be consulted. Second, compiling the data can present special problems, since they may have to be gathered from offices throughout the country. Third, some information may have to be deleted to preserve confidentiality. Finally, the enormity of an agency's workload may result in considerable delays in obtaining raw data.

132 A win on appeal in the programs studied should not be confused with a reversal by a judicial tribunal of a trial court decision. Except at the final administrative review stage of the FECA program, new evidence is admissible in all program stages for which data were gathered. However, to the extent that the claimant's win on appeal is the result of evidence overlooked at an earlier stage, or is the result of a shift in perspective at a later stage of administrative decisionmaking, the agency can be held responsible for the earlier loss, and a win is more analogous to a reversal by a court of appeals.

133 An alternative would be to omit these remands entirely. This would understimate the claimants' win rate, however, since remands generally operate as signals to lower level decisionmakers that litigants have a strong case. The Employees' Compensation Appeals Board apparently adopts this view, because the agency counts remands as wins. Gilhooley-FECA, supra note 17, at table 4. See Chart I supra, at note e.
cedures in the decisionmaking process. Agencies generally believe that representation encourages formalized procedures, and consider this an argument against encouraging counsel; such procedures, they claim, are costly and unnecessary. In addition, a comparison of the way cases are pursued by represented and unrepresented claimants may indicate how representatives help claimants win.

4. Agency's Use of Outside Experts

This variable was examined to see if experts were biased toward claimants.

5. Type of Issue

When it was possible to identify which issues regularly arose in the decisionmaking process, the data were analyzed to see if the effect of representation varied with the central issue in a case. It was not possible, however, to determine whether an issue was intrinsically easy or difficult to win on. This problem may not be a serious shortcoming. First, even if representatives handled cases that were intrinsically easy to win, counsel may have helped the claimant by urging him to press his claim. Second, the evidence suggests that representatives take both hard and easy cases. If representatives took only easy cases, they should be associated primarily with winning claims; this is not the situation. Third, the representative may not know whether a case is hard or easy until he has accepted it and investigated the facts.

C. Methodology

Each variable is divided into alternate categories. For example, the independent variable "representation" consists of "no repre-

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134 See note 5 and accompanying text supra.
136 An experiment could be designed in which a panel of experts would rate cases as "easy" or "hard" to win. After being distributed among represented and unrepresented claimants, the cases would be observed as they went through the decisionmaking process. Use of actual claimants for this experiment, however, would be unfair to some of them, and passing simulated cases through an agency's decisionmaking process might present difficulty. One alternative would be to simulate both the cases and the decisionmaking process.
137 See Table 1A infra.
138 Once an attorney has investigated a claim, it would be considered unprofessional for him to withdraw. See ABA, CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-116(C).
sentative/representative," "attorney/non-attorney," "no representative/type of representative," and the "result" variable is "win/lose." A comparison of the percentage of wins for one alternative (unrepresented claimants, for example) with the percentage of wins for the other alternative (represented claimants, for example) indicates the effect being in one category rather than the other has on the claimant's chances of winning a case.

The study used the difference of proportions test,\textsuperscript{139} which indicates when a correlation between two variables (for example, representation and results) in the sample reflects a difference in the total population from which the sample was drawn. For example, if samples are small enough, a substantial difference in the win rates between represented and unrepresented claimants might not, by itself, prove that represented claimants are more likely to prevail.

This study treats any difference in the sample significant at a .10 level as a real difference in the total population. To use a .10 level means that a real difference in the total population from which the sample was drawn is deemed to exist even though there is a one in ten chance that no such difference exists.\textsuperscript{140}

Although the difference of proportions test determines the likelihood of a difference existing between two groups in the total population, it does not prove that this variation found in the sample is the exact one to be found in the total population. For every significance level there is a range above and below the difference found in the sample, known as the "confidence interval," within

\textsuperscript{139} For a more detailed explanation of the difference of proportions test, see J. Mueller, K. Scheussler, & H. Costner, Statistical Reasoning in Sociology 429-31 (1970).

\textsuperscript{140} More demanding significance levels are used more frequently. But see Skipper, Guenther, & Nass, The Sacredness of .05: A Note Concerning the Uses of Statistical Levels of Significance in Social Science, 2 Am. Soc. 16 (1967), in which the authors suggest that it is often unduly restrictive in sociological studies to set significance levels too high.

This study reports the significance levels for all relationships significant at the .10 level or better for several reasons. First, others may not consider the .10 level high enough; reporting the significance levels in this study allows them to draw independent conclusions. Second, if inequities do exist, certain remedies may be called for only if the degree of certainty is greater than .10. For example, providing free counsel to all claimants would involve significant costs; the government should not have to bear these costs unless there are serious inequities in the current system. Third, relationships between variables other than "representation/results" may call for a significance level other than .10. Rather than shifting significance levels, this study reports findings as significant, reveals the significance level, and lets the reader decide whether another level might be more appropriate for analyzing the data.
which the real difference might fall. For example, where the difference between indicated chances of success for represented and unrepresented claimants equals 20% (e.g., 70% minus 50%), the confidence interval might be (+5%, +35%) or (+15%, +25%), indicating that the real difference in the population might lie in nine out of ten instances between 5% and 35% or, more narrowly, between 15% and 25%. This report presents these confidence intervals because they provide policymakers with the widest and narrowest estimates of the difference in the total population.

D. Specific Program Samples

1. FECA

a. Hearing Stage. In fiscal 1973 OWCP held 599 FECA hearings. The study includes all cases decided on the merits during May, June, and July 1973, a total of 136. Agency data show a win rate, counting remands as wins, of 70%,\textsuperscript{141} compared to a 65% win rate in the three-month sample.\textsuperscript{142}

The data were gathered from file folders maintained by the Division of Hearings and Review.\textsuperscript{143} Data for presentation of new evidence and use of outside experts are omitted when the issue is purely legal. This distinction is lacking in the studies of other agencies. The most prominent "legal" issue at the FECA hearing stage is whether a particular type of activity gave rise to an injury "in the performance of duty"; this issue does not arise in other programs.

b. Final Administrative Review Stage. The sample consists of all 206 cases decided on the merits by the Employees' Compensation Appeals Board in fiscal 1971 and 1972. The agency's data for fiscal

\textsuperscript{141} Office of Federal Employees' Compensation, Fiscal Year Report of Division of Hearings and Review (July 31, 1973).
\textsuperscript{142} See Chart 7 infra.
\textsuperscript{143} Source of information by variable analyzed:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Representation:</td>
<td>Correspondence on file, which indicates whether the claimant had a representative. Also, notations in the address indicate the type of representative.</td>
</tr>
<tr>
<td>2. Results:</td>
<td>Hearing examiners' recommendation memoranda and correspondence with the claimant.</td>
</tr>
<tr>
<td>3. Presentation of new evidence, Request for hearing, Hearing held, Use of outside experts, Issues:</td>
<td>Recommendation memoranda</td>
</tr>
</tbody>
</table>
1971 show a 27% win rate,\textsuperscript{144} compared to the sample's 28% win rate.\textsuperscript{145} The data are contained in the published opinions and in docket cards at the Board's office in Washington, D.C.\textsuperscript{146}

2. Social Security

a. Reconsideration Stage. The sample consists of 2,163 cases involving disputes over whether the claimant was disabled or over the time his disability began.\textsuperscript{147} All cases involved insured workers. The study sample was 100% of the quality control sample processed by the Bureau of Disability Insurance during part of May, all of June, and part of July 1974.\textsuperscript{148} Agency data show a 34% win rate

\textsuperscript{144} See Chart 1 supra.


\textsuperscript{146} Source of information by variable analyzed:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Representation:</td>
<td>Docket cards, which indicate the presence or absence of a representative. Notations in the address indicate the type of representative.</td>
</tr>
<tr>
<td>2. Results, Requests for oral argument, Oral argument held, Issues:</td>
<td>Case opinion.</td>
</tr>
</tbody>
</table>

\textsuperscript{147} Eighteen cases were omitted because the representative was not identified. Another 15 cases in which a friend or relative represented the claimant were omitted from analysis of the data, except for the tabulation of representatives. This isolated those cases where an attorney appeared at the initial decisionmaking stage, and allowed a comparison with the Veterans initial stage, where only non-attorneys appeared. The inclusion of cases where friends and relatives represented the claimant would have had virtually no effect on the data.

\textsuperscript{148} This is a 10% sample, achieved by using the ninth digit of claimants' social security numbers. Letter from Francis J. Cullen, Bureau of Disability Insurance, Social Security Administration, to William D. Popkin (Jan. 20, 1975). There were 173,653 disability cases processed during fiscal 1974 (see note 55 supra), of which the study’s sample constitutes approximately 1.2%.

Source of information by variable analyzed:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Representation:</td>
<td>Determined by the agency from the case file and noted by prearranged code on forms SSA-2506 and SSA-2506R.</td>
</tr>
<tr>
<td>2. Results, Use of outside experts:</td>
<td>Forms SSA-2506 and SSA-2506R.</td>
</tr>
<tr>
<td>3. Issues:</td>
<td>This variable was omitted, since form SSA-2506R supplied information on the issue for only one-half of the cases.</td>
</tr>
</tbody>
</table>
for fiscal 1974, compared to a 23% win rate in the three-month sample. This smaller win rate may be due to monthly variations in win rates or to a decline in the claimants' win rate toward the end of the time period sampled.

b. Hearing Stage. The sample consists of 419 cases randomly selected from those decided between June and September 1974. Only cases involving a dispute over whether the claimant was disabled or over the time disability began were selected. The agency's data for fiscal 1975 show a 55% win rate, compared to the sample win rate of 58.

The cases in the hearing stage sample were also studied to see whether representation affected the appeal rate. The agency pro-

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149 See note 55 and accompanying text supra.

150 See Chart 7 infra.

151 In the prior year, the win rate was 40% (N=146,600). STAFF REPORT, supra note 45, at 308-09.

152 The agency determined that a sample of 421 cases would provide a 90% confidence rate. Memorandum from Hallet A. Duncan, Chief, Management Information and Appraisal Staff, Bureau of Hearings and Appeals, to Edwin W. Semans, Jr., Assistant Bureau Director, Bureau of Hearings and Appeals (May 10, 1974). Two of the cases involving the question of insured status were discarded.

153 The random selection process involved using the terminal digits one, five, and nine of claimants' social security numbers. Not all cases decided during the sample period were in the pool from which the selection was made. The agency recommended this procedure because win rates do not vary more than 1% from month to month. Id.

154 This win rate is based on 57,774 cases decided on the merits, of which claimants won 31,988. An additional 6,141 cases were dismissed. Letter from Philip W. Fensterer, supra note 57.

155 See Chart 7 infra.

Source of information by variable analyzed:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Representation:</td>
<td>Determined by the agency from its case file and noted by prearranged code on form HA-503.</td>
</tr>
<tr>
<td>2. Results, Request for hearing, Hearing held, Use of outside experts:</td>
<td>Form HA-503.</td>
</tr>
<tr>
<td>3. Presentation of new evidence:</td>
<td>List of exhibits attached to the case opinion.</td>
</tr>
<tr>
<td>4. Issues:</td>
<td>Case opinions (using the agency's &quot;basis of decision&quot; code).</td>
</tr>
</tbody>
</table>

Note that "Use of outside experts" refers to medical advisors and vocational experts, not those giving consultive examinations.
vided this data for all cases in which the sixty-day appeal period had expired. Data on representation only identify the presence of counsel at the hearing stage, however, not whether counsel was consulted on the decision to appeal.\textsuperscript{156}

3. Veterans

\textit{a. Initial Stage.} The sample consists of 399 cases\textsuperscript{157}—276 claims under the Compensation program and 123 claims for Pension program benefits. In all cases the claimants sought cash awards for an alleged disability. Drug abuse cases and cases involving special cash awards for household assistance were excluded, as were claims for payment of in-kind hospitalization benefits. All but six cases involved a dispute over the degree of disability or whether the disability was service-connected. One observer estimates a 40\% win rate in Compensation cases and an 80-90\% win rate in Pension cases;\textsuperscript{158} the one-week sample shows a 47\% win rate in Compensation cases and an 81\% win rate in Pension cases.

\textsuperscript{156} Data on the effect of representation on the rate of appeal appear in note 130 \textit{supra}.

\textsuperscript{157} The sample was selected from the agency's quality control sample for the week beginning March 18, 1974, and included about .2\% of the annual caseload. The agency does not maintain data on the number of claims processed during the year.

Source of information by variable analyzed:

\begin{center}
\begin{tabular}{ll}
\textbf{Variable} & \textbf{Source} \\
1. Representation: & Form 21-6796, § 24, specifies which recognized service organizations appeared for the claimant. \\
2. Results, Issues: & Form 21-6796, §§ 15, 20, & 21. \\
\end{tabular}
\end{center}

The Rating Board form notes both winning and losing efforts on schedular and service-connection issues, but only a win on the unemployability or extra-schedular wage-earning capacity issues. In a sense, every case is a loss on the extra-schedular and unemployability issues because they could have been raised by the claimant. But it is impossible to tell from the forms whether these issues were raised and lost, or even whether they realistically could have been raised. The same problem arose with the "no medical impairment" issue, except that all such cases were "losses." When the form did not indicate "no medical impairment," this issue was "won" because the claimant established some medical impairment. However, it is impossible to determine whether there was a dispute over the existence of a medical impairment.

\textsuperscript{158} Gilhooley-Veterans, \textit{supra} note 81, at 25.
Size and Source of Sample by Stage of Decisionmaking

<table>
<thead>
<tr>
<th>Program</th>
<th>Initial Stage</th>
<th>Reconsideration Stage</th>
<th>Hearing Stage</th>
<th>Final Administrative Review Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>FECA</td>
<td>Omitted</td>
<td>N/App</td>
<td>N=136</td>
<td>N=206</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100% Sample—</td>
<td>100% Sample—</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3 months</td>
<td>2 years</td>
<td></td>
</tr>
<tr>
<td>Social Security</td>
<td>Omitted</td>
<td>10% Sample—</td>
<td>N=419</td>
<td>Omitted</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2-3 months</td>
<td>30% Sample—</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>about 1 month</td>
<td></td>
</tr>
<tr>
<td>Veterans</td>
<td>100% Sample—</td>
<td>Omitted</td>
<td>Omitted</td>
<td>N/App</td>
</tr>
<tr>
<td></td>
<td>1 week</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"N" refers to sample size. The number of cases for some variables may fluctuate. See Chart 7 infra, at notes c, j, & k.

a See notes 141-46 and accompanying text supra.

b In the Social Security program, the reconsideration stage was studied by examining cases selected by the agency for its own quality control purposes. The quality control forms contained much of the necessary data, and the agency was able to note on the forms additional data necessary for this study. Information about cases decided at the initial stage might have been obtained in the same manner, but since representation is rare at the initial stage, the number of cases that would have had to be analyzed to yield significant data was simply too large. Because the initial and reconsideration stages follow the same procedure, however, this may not be a serious omission. Once the reconsideration stage is completed there are two further stages of review—the hearing stage and the final administrative review stage. Time permitted study only of the hearing stage.

c In the Veterans program, the initial stage was studied because the agency summarizes the case on a one- or two-page form that is easier to understand than the elaborate files in the FECA program. Although its workload is heavy, the agency selects a random sample of cases for quality control purposes; that sample provided the data for study of the initial stage. No effort was made to obtain the documents reporting the results of the agency's reconsideration in cases where the claimant later appealed to the Board of Veterans Appeals. Efforts to obtain cases decided at the last stage of appeal were unsuccessful because the agency claimed that researching the cases would interfere with the decisionmaking process.
### Chart 7

**Summary of Variables by Stage of Program**

<table>
<thead>
<tr>
<th></th>
<th>Veterans initial</th>
<th>Soc. Sec. reconsideration</th>
<th>FECA hearing</th>
<th>Soc. Sec. hearing</th>
<th>FECA final admin. review</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sample size</strong></td>
<td>N=399</td>
<td>N=2163</td>
<td>N=136</td>
<td>N=419</td>
<td>N=206</td>
</tr>
<tr>
<td><strong>Win rate</strong> a</td>
<td>57% or 62% b</td>
<td>23%</td>
<td>65%</td>
<td>58%</td>
<td>28% d</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=140) c</td>
<td>(N=141) c</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Representation</strong> c</td>
<td>60%</td>
<td>7%</td>
<td>43%</td>
<td>40%</td>
<td>32%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=2178) f</td>
<td>(N=139) c</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Hearing requests</strong></td>
<td>N/Av</td>
<td>N/App</td>
<td>42%</td>
<td>88%</td>
<td>15% h</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=139) c</td>
<td>(N=365) k</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Hearing held</strong></td>
<td>N/Av</td>
<td>N/App</td>
<td>21%</td>
<td>88% h</td>
<td>15% f</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=139) c</td>
<td>(N=365) k</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>New evidence presented by claimant</strong></td>
<td>N/Av</td>
<td>N/Av</td>
<td>54%</td>
<td>55%</td>
<td>N/App</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=126) c</td>
<td>(N=365) k</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Agency's use of outside experts</strong></td>
<td>N/Av</td>
<td>27%</td>
<td>23%</td>
<td>28%</td>
<td>N/App</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N=124) c</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

N/Av=data not available.
N/App=variable not applicable to program.

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a Wins include remands in the FECA hearing and final administrative review stages. At the FECA hearing stage, remands constituted 19 percent of all wins in fiscal 1973. Agency data at the final administrative review stage do not distinguish between outright wins and remands.

b The lower figure assumes that a zero-rated impairment is a loss even though service-connection for the impairment is established. The higher figure treats these cases (N=20) as wins.

c One case could count as two at the FECA hearing stage for one of two reasons. First, the case file could include two different claims filed at different times by the same claimant. These two claims are treated as separate cases for all variables. Second, a case file could contain both an original decision remanding the case and a report of the case after it was returned to the hearing stage for further consideration. When this occurred, a variable was counted twice only if it was different in the hearing stage after the remand. For example, if a hearing was requested initially but not after the case returned to the hearing stage, one “hearing” and one “no-hearing” case were tabulated. The same is true for the other variables at this stage of the FECA program.

d Remands at the recommendation of the Solicitor prior to consideration of a case by the Employees' Compensation Appeals Board depress the win rate.

e See Chart 9 infra for a breakdown of representation. Percentages in Chart 7 may not equal those in Chart 9 due to rounding.

f This figure includes 1 percent representation by “friends or relatives.” These cases are omitted from the later analysis to isolate the role of attorneys. In another 4 percent of the cases a Congressman made an inquiry on behalf of a claimant, but these cases are not included in the 7 percent figure.
The percentage for "hearings held" is less than that for "hearings requested" because claims could be allowed without the hearing being held.

Due to problems in obtaining the relevant data, it is impossible to tell whether six cases in which a hearing was requested were decided for the claimant without a hearing.

At the FECA final administrative review stage, "hearings" refer to oral argument in which the claimant or his representative appeared, not evidentiary hearings. In six additional cases, the government requested a hearing and no one appeared for the claimant.

The lower case count for the "new evidence presented by claimant" and "agency's use of outside experts" variables reflects the tabulation of these variables only for those cases in which the introduction of new evidence or use of an expert was relevant to the issue under dispute. This refinement in the data was very difficult to apply, however, and was not attempted in other programs involving purely legal issues for which new evidence and experts would not be relevant.

The "new evidence presented by claimant" variable refers only to new evidence submitted at the hearing.

### Chart 8

Summary of Issues by Stage of Program

<table>
<thead>
<tr>
<th></th>
<th>Veterans initial</th>
<th>Soc. Sec. reconsideration</th>
<th>FECA hearing</th>
<th>Soc. Sec. hearing</th>
<th>FECA final admin. review</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% N</td>
<td>% N</td>
<td>% N</td>
<td>% N</td>
<td>% N</td>
</tr>
<tr>
<td>Schedular</td>
<td>45 (180)</td>
<td>25 (35)</td>
<td>4 (15)</td>
<td>14 (32)</td>
<td></td>
</tr>
<tr>
<td>Wage-earning capacity</td>
<td></td>
<td>24 (95)*</td>
<td>17 (24)</td>
<td>86 (361)*</td>
<td>17 (39)</td>
</tr>
<tr>
<td>Time of origin of medical impairment</td>
<td>18 (72)d</td>
<td>Information</td>
<td>42 (58)</td>
<td>2 (7)</td>
<td>42 (94)</td>
</tr>
<tr>
<td>Timely notice</td>
<td>—</td>
<td>for</td>
<td>6 (8)</td>
<td>—</td>
<td>7 (15)</td>
</tr>
<tr>
<td>Wage rate</td>
<td>—</td>
<td>issue</td>
<td>2 (3)</td>
<td>—</td>
<td>4 (8)</td>
</tr>
<tr>
<td>Any medical impairment</td>
<td>12 (46)*</td>
<td>variable^c</td>
<td>2 (3)</td>
<td>5 (23)f</td>
<td>8 (17)</td>
</tr>
<tr>
<td>Other</td>
<td>2 (6)</td>
<td>5 (7)</td>
<td>3 (13)</td>
<td>9 (21)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>101 (399)</td>
<td>99 (138)b</td>
<td>100 (419)</td>
<td>101 (226)b</td>
<td></td>
</tr>
</tbody>
</table>

Percentages may not equal 100% due to rounding.

* In the Veterans program, "wage-earning capacity" cases include only wins on the unemployability issue (N=92) and extra-schedular determinations of ability to work (N=3). "Any medical impairment" cases are losses on that issue. See note 157 supra for an explanation of why this method of tabulation was adopted.

* This figure includes 226 wins on the ground that the claimant could not engage in substantial gainful employment, 90 losses on the ground that the claimant could perform his prior job, and 45 losses on the ground that the claimant could engage in substantial gainful employment other than his old job. None of the wins involved older, unskilled labor-
ers, for whom the test is occupational disability. This tabulation of issues and the basis for
decision corresponds to that used by the agency in its quality control study at the initial
and reconsideration stages, but the conclusions are based on a reading of the opinions.

In the FECA program the central issue is whether the impairment "arose out of and in the
course of employment." See note 16 and accompanying text supra. In the Veterans pro-
gram, the issue is whether the impairment arose while the claimant was in the armed ser-
vice. See note 78 and accompanying text supra. In the Social Security program, the issue
is whether the disability arose while the claimant had insured status. See note 36 and ac-
companying text supra.

d The Chart treats zero-rated claims as schedular cases; if they were treated as service-con-
nection cases, there would be 92 "timing of origin of medical impairment" cases.

e See note 148 supra.

f There were 20 "slight impairment" cases and three cases in which the impairment was not
expected to last 12 months.

The "other" issues are: Veterans initial stage—disability arising from misconduct (6); FECA
hearing stage—when medical impairment ended (5); entitlement to lump sum benefits (1);
entitlement to medical expenses (1); Social Security hearing stage—failure to cooperate (1);
claimant engaging in substantial gainful employment (2); loss by widow (10); FECA final
administrative review stage—entitlement under foreign law (6); entitlement to medical ex-
penses (5); entitlement to lump sum benefits (3); entitlement to benefits under more than
one program (1); when medical impairment ended (6).

h The totals in the FECA program exceed the sample size in Chart 7 because more than one
important issue might arise in a case.

**Chart 9**

Summary of Representation by Stage of Program

<table>
<thead>
<tr>
<th></th>
<th>Veterans initial</th>
<th>Soc. Sec. reconsideration</th>
<th>FECA hearing</th>
<th>Soc. Sec. hearing</th>
<th>FECA final admin. review</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>No Representative</td>
<td>40 (159)</td>
<td>90 (1957)</td>
<td>57 (80)</td>
<td>60 (252)</td>
<td>68 (141)</td>
</tr>
<tr>
<td>Attorney</td>
<td>—</td>
<td>—</td>
<td>6 (127)</td>
<td>35 (50)</td>
<td>33 (137)</td>
</tr>
<tr>
<td>— private practice</td>
<td>—</td>
<td>—</td>
<td>5 (114)</td>
<td>34 (48)</td>
<td>29 (121)</td>
</tr>
<tr>
<td>— legal aid</td>
<td>—</td>
<td>—</td>
<td>0 (8)</td>
<td>1 (2)</td>
<td>4 (16)</td>
</tr>
<tr>
<td>— union</td>
<td>—</td>
<td>—</td>
<td>0 (5)</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Non-attorney</td>
<td>60 (240)</td>
<td>1 (15)</td>
<td>8 (11)</td>
<td>7 (30)</td>
<td>10 (20)</td>
</tr>
<tr>
<td>— union</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>7 (10)</td>
<td>1 (5)</td>
</tr>
<tr>
<td>— veterans</td>
<td>60 (240)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>1 (1)</td>
</tr>
<tr>
<td>— other</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>6 (24)</td>
<td>2 (5)</td>
</tr>
<tr>
<td>Congressional Inquiry</td>
<td>—</td>
<td>—</td>
<td>4 (79)</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Total</td>
<td>100 (399)</td>
<td>101 (2178)</td>
<td>100 (141)</td>
<td>100 (419)</td>
<td>100 (206)</td>
</tr>
</tbody>
</table>

Percentages may not equal 100% due to rounding.
This figure includes two paralegals working for legal aid offices on the theory that they worked under close attorney supervision.

The veterans service organizations are: American Legion (66); Veterans of Foreign Wars (59); Disabled American Veterans (42); American Red Cross (11); other recognized service organizations (62).

The "other" non-attorney category consists of: Social Security reconsideration—friends and relatives (15); Social Security hearing—law student (1); friends and relatives (4); no further identification possible (19); FECA final administrative review—no further identification possible (5).

An inquiry by a member of Congress to determine the progress of the claimant's case also occurred in 24 FECA hearing stage cases, but not as an alternative to other assistance. At the Social Security reconsideration stage, a congressional inquiry was apparently an alternative to representation.

The representative count exceeds the sample size in Chart 7 because it includes the fifteen "friends and relatives" cases which were omitted from the statistical analysis.

The case count exceeds the sample size in Chart 7 for the reasons given in Chart 7 supra, at note c.

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III

FINDINGS AND INTERPRETATION OF DATA

A. Effect of Representation on Results

1. The Data

<table>
<thead>
<tr>
<th>TABLE 1A</th>
<th>Effect of Representation on Results by Stage of Program</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Soc. Sec. recom.</td>
</tr>
<tr>
<td>Win %</td>
<td>N</td>
</tr>
<tr>
<td>No rep.</td>
<td>23 (1957)</td>
</tr>
<tr>
<td>Rep.</td>
<td>20 (127)</td>
</tr>
<tr>
<td>Total</td>
<td>23 (2084)*</td>
</tr>
<tr>
<td>Significance</td>
<td>(NS)</td>
</tr>
<tr>
<td>Conf interv</td>
<td>(-9, +3)</td>
</tr>
</tbody>
</table>

* The Social Security reconsideration stage data omit 79 cases in which there was an inquiry by a member of Congress. The claimant won 34% of these cases, compared to a 23% win rate (N=1957) for claimants without any form of help (significance = .015) (the confi-
Evidence intervals for an advantage from congressional inquiry are +2, +20. The inquiry is not technically "representation" because the Congressman neither submits evidence nor requests hearings. Rather, he generally sends a letter expressing concern for the applicant and requesting information about the progress of the claim. If included, these cases would be added to the "no representative" category, thereby reducing the statistical advantage for claimants with representatives.

Conversely, a congressional inquiry had no favorable effect at the FECA hearing stage. The overall win rate was 65% (N=140), but a claimant with a congressional inquiry won only 50% (N=24) of the time. Perhaps the difference between Social Security and FECA lies in the decisionmaking structure of each agency. In the FECA program, six hearing examiners work under close supervision in the national office, whereas in Social Security cases the decentralized structure of state agency decisionmaking allows a tilting toward the claimant.

Another 15 Social Security reconsideration stage cases where "friends or relatives" represented claimants were also omitted to isolate the role of attorneys. Claimants won 27% of these cases. If these cases were included, the win rate would still be 20% for represented claimants.

The case count varies from the sample size for the reasons given in Chart 7 supra, at note c.

### Table 1B

**Effect of Representation on Results—Veterans Initial Stage**

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Win %</td>
<td>N</td>
</tr>
<tr>
<td>No representative</td>
<td>58</td>
<td>(159)</td>
</tr>
<tr>
<td>American Legion</td>
<td>74</td>
<td>(66)</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td>(225)</td>
</tr>
<tr>
<td>Significance</td>
<td>(.014)</td>
<td>(.016)</td>
</tr>
<tr>
<td>Confidence intervals for representative advantage</td>
<td>(+5, +27)</td>
<td>(+5, +27)</td>
</tr>
<tr>
<td>No representative</td>
<td>58</td>
<td>(159)</td>
</tr>
<tr>
<td>Veterans of Foreign Wars</td>
<td>74</td>
<td>(59)</td>
</tr>
<tr>
<td>Total</td>
<td>62</td>
<td>(218)</td>
</tr>
<tr>
<td>Significance</td>
<td>(.016)</td>
<td>(NS)</td>
</tr>
<tr>
<td>Confidence intervals for representative advantage</td>
<td>(+5, +27)</td>
<td>(-4, +20)</td>
</tr>
</tbody>
</table>

* Column (A) for the Veterans initial stage treats the 20 zero-rated compensation cases as wins, because service-connection was established. Column (B) treats these cases as losses, because no disability was found.
The study of effect of representation compares the win rates of represented and unrepresented claimants. The data in Table 1A show that represented claimants have an advantage at the FECA hearing and final administrative review stages, and the Social Security hearing stage, but not at the Social Security reconsideration stage. A second analysis sought to determine whether a particular type of representative could provide an advantage. The win rates for claimants with particular types of representatives were compared with both the win rates for unrepresented claimants and the win rates for claimants with different types of representatives. As Table 1B shows, in the Veterans program, where the American Legion or Veterans of Foreign Wars furnished counsel, particularized representation markedly improved the claimant's chance of success.

2. Interpretation

The data do not support claims that the agency can adequately protect the interests of the unrepresented litigant. This is true even for the FECA and Veterans programs, which both give the claimant the benefit of the doubt in a dispute.\(^{159}\) The findings do not prove, however, that the agencies fail to make good faith efforts to help claimants. Instead, the data may suggest that counsel benefits claimants notwithstanding the agencies' willingness to help.

The one program stage where represented claimants did not have an advantage was the Social Security reconsideration stage. This discrepancy can be explained by the difference in the issues involved at the various program stages. A Social Security claimant must prove both that a medical disability exists\(^{160}\) and that the disability renders him incapable of holding a job.\(^{161}\) Although both issues must be decided in every case,\(^{162}\) it is widely believed that the state agencies administering the initial and reconsideration stages of the program focus on the medical question, and give insufficient attention to the vocational considerations.\(^{163}\) The emphasis on

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\(^{159}\) See notes 17, 72, 73, and accompanying text supra.


\(^{161}\) Id. § 423(d)(2)(A).

\(^{162}\) 20 C.F.R. § 404.1502(a)-(b) (1976).

\(^{163}\) Staff Report, supra note 45, at 98-99. SSA asserts that only 20% of cases at the reconsideration stage are won on vocational grounds. Id. at 98. This is consistent with the sample data, which show that 94% of the cases in which the claimant was found disabled at the hearing stage were based on vocational rather than medical grounds. See Chart 8 supra.
medical issues at the reconsideration stage is a natural consequence of the procedures used at that stage; doctors dominate the decisionmaking process and agencies render decisions on the basis of written documents.\footnote{See text accompanying notes 48-51 supra.}

When medical issues predominate, counsel may not be a great help to the claimant,\footnote{For a view that issues involving medical expertise can be resolved in a simple manner by doctors, see Friendly, Foreword to B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT at xvi n.5 (1972). See also K. DAVIS, ADMINISTRATIVE LAW TEXT 174 (3d ed. 1972).} since there is less chance for a representative to gather evidence that the agency would not have discovered on its own and to argue about the inferences to be drawn from the underlying facts. By contrast, when the issue is less technical, as when medical and vocational considerations determine a claimant’s wage-earning capacity, a representative’s skills in producing and marshalling evidence can markedly benefit the claimant.

Represented claimants have an advantage when the issues that predominate are not exclusively medical. For example, at the Social Security hearing stage, where representation significantly improved claimants’ win percentage, the wage-earning capacity issue arose in 86% of the cases.\footnote{See Chart 8 supra.} At the FECA hearing and final administrative review stages, where counsel also helped claimants, the degree of medical impairment, an exclusively medical issue, was disputed in only 25% of the hearings and 14% of the final administrative proceedings;\footnote{Id.} the wage-earning capacity and job-relatedness issues arose in a total of 59% of the cases at both stages.\footnote{Id.} Even the medical issue implicit in all work-connection disputes—whether the claimant’s activity could have caused the impairment—allows counsel more leeway to gather and interpret evidence than does the issue of degree of current medical impairment.\footnote{In the Social Security program, a “timing” question analogous to the work-connection issue in FECA can arise if a presently uninsured claimant contends that he became disabled when he was insured. This issue appeared in 2% of the Social Security hearing stage cases. Id.} In short, the less medically technical the issues, the more advantages representation provides.

The findings for the initial stage of the Veterans program seem to contradict this theory; representation increases a claimant’s advantage even though technical medical issues are in-
Moreover, disputes over unemployability do not involve the difficult medical and vocational issues that arise in the FECA and Social Security programs, but turn instead largely on the fact of unemployment. Finally, the Veterans Administration can easily discover whether a claimant’s injury occurred while he was in the service, since it has ready access to his service medical history. In light of these facts, represented claimants should not hold the advantage they have in the Veterans initial stage. This anomaly can be explained by the close relationship between the Veterans Administration and recognized service organizations. The representatives supplied by the service organizations are provided with space free of charge at the Veterans Administration offices and enjoy an ongoing working relationship with the agency. In this setting, one might expect represented claimants to have an advantage over unrepresented claimants no matter what the issue in the case.

B. Effect of Representation on Use of Procedures

1. The Data

<table>
<thead>
<tr>
<th>Table 2A</th>
<th>Effect of Representation on Hearing Requests by Stage of Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>Veterans initial</td>
<td>Soc. Sec. reconsideration</td>
</tr>
<tr>
<td>Use %</td>
<td>N</td>
</tr>
<tr>
<td>No representative</td>
<td></td>
</tr>
<tr>
<td>Representative</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>Significance</td>
<td></td>
</tr>
<tr>
<td>Confidence intervals</td>
<td></td>
</tr>
<tr>
<td>Use of procedure</td>
<td>(+33, +58)</td>
</tr>
</tbody>
</table>

170 The current medical impairment issue arose in 45% of the cases. Id.
171 See text accompanying notes 84-87 supra.
### Table 2B

**Effect of Representation on Presentation of New Evidence by Claimant by Stage of Program**

<table>
<thead>
<tr>
<th></th>
<th>Veterans initial</th>
<th>Soc. Sec. reconsideration</th>
<th>FECA hearing</th>
<th>Soc. Sec. hearing</th>
<th>FECA final admin. review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use%</td>
<td>N</td>
<td>Use%</td>
<td>N</td>
<td>Use%</td>
<td>N</td>
</tr>
<tr>
<td>No representative</td>
<td>42 (71)</td>
<td>48 (208)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Representative</td>
<td></td>
<td></td>
<td>69 (55)</td>
<td>64 (157)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>Data</td>
<td>Data</td>
<td>54 (126)c</td>
<td>55 (365)d</td>
<td>Not</td>
</tr>
<tr>
<td>Significance</td>
<td>Not</td>
<td>Not</td>
<td>(.005)</td>
<td>(.003)</td>
<td></td>
</tr>
<tr>
<td>Confidence intervals for representative's use of procedure</td>
<td>Available</td>
<td>Available</td>
<td>Applicable</td>
<td>(+13, +41)</td>
<td>(+8, +25)</td>
</tr>
</tbody>
</table>

- a Evidentiary hearings are permitted, but are rare.
- b The case count varies from the sample size for the reasons given in Chart 7 *supra*, at note c.
- c The case count is less than the sample size because only cases in which new evidence could be relevant were included.
- d The "new evidence" variable includes only cases for which an exhibit list was attached to the case opinion. It refers only to "new evidence presented at the hearing." See Chart 7 *supra*, at note k.

### Table 3

**Effect of Type of Representative on Use of Procedures at Social Security Hearing Stage**

<table>
<thead>
<tr>
<th></th>
<th>New Evidence Presented by Claimant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hearing Requests</td>
</tr>
<tr>
<td>Use%</td>
<td>N</td>
</tr>
<tr>
<td>Attorney</td>
<td>96 (137) 67 (129)</td>
</tr>
<tr>
<td>* Non-attorney</td>
<td>93 (30) 47 (28)</td>
</tr>
<tr>
<td>Total</td>
<td>95 (167) 64 (157)a</td>
</tr>
</tbody>
</table>

- a The "new evidence presented by claimant" variable includes only cases for which an exhibit list was attached to the case opinion. It refers only to new evidence presented at the hearing. See Chart 7 *supra*, at note k.
2. Interpretation

There is no doubt that represented claimants are more likely than unrepresented claimants to insist on procedural safeguards. The significance levels are very low and the bottom range of the confidence intervals never falls below 6%.

Table 3 explores the possibility of a difference in procedural style between attorneys and non-attorneys. Only the Social Security hearing stage has a large enough sample to provide useful data. As Table 3 indicates, attorneys are no more likely to ask for hearings than non-attorneys, but are more likely to present new evidence.

C. Effect of Procedures on Results

1. The Data

Once it is established that represented claimants are more likely to take advantage of procedural opportunities, an important question arises: Does use of these procedures increase claimants' chances of winning?

<table>
<thead>
<tr>
<th>Table 4A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effect of Agency's Use of Outside Experts on Results</td>
</tr>
<tr>
<td>Veterans</td>
</tr>
<tr>
<td>initial</td>
</tr>
<tr>
<td>Win %</td>
</tr>
<tr>
<td>No expert</td>
</tr>
<tr>
<td>Expert</td>
</tr>
<tr>
<td>Total</td>
</tr>
<tr>
<td>Significance</td>
</tr>
</tbody>
</table>

Confidence intervals for expert helping claimant: (+7, +13) (-21, +13) (+1, +19)

* The case count is less than the sample size because only cases in which an expert's advice could be relevant were included.

173 The only qualification to this conclusion is the data suggesting that claimants represented at the hearing stage of the Social Security program are not more likely to appeal than unrepresented claimants. See note 130 supra.
### Table 4B

*Effect of New Evidence Presented by Claimant on Results*

<table>
<thead>
<tr>
<th></th>
<th>Veterans</th>
<th>Soc. Sec.</th>
<th>FECA</th>
<th>Soc. Sec.</th>
<th>FECA final</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>initial reconsideration</td>
<td>hearing</td>
<td>hearing</td>
<td>hearing</td>
<td>admin. review</td>
</tr>
<tr>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
</tr>
<tr>
<td>No new evidence</td>
<td>66 (58)</td>
<td>49 (166)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New evidence</td>
<td>63 (68)</td>
<td>65 (199)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>Data Data</td>
<td>64 (126)b</td>
<td>58 (365)c</td>
<td>Not</td>
<td></td>
</tr>
<tr>
<td>Significance</td>
<td>Not Not</td>
<td>(NS)</td>
<td>(.003)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confidence intervals for new evidence helping claimant</td>
<td>(-17, +11)</td>
<td>(+8, +25)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- The case count is less than the sample size because only cases in which new evidence could be relevant were included. The reason for the difference between the case count in the “agency's use of outside experts” variable and the “new evidence presented by claimant” variable is explained in Chart 7 supra, at note c.
- The “new evidence” variable includes only cases for which an exhibit list was attached to the opinion. It refers only to new evidence presented at the hearing. See Chart 7 supra, at note k.

### Table 4C

*Effect of Hearings on Results*

<table>
<thead>
<tr>
<th></th>
<th>Veterans</th>
<th>Soc. Sec.</th>
<th>FECA</th>
<th>Soc. Sec.</th>
<th>FECA final</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>initial reconsideration</td>
<td>hearing</td>
<td>hearing</td>
<td>hearing</td>
<td>admin. review</td>
</tr>
<tr>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
<td>Win % N</td>
</tr>
<tr>
<td>No hearing held</td>
<td>63 (114)</td>
<td>54 (48)</td>
<td>23 (175)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing held</td>
<td>Not Not</td>
<td>65 (29)</td>
<td>58 (371)</td>
<td>52 (31)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>64 (143)c</td>
<td>58 (419)</td>
<td>27 (206)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Significance</td>
<td>Applicable Applicable</td>
<td>(NS)</td>
<td>(NS)</td>
<td>(.001)</td>
<td></td>
</tr>
</tbody>
</table>
| Confidence intervals for hearings helping claimant | (-14, +18) | (-9, +17) | (+13, +45) |}

- Evidentiary hearings are permitted, but are rare.
- The case count varies from the sample size for reasons given in Chart 7 supra, at note c.

2. **Interpretation**

a. *Agency's Use of Outside Experts*. Some have charged that outside experts in Social Security disability cases are biased in favor of
the agency. The data do not support this charge. At both the reconsideration and hearing stages, claimants benefit from the presence of outside experts; this suggests that the agency makes a genuine effort to assist the claimant. But the data show that the presence of an expert is no substitute for representation at the hearing stage.

The FECA hearing stage results are less clear. Outside experts neither help nor hurt the claimant, which is consistent with the inference that the agency does not use experts to the claimant's disadvantage. However, as the width of the confidence intervals indicates (−21, +13), the size of the sample is too small to compel this inference.

b. Procedures Used by Claimants. (i) Social Security Hearing Stage. As Table 4C indicates, there is no significant advantage in having a hearing. This finding is consistent with the Supreme Court's view in Mathews v. Eldridge that hearings are not crucial for the claimant in disability programs. It does not, however, dispose of the argument that some claimants might benefit from a hearing by using the opportunity to demonstrate their disability; other claimants might harm their cases at a hearing by appearing to be malingeringers.

Table 4B shows that new evidence on appeal helps the claimant, and Table 2 indicates that represented claimants are more likely to offer new evidence than unrepresented claimants. Together, these findings suggest that represented claimants have an advantage.

Table 5 shows, however, that this advantage for represented claimants persists whether or not new evidence is presented. This lingering advantage for represented claimants may result from representatives taking only "easy" cases. But a more plausi-

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176 Id. at 343-47. An earlier SSA study shows that in fiscal years 1965-1968 hearings gave a 2.7%, 5.3%, 8.7%, and 8.1% advantage respectively. M. Rock & R. Berwanger, An Evaluation of the SSA Appeals Process, Progress Report No. 6, at 3 (Mar. 1969).

177 The data also suggest representation remains helpful whether or not there is a hearing. When there was a hearing, represented claimants won 70% (N=159) of their cases, while unrepresented claimants won only 49% (N=212) of their cases (significance .000) (the confidence intervals for advantage of representation are +13, +29). When there was no hearing, the represented claimant had an advantage, but the finding is not significant, probably because the sample size is too small. Represented claimants won 88% (N=8) of their cases and unrepresented claimants won 48% (N=40) of their cases (the confidence intervals for the advantage of representation are −22, +42).
ble explanation is that counsel can skillfully organize evidence to prove a case.

Table 5
Effect of Representation and Presentation of New Evidence by Claimant on Results at Social Security Hearing Stage

<table>
<thead>
<tr>
<th></th>
<th>New Evidence</th>
<th>No New Evidence</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Win %</td>
<td>N</td>
<td>Win %</td>
</tr>
<tr>
<td>No representative</td>
<td>55 (99)</td>
<td>44 (109)</td>
<td>49 (208)</td>
</tr>
<tr>
<td>Representative</td>
<td>76 (100)</td>
<td>59 (57)</td>
<td>68 (157)</td>
</tr>
<tr>
<td>Total</td>
<td>65 (199)</td>
<td>49 (166)</td>
<td>58 (365)</td>
</tr>
</tbody>
</table>

Significance (.002) (.038) (.001)
Confidence intervals for representative advantage (+10, +32) (+2, +28) (+11, +27)

a The "new evidence" variable includes only cases for which an exhibit was attached to the opinion. It refers only to new evidence presented at the hearing. See Chart 7 supra, at note k.

(ii) FECA Hearing Stage. As Tables 4B and 4C indicate, neither a hearing nor new evidence helps the FECA claimant, although represented claimants do have an advantage at this stage. The samples are too small, however, to determine the relationship between representation and use of procedures. This

178 The results showing this advantage appear in Table IA supra.

179 As the following data show, the helpful effect of representation is significant in only one of four comparisons.

Effect of Representation and Use of Procedures On Claimant's Win Rate at the FECA Hearing Stage

<table>
<thead>
<tr>
<th></th>
<th>Hearing Held</th>
<th>No Hearing Held</th>
<th>New Evidence</th>
<th>No New Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Win %</td>
<td>N</td>
<td>Win %</td>
<td>N</td>
</tr>
<tr>
<td>No representative</td>
<td>50 (6)</td>
<td>57 (76)</td>
<td>51 (31)</td>
<td>60 (41)</td>
</tr>
<tr>
<td>Representative</td>
<td>70 (23)</td>
<td>73 (38)</td>
<td>71 (38)</td>
<td>77 (17)</td>
</tr>
<tr>
<td>Total</td>
<td>65 (29)</td>
<td>63 (114)</td>
<td>62 (69)</td>
<td>66 (58)</td>
</tr>
</tbody>
</table>

Significance (NS) (.048) (NS) (NS)
Confidence intervals for representative advantage (-18, +58) (+1, +31) (0, +39) (-4, +38)
finding suggests the same conclusion as the Social Security hearing stage data: representatives may take easy cases, but are more likely to improve the claimant's chances of winning through effective organization of existing evidence.

An interesting feature of the data is the failure to detect an advantage from the presentation of new evidence at the hearing stage, even though this helped Social Security claimants. This finding may result because the procedures at the FECA hearing stage are a hybrid of the procedures at the hearing and prehearing stages in other programs. The judges are not doctors, and the decisionmakers are independent of the initial stage, both characteristics of hearing stages. However, the judges are not lawyers, they review cases after only one stage of decisionmaking, and they are located in the National Office of the agency responsible for making the initial decision, all characteristics of prehearing stages. Because of these similarities to the prehearing stages of other programs, the agency might actively investigate cases that come before it at the hearing stage. Therefore, the presentation of new evidence by the FECA claimant may have a less dramatic impact than at the Social Security hearing stage.

(iii) FECA Final Administrative Review Stage. Table 4C shows that oral argument helps the claimant win at the final administrative review stage of the FECA program. Tables 1 and 2 show that represented claimants have an advantage and that they are more likely to request oral argument. Because of the size of the sample, however, it is not possible to determine the interrelationship between representation and oral argument.\textsuperscript{180}

The effect of counsel in hearings before the Employees' Compensation Appeals Board might differ from that in other programs. The Board has a light caseload, which allows one of the three judges to analyze the record exhaustively prior to consideration by the Board. This independent analysis of the case may reduce the importance of counsel's ability to persuade the Board by written or oral argument. Therefore, although representatives may

\textsuperscript{180} There are three possible interactions. First, counsel may help the claimant simply by insisting on oral argument, even if all other help given is ineffective. Second, the beneficial effect of representation may persist without regard to oral argument, just as it persists without regard to the presentation of new evidence at the Social Security hearing stage. See note 177 and accompanying text supra. Third, counsel might be especially effective at oral argument, if not much help otherwise.
help claimants by insisting on oral argument, it may be the oral argument itself, regardless of the presence or absence of counsel, that is decisive in the decisionmaking process.

IV

REACHING POLICY CONCLUSIONS

Data alone cannot determine whether representation in nonadversary proceedings should be encouraged or discouraged. The following discussion will deal with the factors that ought to be taken into account in making that policy choice, and should also provide a preliminary outline for a more complete study of the proper role of representatives in nonadversary contexts.

A. Value Judgments

Any decision to encourage representation will depend, in part, on value judgments. The policymaker should weigh the claimant's interest in the adjudication, the importance of giving the claimant a sense of fair treatment and meaningful participation in the administrative process, the legitimacy of paternalistically protecting the claimant's award from depletion by counsel fees, and the value placed on lowering the government's cost of administration. Empirical data could aid the policymaker in making relevant value judgments, since the value judgments themselves may be based on certain factual assumptions which can be empirically tested.

1. Importance of Income Maintenance Claims

Historically, this country has not enthusiastically supported income maintenance programs. As late as 1955, the Hoover Commission recommended that participants in administrative proceedings be allowed to appear with a representative, except in proceedings granting "voluntary benefits." But the pendulum has now swung in the other direction. The income maintenance claimant has an "entitlement," if not a "right," to benefits, which the state cannot

182 The history of the development of the "entitlement" approach begins with Flemming v. Nestor, 363 U.S. 603 (1960), in which the Court denied a Social Security claimant's assertion that government action was arbitrary, but stated that the claim had "sufficient
discontinue without affording him procedural due process.\textsuperscript{183} Moreover, sympathy for the poor continues to surface, sometimes in unexpected ways.\textsuperscript{184}

Despite occasionally conservative rhetoric, Congress in recent years has expressed a growing concern for income maintenance claimants. It federalized the welfare programs for the aged, blind, and disabled\textsuperscript{185} and nearly federalized the Aid to Dependent Children program.\textsuperscript{186} Congress also drastically expanded the Food


\textsuperscript{184} Several cases decided on the theory that the government's action failed a "minimum rationality" test contain references to the burdens that the challenged legislative classification imposed on the poor. \textit{E.g.}, Department of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (requirement that households receiving food stamps consist of related individuals fell heaviest on those "desperately in need"); James v. Strange, 407 U.S. 128, 141-42 (1972) ("[s]tate recoupment laws . . . need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect"); Lindsey v. Normet, 405 U.S. 56, 79 (1972) (double-bond requirement imposed "particularly obvious" burden on poor). The Supreme Court has also decided that overreaching of the poor in contract negotiations may void a waiver of constitutional rights to a hearing (Fuentes v. Shevin, 407 U.S. 67, 95 (1972)), and that one reason for striking down a vagrancy statute on vagueness grounds was its use against the poor (Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).


Stamp program from a farmers' subsidy to a welfare program, 187 added Social Security disability beneficiaries to the Medicare rolls, 188 and, during the recent recession, made Unemployment Insurance benefits available for a longer period than in any previous economic slump. 189

One could argue that disability claimants are more likely to be members of the "undeserving poor" than, for example, claimants to old age assistance, because of the possibility that disability claimants malinger. 190 Historically, however, disability claimants show a greater risk of malingering than the aged, but less than the able-bodied unemployed. 191

The value given to income maintenance claims is obviously relevant to a decision on whether to make representation available to claimants, even if counsel help claimants win cases they should not win. Unequal opportunity to win claims resulting from unequal availability of procedural opportunities, such as the use of counsel, is itself a serious problem. Fundamental fairness requires that in proceedings affecting a claimant's ability to meet basic needs, important procedural advantages should be equally available to all. Of course, the quality of the available procedural protection will vary, but the inevitable imperfections encountered in reaching for equality do not make it a worthless goal. Claimants will find it hard to understand reasoning that proceeds from the premise that, since not all representatives are equally good, representation should thus not be available to everyone.

2. Importance of the Claimant's Sense of Fair Treatment and Meaningful Participation

A representative does more than help his client win. Counsel play an important role in assuring claimants that they are fairly treated and have an opportunity to participate meaningfully in the decisionmaking process. In income maintenance proceedings, where the claimants are likely to feel especially vulnerable, these considerations might justify allowing representation even if it would not affect the claimant's ability to win.

3. Legitimacy of Government Paternalism in Protecting Awards from Depletion by Counsel Fees

Depletion of the claimant's award militates against encouraging representation in income maintenance cases. Any effort to protect the claimant's award from depletion, however, assumes that the government ought to interfere with private arrangements for hiring counsel. The degree of interference with the claimant's choice is also relevant; for example, scrutinizing the reasonableness of counsel fees produces less interference than barring a particular type of representative from appearing.

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192 A recent description of the goals of procedural systems omits the claimant's sense of fair treatment and meaningful participation, referring only to accuracy and the costs of operating the system. See R. Posner, Economic Analysis of Law 333 (1972).

In making an inquiry into this issue, one must distinguish between "fair treatment" and "meaningful participation." A claimant may feel that he has been fairly treated within the boundaries of the applicable legal standard, but still feel bewildered by a system that does not allow him to present his real concerns to the agency, and therefore deprives him of meaningful participation. More data is needed to determine whether counsel would contribute to a claimant's sense of meaningful participation, although representation would likely encourage a feeling of fair treatment. A recent study found that the litigant's freedom to choose counsel had a favorable effect on his view of the fairness of procedures, but no significant effect on his sense of control or involvement in the decisionmaking process. See J. Thibaut & L. Walker, Procedural Justice 84-85, 90-91 (1975).


194 The importance of providing litigants with procedural opportunities becomes clouded, however, when one considers the possibility that procedures will be an empty formalism masking the real decisionmaking process. In that case, the availability of procedures might only heighten the litigant's cynicism rather than increase his sense of involvement. See Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent, 1975 Sup. Ct. Rev. 25, 72.


196 If regulation of counsel fees limits the claimant's choice of counsel, it becomes important to know if unpaid counsel are available to take the claimant's case.
4. Importance of Reducing Administrative Costs

If the participation of counsel in administrative proceedings increases administrative costs, the importance placed on lowering costs will influence any judgment about whether to encourage representation.\textsuperscript{197} It may seem heartless to worry about such considerations when individual rights are at issue, but at some point the problem of excessive governmental expenditures will determine the kind of procedures to provide, especially if elimination of a particular procedural safeguard would not drastically affect the claimant's basic rights.

In \textit{Goldberg v. Kelly},\textsuperscript{198} the leading case on procedural protections for income maintenance claimants, the Supreme Court largely ignored the cost problem involved in implementing its decision to require an evidentiary hearing before termination of benefits.\textsuperscript{199} Later cases, however, indicate that the Court will indeed consider the cost of fairness. In \textit{Richardson v. Perales},\textsuperscript{200} for example, the Court emphasized the burdens that oral testimony would place on the agency.\textsuperscript{201} Even where suspect classifications are scrutinized, there is a growing concern over administrative costs.\textsuperscript{202}

B. Relevant Data

In addition to data relevant to forming value judgments and to understanding the interaction of representatives with the decisionmaking process, it is important to obtain information about the efficacy of measures that an agency could take in lieu of encouraging counsel to appear. For example, assuming that representa-

\textsuperscript{197} If representation is encouraged, agencies will have to hire new staff, since counsel are likely to insist on formal procedures. Representatives may also save money, however, by investigating cases and thereby reducing the burden on the agency of obtaining evidence.

\textsuperscript{198} 397 U.S. 254 (1970).

\textsuperscript{199} Apparently the Court took cost into account only in not requiring a transcript of the hearing or a full written opinion. See id. at 267, 271.

\textsuperscript{200} 402 U.S. 389 (1971).

\textsuperscript{201} Id. at 406. Cf. Richardson v. Wright, 405 U.S. 208, 209 (1972) (issue of claimant's alleged right to oral presentation not reached).

\textsuperscript{202} Compare Frontiero v. Richardson, 411 U.S. 677, 688-90 (1972) (discrimination against women), with Mathews v. Lucas, 427 U.S. 495, 509-10 (1976) (discrimination against illegitimate children). Weinberger v. Salfi, 422 U.S. 749 (1975), in which the Court upheld a conclusive presumption, also exhibits an increased awareness of administrative costs by reversing a trend in which the Court disallowed statutory presumptions and required costly case-by-case determinations.
tives assist claimants by gathering and/or interpreting evidence, the agency could increase its staff of judges or legal assistants to enhance its own ability to gather and interpret evidence. If hearings help claimants win, the agency could initiate hearings on its own. If representatives are helpful in resolving those less technical issues that earlier stages bypass, the agency could redesign its procedures to encourage resolution of these issues by allowing hearings at an earlier stage of the decisionmaking process, by increasing the use of experts at the earlier stage, or by allowing claimants to bypass the earlier stage entirely. Any of these measures might prove less costly than encouraging representation.

C. Rules Affecting Representation

1. Discouraging Representation

a. Prohibiting Representation. There are only two situations where prohibition of representation is lawful. First, when an agency conducts a preliminary investigation to decide whether to commence a proceeding that might eventually affect an individual,
representation is occasionally disallowed on the theory that it will unduly delay the proceedings.\footnote{\textit{See In re Groban}, 352 U.S. 330, 334 (1957); \textit{Nason v. Immigration & Naturalization Serv.}, 370 F.2d 865, 868 (2d Cir. 1967); \textit{Haa land v. Pomush}, 263 Minn. 506, 511-13, 117 N.W.2d 194, 198-99 (1962); \textit{Commonwealth v. McCloskey}, 443 Pa. 117, 142-45, 277 A.2d 764, 777 (1971). It is unclear whether the prohibition would apply to non-attorneys who share the agency's objectives. \textit{See Madera v. Board of Educ.}, 386 F.2d 778, 778 (2d Cir. 1967); \textit{Suess v. Pugh}, 245 F. Supp. 661, 665 (N.D.W. Va. 1965).} Second, representation is sometimes prohibited when the agency and the individual are involved in a continuing relationship that adversary hearings might seriously affect.\footnote{\textit{First,} there is nothing preliminary about the denial of a claim after an initial investigation, and claimants have no incentive to delay. Second, income maintenance claimants are independent bearers of rights rather than dependents who rely on the continuing good will of the agency.\textit{See also In re Gault}, 387 U.S. 1, 25-31 (1966).} Income maintenance programs, however, do not fit either of these categories.\footnote{\textit{See text accompanying notes 116 & 120 supra.}}

b. \textit{Notice that Counsel Are Not Necessary.} Certain ways of discouraging counsel fall short of outright prohibition and cannot be dismissed as improper, since their impact on the claimant is less severe. For example, in the FECA and Social Security programs the agency tells the claimant that representation is not needed at the initial stage; SSA is not even required to inform the claimant of his right to counsel at this stage unless he inquires about it.\footnote{\textit{See, e.g., Goss v. Lopez}, 419 U.S. 565, 583-84 (1975) (school discipline); \textit{Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting}, 28 STAN. L. REV. 841 (1976). \textit{See also In re Gault}, 387 U.S. 1, 25-31 (1966).} Agencies probably discourage counsel because they believe that they can adequately protect the unrepresented claimant's interests, and that they should try to save the claimant unnecessary counsel fees. If representatives at this stage increase administrative costs without significantly helping claimants, this mild interference with the claimant's ability to choose counsel freely might be desirable.

c. \textit{Fee Limits.} A requirement that the agency approve the reasonableness of the representative's fee is a common provision in income maintenance programs.\footnote{\textit{See notes 118, 123, 127, and accompanying text supra.} Agency approval of reasonable fees has been upheld in \textit{Yeiser v. Dysart}, 267 U.S. 540, 541 (1925). \textit{See also Randolph v. United States}, 274 F. Supp. 200 (M.D.N.C. 1967), aff'd, 389 U.S. 570 (1968) (statutory restrictions on fees in Social Security); \textit{Thatcher v. Industrial Comm'n}, 115 Utah 568, 207 P.2d 178 (1949) (administrative regulation of fees in workers' compensation cases).} Arguably, fee approvals discourage counsel from taking cases, but it is equally plausible that the claimant's freedom from being overcharged encourages him to seek out counsel when he might otherwise avoid hiring a rep-
Federal policy favors the reasonable-fees approach, despite its interference with the client's right to bargain with counsel. Congress has explicitly refused to replace fee approvals with an agency review of attorney-client agreements, subject to judicial review at the agency's request if the parties and the agency cannot agree.212

Fee limits set so low that they effectively prevent representation by private counsel present an entirely different problem. For instance, the Veterans disability program limits fees to $10,213 thereby effectively prohibiting representation by private counsel and severely interfering with the claimant's selection of a representative. At the same time, however, service organizations provide free and effective representation.214 This alternate source of counsel may justify a virtual prohibition of private counsel, at least for work done at the initial stage of decisionmaking.

d. Discouraging Non-attorneys. Prohibition of the unauthorized practice of law may place restrictions on representation by non-attorneys. However, this proscription usually applies only to adversary proceedings,215 and none of the programs studied prohibits non-attorneys from representing claimants.216 Several good reasons exist for allowing a claimant to use a non-attorney in nonadversary proceedings. First, nonadversary litigation is less complex than adversary proceedings. Second, nonadversary programs bear no risk of unequal confrontation likely to result in loss by the litigant with inferior counsel. Any difference between attorneys and non-attorneys representing the claimant will mean only that the claimant decreases his chance of winning if he is counseled by the less effective representative. Third, this study suggests that attorneys may not always be more successful than non-attorneys in nonadversary programs. Attorneys are not helpful at the Social Security reconsideration stage, and non-attorneys do help the

\[\begin{align*}
\text{211} & \text{ See note 113 and accompanying text supra.} \\
\text{212} & \text{ Viles, supra note 113, at 59-60 n.279.} \\
\text{213} & \text{ 38 U.S.C. § 3404(c)(2) (1970).} \\
\text{214} & \text{ See text accompanying note 126 supra; Table 1B supra.} \\
\text{215} & \text{ Annot., 2 A.L.R.3d 724, 728-29 (1965) notes that non-attorneys have been allowed to handle workers' compensation claims before the adversary stage has been reached, but are not allowed to appear once the proceedings become adversary. The effect such a rule will have on the willingness of non-attorneys to settle cases prior to the stage at which they will be replaced by attorneys is unclear.} \\
\text{216} & \text{ See notes 115, 119, 124, and accompanying text supra. The only discrimination against non-attorneys is the statute which authorizes SSA to pay fees directly to counsel only if they are attorneys. See 42 U.S.C. § 406(a) (1970).}
\end{align*}\]
claimant at the Veterans initial stage. Fourth, where attorneys do not customarily handle income maintenance claims, a non-attorney may provide a better chance of winning.

Finally, one ought to consider if the right to choose counsel fosters the claimant's sense of fairness in the administrative process. This is especially important in income maintenance programs, where claimants may feel vulnerable when confronted by the government bureaucracy. Free choice of counsel may also increase the claimant's sense of meaningful participation in the decision-making process.

2. Encouraging Representation

a. Free Counsel. Providing free counsel in all cases encourages representation, but at a high cost. At one time the Department of Health, Education, and Welfare toyed with the idea of requiring states to provide free counsel in needs-tested welfare proceedings, and a few courts have exercised their discretion to order free counsel in such cases, but little pressure now exists to pro-

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217 See Table 1B supra.


219 The organized bar is primarily concerned with non-attorneys as legal assistants to attorneys, not with expanding available legal services. Because of attorney supervision of legal assistants, the question of unauthorized practice of law is not likely to arise. Low income claimants, however, are more interested in paraprofessionals as a means of expanding available legal services and obtaining cheaper and more sympathetic representation. See National Clearinghouse for Legal Services, A Compilation of Materials for Legal Assistants and Lay Advocates (M. Ader ed. 1971); Brickman, Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism, 71 COLUM. L. REV. 1153, 1165-68 (1971).


221 See, e.g., Aiello v. Commissioner of Pub. Welfare, 358 Mass. 91, 260 N.E.2d 662 (1970); Ebenhart v. Goldberg, 1 Pov. L. REP. (CCH) ¶ 659.98 (N.Y. Sup. Ct. 1969). Contra, Granger v. Finch, 422 F.2d 206 (7th Cir. 1970) (Social Security); Staley v. California Unemployment Ins. Appeals Bd., 6 Cal. App. 3d 675, 86 Cal. Rptr. 294 (1970) (Unemployment Insurance). The authority for courts to order free counsel in civil cases usually rests on a general statutory grant of authority or on the inherent equity powers of the courts. Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 VAL. L. REV. 21, 49 (1968). Occasionally, however, a statute creating substantive rights will explicitly authorize appointment of free counsel (see Petete v. Consolidated Freightways, 315 F. Supp. 1271 (N.D. Tex. 1970)), or a court will find authority in the Constitution to appoint free counsel (see Note, Parents' Right to Counsel in Dependency and Neglect Proceedings, 49 IND. L.J. 167 (1973)). Federal courts must exercise their discretion in civil cases to decide whether free counsel should be appointed, even though they rarely grant such a
vide free counsel for income maintenance claimants.\textsuperscript{222} The contrast between criminal litigation, where free counsel is provided,\textsuperscript{223} and income maintenance disputes suggests why free counsel may be less appropriate in income maintenance proceedings. The criminal defendant's interest in retaining freedom and avoiding the stigma of conviction is greater than the income maintenance claimant's interest in his own litigation. Criminal litigation also involves procedural rules that are far more technical than in the administration of income maintenance programs, and the proceedings are almost exclusively adversary.\textsuperscript{224}

Moreover, the practical problems of providing free counsel in all cases are enormous. Procuring an adequate number of representatives may not be easy,\textsuperscript{225} and if counsel are not paid, the additional problem of unfairness to the representatives exists.\textsuperscript{226} These considerations suggest that the policymaker should be cautious in using the data in Tables 1A and 1B showing that representation is helpful before concluding that free counsel should be provided—the bottom range for that advantage in the FECA program is only 2%. Of course, if the policymaker's disposition is toward providing free counsel in any event, he certainly will note that the FECA sample shows an advantage for represented claimants of up to 28% at the hearings stage and 25% at the final administrative review stage.\textsuperscript{227}

\textsuperscript{222} However, Congress recently authorized free legal help for claimants in the Longshoremen's program. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 17, 86 Stat. 1262 (amending 33 U.S.C. § 939(c)(1) (1970)). This is an unusual provision for a workers' compensation program, where contingent fees usually attract attorneys. The legislation may be justified, however, as a residual measure to protect claimants in adversary proceedings.


\textsuperscript{225} Cf. Note, Dollars and Sense of an Expanded Right to Counsel, 55 IOWA L. REV. 1249, 1259 (1970) (few attorneys willing to provide assistance to indigent criminal defendants).

\textsuperscript{226} Most courts hold that appointed counsel must work for nothing if requested to do so. See, e.g., United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965). It is doubtful that a court has the power to order payment absent a statute. Allison v. Wilson, 277 F. Supp. 271 (N.D. Cal. 1967), holds that the power of appointment implies a power to commit federal funds to pay counsel. Id. at 275. But the court in In re Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975), concluded that, absent specific statutory or constitutional authorization, no right to paid or appointed counsel exists. Id. at 437, 330 N.E.2d at 55, 369 N.Y.S.2d at 90. The effect of the Supreme Court decision in Edelman v. Jordan, 415 U.S. 651 (1974) (courts cannot order damage awards to be paid out of state treasury) on the power of federal courts to order payment of counsel fees by the state is also uncertain. See Note, Attorneys' Fees and the Eleventh Amendment, 88 HARV. L. REV. 1875, 1876 (1975).

\textsuperscript{227} See Table 1A supra.
b. Payment of Winning Counsel's Fees. The government might encourage representation by paying the winning counsel's fees. The tradition in the United States has been to limit the payment of winning counsel's fees to cases involving the opposing party's bad faith, to situations where the results of the litigation confer benefits on persons from whom one can reasonably demand a contribution to the costs of counsel and to a limited number of situations where a plaintiff, acting as a "private attorney general," has vindicated a strong public policy, and is entitled to reimbursement for litigation costs. Despite this limiting tradition, however, other reasons justify subsidizing winning counsel in those nonadversary income maintenance proceedings in which they prove especially helpful after the initial stages.

First, when the government pays the fees, the costs are spread out over the general public as an administrative cost. Second, winning counsel help the agency discharge its obligation to protect the claimant's interests in nonadversary proceedings. If the agency's efforts in this direction fail prior to the hearing stage, winning counsel would serve a useful function in helping the government correct a prior error, and their appearance should be encouraged by relieving the claimant of the cost.

This argument for paying the fees of winning counsel is subject to two qualifications. If the results prove inaccurate, it is difficult to argue that counsel help the agency fulfill its obligations. Also the production of previously unavailable evidence, and not error at the initial stage, may account for the claimant's success on appeal. However, the earlier analysis on the effect of representation at the Social Security hearing stage suggests that the agency's

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228 See Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928).
230 In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court held that federal courts are not free to impose attorney fees under this theory absent express provision by statute. Id. at 265-69. Congress, however, in response to Alyeska, recently provided a list of statutes under which private attorney general fees may be allowed. See 42 U.S.C.A. § 1988 (Dec. Supp. 1976). See also Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849 (1975).
shift in perspective plays a major role in the reversal of earlier denials.\textsuperscript{233}

Any decision to pay the costs of winning counsel is clouded by the uncertainty of the decision's effect on the agency's costs and on the claimant's sense of meaningful participation in the decision-making process. Moreover, such a decision would require further evaluation of whether to pay the cost of counsel when the fees are financed through a legal insurance program or a prepaid group legal services plan to which the claimant belongs,\textsuperscript{234} or when a legal services organization provides free counsel.\textsuperscript{235}

c. **Payment of Fees to Counsel Out of an Award.** An agency can encourage representation by paying counsel fees out of the claimant's award directly to the representative.\textsuperscript{236} Unlike providing free counsel in all cases, or paying fees to winning counsel, this method of encouraging representation is not costly to the government.

Once the claimant is permitted to choose counsel freely, it seems appropriate to help counsel collect their fees. Arguably, such help is improper if representatives do not help the claimant win. But if the data suggest that counsel are too costly in light of the help they render, the correct step is to confront this problem directly by deciding whether to restrict access to counsel by prohibiting or limiting fees. Failure to help counsel collect fees is an indirect way of discouraging representation, and deflects attention from the real issue of whether costly representation should be allowed at all.

Providing assistance to the claimant's counsel might seem improper if the fee is unreasonable, but a requirement that the

\textsuperscript{233} See text accompanying notes 161-64 supra.

\textsuperscript{234} See generally Hearings on Recent Developments in Prepaid Legal Services Plans Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974); F. Marks, R. Hallauer, & R. Clifton, Conference on Prepaid Legal Services (1972).

\textsuperscript{235} See generally Note, Award of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973). Reasonable fees might be paid to legal services organizations on the theory that they will only take such cases when the private bar is reluctant to act and, therefore, encouragement of their appearance will overcome a barrier to representation. Moreover, such organizations are likely to develop an expertise in income maintenance litigation that private attorneys may lack.

\textsuperscript{236} The Social Security program currently pays up to 25\% of an award for counsel fees. See note 123 supra. Such payments are also provided in the Veterans program (38 U.S.C. § 3404 (1970)), but are unimportant because of the dominance of service organizations providing free representation and the absence of private practitioners. See Chart 9 supra.
agency approve the fee eliminates this objection. There may also be occasions when the fee will have to be paid out of a future award. The past-due award may be too small to cover the fee, or concern for the claimant's well-being might suggest spreading out the payment so that the past-due benefits are not excessively reduced. In such circumstances, the administrative burden is increased by the need to flag future payments so that a portion will be paid to the representative. However, agency record-keeping systems should be able to cope with this problem in the limited number of cases where it will arise.

d. Notice that Representation Is Helpful. The least costly method of encouraging counsel is to tell the claimant that a representative may be helpful.\textsuperscript{237} It is the agency's job to prevent unequal results caused by unequal access to counsel. The following notice might therefore be sent to claimants: "You may obtain the assistance of a representative in presenting your appeal. Although the reviewing agency will do all it can to decide your appeal fairly, you may find a representative helpful to you in presenting your case."

This notice may be inadequate, however, since many claimants are probably wary of counsel and unfamiliar with the different types of representatives. The notice should therefore inform the claimant of the types of counsel likely to be available in the community.\textsuperscript{238} An appropriate notice might read:

\textsuperscript{237} Courts do not usually require a notice that counsel may be helpful. In Staley v. California Unemployment Ins. Appeals Bd., 6 Cal. App. 3d 675, 86 Cal. Rptr. 294 (1970), the court suggested, but did not require, notice that free legal assistance was available. \textit{Id.} at 679, 86 Cal. Rptr. at 296. \textit{Cf.} Granger v. Finch, 425 F.2d 206, 208 (7th Cir. 1970) (notice of right to counsel sufficient; informing claimant of contingent fee possibility unnecessary). \textit{But see} Miner v. Industrial Comm'n, 115 Utah 88, 202 P.2d 557, 559 (1949) (must tell claimant that counsel is "desirable"). Sometimes a holding that representation may not be discouraged, however, comes close to a finding that representation must be encouraged. In Coyle v. Gardner, 298 F. Supp. 609 (D. Hawaii 1969), the court examined the transcript to see whether, in light of claimant's inadequate education, the notice of a right to counsel amounted to a discouragement of counsel. \textit{Id.} at 612-13.

\textsuperscript{238} The Social Security Administration is obviously concerned about the problem. The Claims Manual gives the following instructions to district office personnel for dealing with claimants who express an interest in representation:

\textit{(c) Advising Claimants of Legal Service Organizations.} SSA will not routinely inform claimants of legal service organizations. Some claimants may prefer to have an attorney in private practice or a nonattorney represent them. In addition, to inform a claimant of legal service organizations when he has not indicated an interest in or need for such information would make it appear SSA is recommending such organization.

The DO should maintain a list of legal service organizations . . . where a claimant may obtain legal services. If a claimant wants an attorney to represent
Examples of representatives who may be available in your community include attorneys in private practice, unions and veterans organizations, claimant's representatives licensed by law to present claims before this agency, and legal aid or legal services organizations providing free legal assistance.

CONCLUSION

The data in this study suggest that counsel help claimants win their cases in most stages of most nonadversary programs. The study also indicates that a range of unanswered questions must be resolved before agencies can make intelligent policy choices about the desirability of taking costly steps to encourage representation. However, the results suggest that agencies ought to take the inexpensive first step of encouraging the income maintenance claimant to seek out a representative. Although a small step, it may contribute significantly to eliminating the inequality of results brought about by inequality of representation.

him but has difficulty in obtaining legal services or asks for information, he should be notified of legal service organizations available in the area. Claims Manual, supra note 120, at § 3505(c).