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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

IMPROVING TIMELINESS IN AGENCY ADJUDICATION

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INTRODUCTION

It is often said of administrative adjudication that justice delayed is justice denied. Indeed, one rationale underlying the adjudication of many categories of cases by executive-branch agencies is that such institutions often can decide them more quickly through administrative methods than Congress can through legislation,[1] or the courts can through comparatively formal, trans-substantive procedures.

Federal agencies adjudicate millions of cases each year, including applications for benefits and services, applications for licenses and permits, and enforcement actions against persons suspected of violating the law. People depend on the timely adjudication of their cases, and delayed adjudication can have significant consequences, particularly for members of historically underserved communities.

Agencies and agency employees are under continual pressure to process and decide cases promptly. Parties, advocates, and researchers frequently raise concerns about the time it takes agencies—or certain agencies—to adjudicate cases, and media reports on the effects of long wait times, especially on vulnerable populations, are commonplace. It is unsurprising, then, that the timeliness of administrative adjudication and efforts to improve it frequently are the subject of legislative-branch oversight.

Congress has adopted a variety of measures designed to address the timeliness of agency adjudication. In passing the Administrative Procedure Act (APA), for example, it included language requiring agencies to conclude matters "with reasonable dispatch"[2] and empowered the courts to compel agency action unlawfully withheld or unreasonably delayed.[3] Congress also has experimented with deadlines requiring agencies to commence or complete action by a specific date and has adjusted agency funding levels to prompt quicker decision making, although with mixed success.[4]

The Administrative Conference of the United States (ACUS) has adopted many recommendations identifying specific mechanisms that agencies might use to promote or improve timeliness in administrative adjudication—tools like remote hearings, case management techniques, and alternative dispute resolution (ADR). No single mechanism is likely to address

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[1] Many administrative programs—including early benefits programs and programs for adjudicating claims against the government—grew out of processes by which individuals petitioned Congress for legislation granting their claims. This process largely terminated with the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, which "banned the passage of certain private bills that Congress had used to resolve petitions." Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1548 (2018).

[2] §6(a).

[3] 5 U.S.C. § 706(1).

[4] *E.g.*, Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987); Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987); Anthony M. Bertelli & Kathleen M. Doherty, *Setting the Regulatory Agenda: Statutory Deadlines, Delay, and Responsiveness*, 79 PUB. ADMIN. REV. 710 (2019); Donald K. Duvall, *Adjudication Under Statutory Time Limits: The ITC Experience*, 32 ADMIN. L. REV. 733 (1980); Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008); Stéphane Lavertu & Susan Webb Yackee, *Regulatory Delay and Rulemaking Deadlines*, 24 J. PUB. ADMIN. RSCH. & THEORY 185 (2014); Stuart Kasdin, *The Relative Influence of Appropriation Subcommittees: Institutional Structure and Program Performance*, 38 PUB. BUDGET. & FIN. 6 (2018).

all concerns about timeliness in all circumstances at all times, however. Each agency has its own mission, serves different communities, adjudicates according to a distinct set of legal requirements, has different resources available to it, and faces different operational realities. Moreover, in promoting timely adjudication, agencies must also remain sensitive to other values of administrative adjudication such as decisional quality;[5] due process and procedural fairness, including the decisional independence of agency adjudications; customer experience; and program integrity. As Jerry Mashaw and others have described, tradeoffs are inevitable.[6]

ACUS launched this project to examine more comprehensively how Congress and agencies foster an organizational culture of timeliness in administrative adjudication in accord with principles fairness, accuracy, and efficiency and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise. In writing this report, we recognized the challenges agencies face in adhering to these legal principles while pursuing broader operational and managerial concerns. Thus, we incorporated a variety of perspectives in our research and relied heavily on insights from prior research on adjudication, internal administrative law, government performance, and public management.

Part I provides background to this study, including prior ACUS recommendations related to timeliness in agency adjudication. Part II addresses the study's objectives, scope, and methodology and explains how we thought about "administrative adjudication" and "timeliness" for purposes of this report. Part III examines several categories of factors that appear to affect timeliness across programs of administrative adjudication. Finally, Part IV describes measures that agencies have taken to promote and improve timeliness in their adjudication programs.

Appendix A proposes a set of recommended best practices for consideration by ACUS. The other eleven appendixes consist of detailed case studies of specific agencies and programs. As described in Part II, this report was informed in large part by these case studies.

BACKGROUND

Timeliness, fairness, and accuracy serve as consensus values for the administrative process.[7] Yet ensuring that government institutions make decisions speedily and without undue delay has been an "intractable problem."[8] Indeed, concern over the timeliness of administrative action began shortly after the first federal agencies began operations and has continued through

[5] *See* Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).
[6] JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983).
[7] Jerry L. Mashaw, *Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1973-1974); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 260 (1978)
[8] Gregory L. Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPP. L. REV. 553, 556 (1979); William M. Cain, *Delay in the Administration of Justice*, 7 NOTRE DAME L. REV. 284 (1932). *See also* CONF. ON ADMIN. PROC., REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE (1953) (addressing concerns of unnecessary delay, expense and volume of records in adjudicatory proceedings).

the modern era.[9] As the number of federal agencies that implement important programs regulating the nation's health, safety, and economic well-being has grown, so have complaints about the pace of administrative decision making.[10]

Unreasonable delay in the resolution of administrative proceedings can unconstitutionally deprive regulated entities and persons—as well as the general public—of rights, welfare, and economic opportunities.[11] These effects are well-documented in public,[12] governmental,[13] and academic discourse on administrative agencies.[14] Yet despite the critical role of timeliness in adjudication, there has been little systematic study across time and agencies of the factors that contribute to administrative delays and backlogs or of the measures agencies have adopted to improve the speed of agency decision making while preserving its quality.[15] We begin to fill that gap with this report.

At the outset, it is important to acknowledge significant prior work by ACUS on the subject, as well as matters that all agencies, regardless of their circumstances, must consider when addressing timeliness in adjudication.

A. Prior Related ACUS Recommendations

ACUS has adopted many recommendations that reflect concerns about the timeliness of agency adjudication and identify specific strategies agencies might use to promote timeliness.

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[9] *E.g.*, Slocum v. Mayberry, 15 U.S. 1 (1817); Smith v. Ill. Bell Tel. Co., 270 U.S. 587 (1926); Oil, Chemical and Atomic Workers Intern. Union v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985); Towns of Wellesley, Concord, and Norwood, Mass. v. F.E.R.C., 829 F.2d 275 (1st Cir. 1987); In re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991); In re A Community Voice, 878 F.3d 779 (9th Cir. 2017); Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018); In re Natural Resources Defense Council, 956 F.3d 1134 (9th Cir. 2020); Barrios Garcia v. U.S. Department of Homeland Security, 25 F.4th 430 (6th Cir. 2022).

[10] Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1383-84 (2011).

[11] MCI Telecommunications Corp. v. Federal Communications Comm'n, 627 F.2d 322, 341 (D.C. Cir. 1980). *See also* Telecomms. Research and Action Ctr. (TRAC) v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (noting "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake").

[12] *E.g.*, Zolan Kanno-Youngs, *Backlogged Courts and Years of Delays Await Many Migrants*, N.Y. TIMES (May 12, 2023); Eric Katz, *Federal Employee Appeals Board Still Has Years of Work Ahead to Cut Through Its Record Backlog*, GOV'T EXEC (Dec. 20, 2022); Sydney Lupkin, *Outcry over EpiPen Highlights FDA's Long Backlog of Generics*, PBS NEWS HOUR (Sept. 6, 2016).

[13] *E.g.*, OFF. DIR. NAT'L INTEL., BACKLOG OF PERSONNEL SECURITY CLEARANCE ADJUDICATIONS – FISCAL YEAR 2020 QUARTERS 2, 3, AND 4 (Feb. 2022); OFF. INSPECT. GEN, DEP'T HOUS. & URBAN DEV., IMPROVEMENTS ARE NEEDED TO ENSURE THAT PUBLIC HOUSING PROPERTIES ARE INSPECTED IN A TIMELY MANNER (May 2023); OFF. INSPECT. GEN., SOC. SEC. ADMIN., THE SOCIAL SECURITY ADMINISTRATION'S HEARINGS BACKLOG AND AVERAGE PROCESSING TIMES (Sept. 2023)

[14] *E.g.*, Samuel B. Bonsall, IV, Eric R. Holzman & Brian P. Miller, *Wearing Out the Watchdog: The Impact of SEC Case Backlog on the Formal Investigation Process*, 2021 ACCT. REV. 1 (2021); Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277 (2019); Amy Widman, *The False Premise of State Administrative Adjudication*, 61 HARV. J. ON LEG. (forthcoming 2024).

[15] For example, agencies' enforcement priorities, choices whether to provide guidance or rules to administrators who make implementation decisions, how they will allocate appropriated funds to address increasing caseloads, and day-to-day management decisions rarely are considered by the agencies' political or judicial overseers. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1131-34 (2016).

These recommendations fall into three categories: general principles related to timeliness, specific mechanisms to improve or promote timeliness, and proposals for congressional action.

One of ACUS's earliest recommendations sets forth general principles for promoting timeliness. In Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, ACUS encouraged agencies to publish statistical compilations of their proceedings.[16] To facilitate efforts to "lessen delays," ACUS recommended that agencies include in such compilations "the number of days which elapsed during each significant step of the proceedings which were concluded during the year" along with other key case processing metrics.[17] ACUS further recommended that agencies "periodically analyze" these data, "develop improved techniques fitted to its particular needs to reduce delays" and achieve other objectives, describe the "specific steps" taken to meet those objectives, and measure the effectiveness of such steps.[18]

Many recommendations address specific mechanisms that agencies might use, in appropriate circumstances, to improve or promote timeliness. Such mechanisms include the delegation of final decisional authority subject to discretionary review by the agency head,[19] the use of precedential decision making by appellate decision makers,[20] the adoption of procedures for summary judgment[21] and prehearing discovery,[22] the use of a broad suite of case management techniques,[23] the establishment of quality assurance systems,[24] the development of reasonable time limits or step-by-step time goals for agency action,[25] the use of ADR

[16] Admin. Conf. of the U.S., Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 38 Fed. Reg. 19,784 (July 23, 1973).
[17] *Id*. at ¶ 3.
[18] *Id*. at ¶ 5-6. The Office of the Chair produced statistical reports for federal administrative law judge hearings conducted in 1975 and between 1976 and 1978. *See* FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976–1978, ADMIN. CONF. OF THE U.S. (1980); FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1975, ADMIN. CONF. OF THE U.S. (1977).
[19] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); *see also* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).
[20] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).
[21] Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).
[22] Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973).
[23] Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).
[24] Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).
[25] Recommendation 86-7, *supra* note 23, ¶ 7; Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).

techniques,[26] the use of simplified procedures in appropriate cases,[27] the use of remote hearings,[28] the aggregation of similar claims,[29] the use of personnel management devices,[30] the implementation of electronic case management and publicly accessible online processes,[31] more extensive use of official notice,[32] and providing adjudicators flexibility to exclude evidence the probative value of which is substantially outweighed by the potential for undue consumption of time.[33] Recent reports to ACUS have also suggested that agencies might use artificial intelligence or other advanced automated tools to promote timeliness in adjudication.[34]

ACUS has also periodically recommended mechanisms for improving timeliness in specific programs, including immigration removal adjudication[35] and adjudication by the Social Security Administration (SSA).[36]

Although most relevant recommendations are directed to agencies, ACUS has also made several recommendations to Congress. Most recommend that Congress provide agencies with sufficient discretion to implement and experiment with various mechanisms that might improve or promote timeliness. In its most comprehensive recommendation on agencies' use of ADR techniques, for example, ACUS recommended that Congress not "inhibit" agencies' use of ADR

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[26] Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23,635 (June 24, 1987).

[27] Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990); Recommendation 86-7, *supra* note 23, ¶ 3.

[28] Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).

[29] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Recommendation 86-7, *supra* note 23, ¶ 9.

[30] Recommendation 86-7, *supra* note 23, ¶ 1.

[31] Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

[32] Admin. Conf. of the U.S., Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, 84 Fed. Reg. 71,350 (Dec. 27, 2019).

[33] Admin. Conf. of the U.S., Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986).

[34] *See* David Freeman Engstrom et al., Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies 38, 45 (2020) (report to the Admin. Conf. of the U.S.); *cf.* Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

[35] Admin. Conf. of the U.S., Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804 (Aug. 10, 2012); *see also* Admin. Conf. of the U.S., Recommendation 89-4, *Asylum Adjudication Procedures*, 54 Fed. Reg. 28,970 (July 10, 1989).

[36] Admin. Conf. of the U.S., Statement #17, *Comments on the Social Security Administration's Proposal on Reengineering the SSA Disability Process*, 59 Fed. Reg. 44,704 (Aug. 30, 1994); Admin. Conf. of the U.S., Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Admin. Conf. of the U.S., Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,134 (Dec. 30, 1987); Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

techniques "by requiring formality where it is inappropriate" and affirmatively permit agencies to adopt voluntary arbitration procedures and agency officials to agree to binding arbitration to resolve specific disputes.[37] And in Recommendation 78-3, *Time Limits on Agency Actions*, ACUS recommended that Congress ordinarily refrain from imposing statutory time limits on agency adjudications and, when it chooses to do so, recognize that "special circumstances (such as a sudden substantial increase in caseload . . .) may justify an agency's failure to act within a predetermined time." That recommendation recognized the potential value of reasonable timelines or deadlines to help reduce administrative delay but concluded that "[g]enerally, it is preferable that such limits be established by the agencies themselves, rather than by statute."[38]

The sheer number and detail of relevant ACUS recommendations hint at the complexity with which Congress and agencies must contend in addressing the timeliness of administrative adjudication.

B. Considerations When Addressing Timeliness

Agencies must consider a variety of factors when adopting or adjusting their adjudicative systems. Legal policy considerations will vary—sometimes considerably—between agencies and programs. A one-size-fits-all analysis therefore is not possible. Although much of the nuance of each agency's decision making in this regard is beyond the scope of this report, some factors are common across agencies. We summarize these considerations in this subsection, focusing first on constitutional and statutory requirements and then on agency mission, policy, and resources.

1. Constitutional and Statutory Requirements

When addressing timeliness in adjudication, all agencies must be aware of both constitutional and statutory frameworks for administrative decision making. Most notable is the constitutional guarantee that "no person shall be deprived of life, liberty, or property, without due process of law."[39] The current constitutional test for due process is notably context-specific, and its application will necessarily vary between agencies and programs.[40] Nonetheless, at least when a protected interest in life, liberty, or property is implicated, constitutional due process constrains the array of options an agency has at its disposal.[41]

[37] Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).
[38] Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).
[39] U.S. CONST. amend V.
[40] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).
[41] *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

In such circumstances, the requirements of procedural due process may compel an agency to adjudicate in a particular way.[42] The agency may need to provide clear procedural rules that apply uniformly and promote fair, reliable, and accurate decision making.[43]

The spirit of uniformity, fairness, reliability, and accuracy, implicit in constitutional due process, requires a sensitivity to core values of the administrative process. While entire books could be written on these core values, we highlight three of central import here: participation, transparency, and efficiency.[44]

In adopting and reforming their adjudicative processes to address timeliness concerns, agencies should encourage full and adequate participation by interested parties. Adherence to this core value may require deliberate action on the part of an agency, particularly when interested persons face or have faced barriers to effective participation.[45] Of course, a balancing act is required by agencies in pursing this core value.[46] Federal statutes encourage public access in some contexts and require agencies to protect sensitive interests and information in others.[47] In adopting policies regarding adjudicative processes, agencies must strike the appropriate balance of weighing the benefits of openness against the potential drawbacks such as disclosure of sensitive or unverified information.[48]

Relatedly, agencies should strive for transparency when addressing timeliness concerns, including the adoption of clear policies and procedures explained in accessible language.[49] Not only can a lack of transparency create confusion and result in unpredictable and unreliable adjudication, but it can discourage meaningful participation by interested parties.[50] Of course, transparency is "at once the oldest and newest idea" in adjudication.[51] Agencies balance the constitutional and statutory requirements promoting and limiting transparency in various

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[42] Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado, 239 U.S. 441 (1915); Goldberg v. Kelly, 397 U.S. 254 (1970); Londoner v. Denver, 210 U.S. 373 (1908); Mathews v. Eldridge, 424 U.S. 319 (1976).
[43] *see also*, *e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976-1977); Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 296 (2014); Martin H. Redish & Lawrence C. Marshall, A*djudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986); Normal W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L. Q. 261 (2021).
[44] *See generally* Thomas O. Sargentich, T*he Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (1984) (examining three ideals (rule of law, public purposes, and democratic process) that influence normative debates over administrative reform).
[45] Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions through Partnership with Experts and Agents*, 27 PACE ENTL. L. REV. 151, 172-177 (2009).
[46] Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).
[47] *C.f.*, 5 U.S.C. § 552b (Government in the Sunshine Act); 5 U.S.C. App. 2 § 11 (Federal Advisory Committee Act); 5 U.S.C. § 552a (Privacy Act); 5 U.S.C. § 552a(2)(A) (Freedom of Information Act); 44 U.S.C. § 3102 (Federal Records Act).
[48] Admin. Conf. of the U.S., Recommendation 2021-6, Public Access to Agency Adjudicative Proceedings,
[49] *See generally* Admin. Conf. of the U.S., Statement of Principles for the Disclosure of Federal Administrative Materials (rev. Nov. 2, 2022).
[50] Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J NAT'L ASS'N ADMIN. L. JUDICIARY 45, 97 (2011).
[51] *Cf.* Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11, 11 (2015).

contexts while at the same time staying nimble enough to ever-changing technological developments in governance.[52]

Included alongside considerations of participation and transparency is the core value of administrative efficiency. Administrative governance requires agencies to pursue their missions with enlightenment, equity, and maximum efficiency at minimum cost.[53] Developing a timely and effective adjudicative system requires a balance between considerations of administrative management and individualized justice.[54] As a result, contemporary adjudicative processes reflect decades of trial and error.[55] Many agencies have experimented with a variety of adjudicative systems in order to promote administrative efficiencies and to avoid inordinately time-consuming processes. These adjudicative systems have had varying successes in adhering to the ingredients of procedural due process.[56] Sensitivity to agency experience and expertise in this regard is essential when addressing timeliness concerns.

In addition to these constitutional values, Congress by statute can require agencies to act in particular ways.[57] These authorizations can, at times, be quite specific and affect an agency's flexibility to adjust its adjudicative processes. For example, before revoking or suspending the authority of a small business lending company, the Administrator of the Small Business Administration must serve an order to show cause and set a hearing to be held before an administrative law judge (ALJ) conducted pursuant to the provisions of 5 U.S.C. §§ 554, 556, and 557.[58] The statutes governing adjudication by the Department of Veterans Affairs (VA),[59] the U.S. Patent and Trademark Office (USPTO),[60] and the Executive Office for Immigration Review[61]—all conducted outside the APA's formal adjudication provisions—are quite detailed.

Relatedly, agencies must respect the decisional independence of many adjudicators, including ALJs. Due process considerations, general considerations of procedural fairness, statutes, and executive orders shape in important ways how agencies hire and manage adjudicators. With respect to ALJs, in particular, the APA regulates, among other things, how agencies appoint ALJs, supervise ALJs, assign duties and cases to ALJs, discipline ALJs and remove them from office, and communicate with ALJs regarding specific cases. Federal law also prohibits agencies from appraising the performance of ALJs and awarding performance incentives to ALJs.[62] Such authorities clearly restrict the ways in which agencies can and should respond to timeliness concerns, and agency experimentation with managerial initiatives to

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[52] Cary Coglianesse & David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1 (2019).
[53] WOODROW WILSON, THE STUDY OF ADMINISTRATION (1887).
[54] JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR & NICHOLAS PARILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS (7th ed. 2014).
[55] Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on Ossifying the Adjudication Process*, 55 ADMIN. L. REV. 787, 798-99; 815 (2003); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143 (2019).
[56] Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 759-771 (1976).
[57] M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1387-88; 1409 (2004).
[58] 15 U.S.C. § 650(f)(1).
[59] 35 U.S.C. pt. 1.
[60] 38 U.S.C.
[61] 8 U.S.C. § 1229a.
[62] 5 U.S.C. §§ 554(d)(2); 5372; 7521. *See also* Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 874-77 (2019).

promote quality and efficiency through robust oversight of adjudicators has sometimes resulted in litigation.[63] Ensuring timeliness in adjudication requires striking a "delicate balance" between managing the implementation of an agency's statutory duties and preserving the decisional independence of administrators.[64]

Yet even within relatively stringent statutory directives, agencies make important procedural and managerial decisions that affect the timeliness of adjudication. Agencies and their adjudicators carefully consider whether and how to conduct hearings within statutory constraints, including those imposed by the APA. More broadly, the presence and management of related processes—such as those for adjudicator assignment, prehearing conferences and settlements, discovery, intervention, case management, decision writing, and allocation of resources—can have important impacts.[65]

Congress occasionally has addressed timeliness specifically. In some contexts, Congress has explicitly required agencies to decide cases within certain time limits or set reasonable time limits for adjudication. The Merit Systems Protection Board (MSPB), for example, must decide actions involving discrimination within 120 days and publicly announce processing times for all other appeals.[66] Certain Medicare appeals must be decided within 90 days.

More generally, the APA directs agencies: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."[67] The APA also authorizes courts to "compel agency action . . . unreasonably delayed."[68]

Parties tired of awaiting long-delayed decisions on veterans' benefits, asylum and visas, and other matters have sought relief in the courts. Parties have had some success in programs in which Congress has imposed a statutory time limit on agency decision making. Statutory time limits are relatively rare, though, and as mentioned earlier, ACUS has recommended that "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings."[69]

In programs where Congress has not imposed a time limit on an agency, parties have relied on due process; the APA; and the Mandamus Act, which authorizes courts "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the

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[63] *E.g.*, Association of Administrative Law Judges v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984); Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980). *See also* Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. Chi. L. Rev. 1187 (2019).
[64] L. Hope O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 594 (1985).
[65] *See* MORELL E. MULLINS, ADMIN. CONF. OF THE U.S., MANUAL FOR ADMINISTRATIVE LAW JUDGES (3d ed. 1993).
[66] 5 U.S.C. §§ 7701, 7702.
[67] 5 U.S.C § 555.
[68] 5 U.S.C. § 706.
[69] Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).

plaintiff."[70] Courts have dismissed many such suits, finding that they lack jurisdiction to decide them or that the parties failed to state a claim for which relief can be granted.[71]

In considering whether an adjudication is unreasonably delayed, courts often consider whether the agency has taken a patently unreasonable amount of time to make a decision, whether Congress has provided a timetable for agency decision making, whether delay is more tolerable (e.g., "in the sphere of economic regulation") or less tolerable (e.g., "when human health and welfare are at stake"), the likely effects of expediting delayed action on other agency activities, and "the nature and extent of the interests prejudiced by delay." To hold that agency action is unreasonably delayed, a court "need not find any impropriety lurking behind agency lassitude."[72]

Medicare appeals provide one context in which parties successfully have convinced courts to intervene. In 2014, the American Hospital Association and other entities sued the Department of Health and Human Services (HHS), requesting that a district court issue a writ of mandamus compelling the agency to work through the backlog of several hundred thousand appeals. Although the district court initially dismissed the case, the D.C. Circuit directed the district court to consider whether "compelling equitable grounds" existed to issue a writ of mandamus.[73] After additional litigation, the district court ultimately entered orders directing the agency to meet court-supervised deadlines for backlog reduction.

Parties have also succeeded in settling unreasonable delay claims after suing agencies. In early 2023, for example, the Department of Homeland Security agreed to expedite processing of certain dependent visa petitions by bundling them with adjudication of principals' petitions.[74]

2. Agency Mission, Policy, and Resources

In addition to constitutional and statutory requirements affecting administrative procedure, each agency's unique mission and policy environment affect both the pace of an agency's decision making and the measures the agency can feasibly adopt to address surges, backlogs, and delays. Balancing procedural accountability and organizational goals, while being sensitive to key actors in the administrative process (both within and outside of the agency), is an incredibly difficult task.[75] The complexity of administrative agencies' responsibilities and the

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[70] 28 U.S.C. § 1361.
[71] *See, e.g.*, Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012). *But see* Garcia v. DHS, 25 F.4th 430 (6th Cir. 2022); *see ALSO* AM. IMMIGR. COUNCIL & AM. IMMIGR. LAWS. ASS'N, DELAY ACTIONS IN THE ASYLUM CONTEXT: AVOIDING DISMISSAL AND PROVING THE CASE (2022); AM. IMMIGR. COUNCIL, AGENCY DELAY LITIGATION: OPPOSING A GOVERNMENT MOTION TO DISMISS (2019).
[72] Telecomm. Rsch. & Action Ctr. v. FTC, 750 F.2d 70, 80 (D.C. Cir. 1984) ; *see also* DANIEL T. SHEDD, CONG. RSCH. SERV., R43013, ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLY DELAY: ANALYSIS OF COURT TREATMENT 4–6 (2013).
[73] Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 192 (D.C. Cir. 2016).
[74] Rae Ann Varona, *DHS Reaches Permit, Visa Deal with Foreign Worker Spouses*, LAW360 (Jan. 23, 2023), https://www.law360.com/articles/1568247/dhs-reaches-permit-visa-deal-with-foreign-worker-spouses.
[75] William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004).

internal and external pressures on implementation mean that agencies must often pursue long-term organizational development within short-term time horizons.[76]

While every agency's policy environment is unique, striking the right balance in the face of short-term time horizons requires communication, realistic expectations, and a consistent adherence to principles of due process.[77] Carefully developed and thoughtfully executed adjudicative systems can help agencies attain this balance.[78] Attention to timeliness requires recognition of all stages of adjudication—from prefiling through appeals—and sustained information exchange both within the agency and between the agency and external stakeholders.

Well-crafted adjudicative processes also require a substantial commitment of agency resources.[79] Thus, in addressing timeliness in adjudication, agencies must be cognizant of their expertise, resources, and relationships[80] and sensitive to their capacity to deliver on their goals.[81] Understanding organizational capabilities and competencies is a key first step in any agency's attempt to tackle timeliness in adjudication, particularly in complex policy environments.[82]

Relatedly, any agency seeking to address caseload surges, backlogs, delays, or other timeliness concerns through organizational, procedural, or other changes must carefully consider the effects those changes will have on other values of administrative adjudication, including decisional quality and procedural fairness.[83] Organizational emphasis on timeliness and efficiency at the expense of other important adjudicative principles may affect negatively the procedural fairness and substantive accuracy of agency decision making.[84] Similarly, an allocation of agency resources towards improving timeliness may affect the agency's ability to

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[76] Robert L. Glicksman, David L. Markell & Justin Seview, *An Empirical Assessment of Agency Mechanism Choice*, 71 ALA. L. REV. 1039 (2020); Jean Hartley, John Benington & Peter Binns, *Researching the Roles of Internal-change Agents in the Management of Organizational Change*, 8 BRIT. J. MGMT. 61, 70 (1997).
[77] Xiaohu Wang, *Assessing Administrative Accountability: Results from a National Survey*, 32 AM. REV. PUB. ADMIN. 350 (2002).
[78] Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495 (2021).
[79] Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986).
[80] M. ERNITA JOAQUIN & THOMAS J. GREITENS, AMERICAN ADMINISTRATIVE CAPACITY: DECLINE, DECAY, AND RESILIENCE 5-6 (2021)
[81] DONALD F. KETTL, POLITICS OF THE ADMINISTRATIVE PROCESS 186 (7th Ed. 2018). *See also* Cody A. Drolc & Lael R. Keiser, *The Importance of Oversight and Agency Capacity in Enhancing Performance in Public Service Delivery*, 31 J. PUB. ADMIN. RSCH. & THEORY 773, 773-74 (2021); Sanjay K. Pandey & Stuart I. Bretschneider, *The Impact of Red Tape's Administrative Delay on Public Organizations' Interest in New Information Technologies*, 7 J. PUB. ADMIN. RSCH. & THEORY 113, 126-28 (1997).
[82] *See generally* Rhys Andrews, Malcolm J. Beynon & Aoife M. McDermott, *Organizational Capability in the Public Sector: A Configurational Approach*, 26 J. PUB. ADMIN. RSCH. & THEORY 239 (2016); Austin M. McCrea, *Can Administrative Capacity Address Wicked Problems? Evidence from the Frontlines of the American Opioid Crisis*, 52 ADMIN. & SOC'Y 983 (2020).
[83] David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 64-65 (2020); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1111 (2018).
[84] Jerry L. Mashaw, *Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 797-98 (1973-1974).

perform other important tasks.[85] Indeed, an agency's efforts to address delay in one aspect of its adjudicative process can result in increased delay elsewhere.[86]

I. OBJECTIVES, SCOPE, AND METHODOLOGY

Through this study, we attempted to identify factors that have contributed to caseload surges, backlogs, delays, and other timeliness concerns in administrative adjudication, and strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address timeliness in adjudication. This Part begins by defining "administrative adjudication" and "timeliness" before describing the methodology we used to survey factors affecting timeliness and measures to promote or improve it.

A. Defining Administrative Adjudication

The APA defines "adjudication" broadly as "any agency process for the formulation of an order" and an "order" as any agency action that is not a "rule."[87] Like most researchers, we address a narrower set of processes, namely those that result in "a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program."[88]

For purposes of this report, we exclude several types of processes that might be considered "adjudication" under the APA's broad definition. First, we do not address processes for making "policy implementation" decisions, such as

> priority setting, maintaining databases, allocating funds between programs, closing a post office, approving state Medicaid rate adjustments, administering grant-in-aid programs managed by states, managing public institutions such as hospitals or prisons, conducting environmental impact assessments, making decisions involving multiple uses of public lands, designating . . . public lands as national monuments or prohibiting mineral extraction, siting airports or power plants, and protecting habitats of endangered species.[89]

Second, we do not address processes by which agencies receive and review complaints of legal wrongdoing from members of the public.[90] Although concerns about timeliness may arise with respect to both types of processes, such processes generally affect different interests, have different effects, and are procedurally and institutionally distinct.

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[85] *See, e.*g., Kristin E. Hickman, *Pursuing a Single Mission (Or Something Closer to It) For the IRS*, 7 COLUM. J. TAX L. 169 (2016).
[86] Daniel L. Nagin, *Goals v. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50, 71-72 (2015).
[87] 5 U.S.C. § 551.
[88] MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019).
[89] *Id*. at 9–10.
[90] Complaint processing may lead, of course, to the initiative of an administrative enforcement action, which is adjudication for our purposes.

Administrative adjudication, as we define it here, exhibits enormous diversity. Substantively, some adjudications are conducted to determine whether an applicant is eligible for a benefit, license, permit, grant, loan, patent, visa, certification, or other entitlement. Some adjudications are conducted to determine whether a regulated entity has violated the law and, if so, what consequences attach. Some adjudications involve conflicting claims by multiple private parties.

Procedurally, administrative adjudications follow processes situated anywhere on a spectrum between adversarial and inquisitorial. They may resemble judicial proceedings, be distinctly bureaucratic in nature, or exist somewhere between those two poles. The processes used at different stages or levels of an overall adjudication process often vary considerably from one another. These and other factors can have important consequences for timeliness, options for promoting or improving timeliness, and the effectiveness of improvement initiatives.

Several ACUS recommendations distinguish between processes that consist of a legally required evidentiary hearing ("Type A" and "Type B") and those that do not ("Type C").[91] Some scholars also distinguish between "executive" or "frontline" decisions and more formal decision-making processes.[92] For several reasons, we do not draw these distinctions for purposes of this report. First, many agency processes that are universally recognized as adjudicative in nature are, as a practical matter, appeals from less formal processes. Efforts to promote timeliness systemwide often focus on these earlier stages.[93] Second, parties typically perceive "timeliness" as the time spent awaiting a final decision by the agency as a whole, not time spent at an individual stage of a multistage process.

Additionally, the widespread organization of administrative adjudication into multistage processes might itself be a strategy for promoting timeliness. Decision making in many programs includes three key stages: (1) a bureaucratic process managed by agency employees, (2) an opportunity for a trial-like hearing before an ALJ or similar official, and (3) an opportunity for administrative review by a Senate-confirmed official or another official exercising delegated review authority. Structuring adjudication in this way may enable agencies to resolve relatively simple cases quickly and inexpensively through less judicialized processes and reserve more time-consuming and resource-intensive trial-like processes for more complicated cases.

Therefore, we consider all stages—from initiation to final disposition, including any opportunities for hearing and administrative review—to constitute a single, overall process of agency adjudication. Admittedly, most of our case studies examine programs in which there is, at some stage, an opportunity for an evidentiary hearing. Many of the principles we identify will apply more broadly, however.

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[91] *See, e.g.*, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

[92] *See, e.g.*, Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 Wash. U. L. Rev. 377, 382–83 (2021); MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8–9 (2019), Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 108–09 (2003).

[93] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 87-6, *State-Level Determinations in Social Security Disability Cases*, 52 Fed. Reg. 49,142 (Dec. 30, 1987).

B. Defining Timeliness

For at least two reasons, it is impossible to define "timeliness" in the abstract. First, the average time it should reasonably take to process a case will vary across case types, programs, and agencies. We see, for example, that record development is far more complex and time-consuming in some programs than in others depending on factors such as the nature, source, and volume of evidence needed to prove a fact; the role of the agency in developing the record; and the sophistication of parties in obtaining evidence.

Second, even within the same program or agency, different stakeholders may have different expectations for timeliness. Expectations are shaped by factors such as the importance of the decision to affected parties, the effects of prolonged wait times on affected parties, formal and informal communications from the agency, historical wait times in the program, and wait times in other programs with similar missions.

Although the definition of timeliness is contingent upon context, it is possible to identify internal agency and exogenous factors that contribute to the time it takes an agency to process a case and shape stakeholders' expectations for timeliness. Depending on the agency and program, these may include the time required to develop the evidentiary record fairly and accurately; provide adequate notice to affected parties; evaluate the record; provide affected parties the opportunity to review and respond to evidence, arguments, and findings; prepare and issue a decision; conduct inline quality assurance activities; and perform some or all of these tasks again, if needed, on reconsideration or appeal.

The time it takes an agency to adjudicate a case is largely also a function of the resources (e.g., funding, personnel, technology) available to the agency to handle the volume of cases it must adjudicate. Timeliness at an agency with 50 pending cases and one available adjudicator will look very different than timeliness at an agency with 100 pending cases and 100 available adjudicators.

It is important to note a few terms that often stand in as proxies for "timeliness." Concerns about timeliness are often expressed through terms such as "surge," "delay," and "backlog." A "surge" typically refers to a sudden increase in case receipts which, without additional resources or procedural changes, is likely to result in increased wait times. "Delay" typically refers to an increase in wait times over historical levels.[94]

There is no standard definition of what constitutes a "backlog," and it is important to pay attention to how different actors use the term in particular contexts. In some contexts, people use "backlog" to refer to the number of cases, or cases of a particular type or cases pending at a particular stage of an overall adjudication process, which have been pending longer than a certain period of time. That period of time is usually a target processing time, a historical case processing average, or some other period of time considered acceptable. In 2006, for example, USCIS defined "backlog" as "the number of pending applications that exceed acceptable or

[94] *See* Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335 (2019).

target pending levels for each case type."[95] In 2016, SSA defined "backlog" as "the extent to which the number of pending cases prevents us from meeting our timeliness expectations. We define the hearings backlog as the number of pending cases that push the average wait time over 270 days."[96] The Veterans Benefits Administration (VBA) defines its backlog as a subset of its overall claims inventory that "represents rating bundle claims that normally require a rating decision and have been pending for more than 125 days since receipt."[97]

In other contexts, people use "backlog" to refer to the number of cases pending during a period minus the number of cases completed or received during the same period. In 2004, for example, USCIS defined "backlog" as "the difference between pending and receipts for the number of months of target cycle time. (Backlog = Pending – Last Six Months' receipts)."[98] In many contexts, especially in media reports, people use "backlog" informally to refer simply to the number of cases awaiting a decision at a given time.[99]

Agency action that is delayed or backlogged is different than agency inaction. "Inaction" typically refers to circumstances in which an agency has the capacity to adjudicate a case but simply opts not to do so.[100]

It also worth noting that agencies sometimes lack the legal capacity to act. For example, statutes establishing multimember agencies typically include quorum requirements, and so a multimember agency that lacks a quorum of members may be unable to take action on a case. Thousands of petitions for review of lower-level decisions accumulated at the Merit Systems Protection Board between January 2017 and March 2022, when the Board lacked a quorum of Senate-confirmed members.

This report considers all of these interrelated proxies in its overall assessment of timeliness in agency adjudication. Inevitably, "surges" can lead to "delays." "Inaction" can influence "backlogs." Agencies seeking to address timeliness must understand, account for, and address each of these broad concerns.

C. Methodology

In preparing this report, we relied on primary and secondary sources that document administrative efforts to adjudicate in a timely and efficient manner.

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[95] U.S. CITIZENSHIP & IMMIGR. SERVS., BACKLOG ELIMINATION PLAN: FISCAL YEAR 2006, 3RD QUARTER UPDATE (2006), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/backlog_FY06Q3.pdf.

[96] SOC. SEC. ADMIN., LEADING THE HEARINGS AND APPEALS PROCESS INTO THE FUTURE: A PLAN FOR COMPASSIONATE AND RESPONSIVE SERVICE 3 (2016), https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf.

[97] *Veterans Benefits Administration Reports*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/reports/detailed_claims_data.asp (last visited Sep. 16, 2023).

[98] U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 95, at 8.

[99] *E.g.*, Jared Kofsky & Maia Rosenfeld, *"A Steady Deterioration": US Communities Face a Public Housing Crisis*, ABCNEWS (May 4, 2023); Lindy Kyzer, *The Staggering Numbers Behind the Security Clearance Backlog*, GOV'T EXEC. (Nov. 9, 2018).

[100] Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1402 (2011).

We began with a detailed review of government, academic, and other materials directly and indirectly related to timeliness in adjudication.[101] This encompassed an examination of federal government publications, including publicly available reports, audits prepared by the Government Accountability Office and inspectors general, congressional hearing transcripts, guides, statistics, agency and presidential budget materials, agency strategic plans and performance plans, and websites.

We also conducted a broad survey of scholarly work on adjudication, administrative performance, and organizational efficiency. Our review included examination of published and forthcoming research in, inter alia, law, public administration, public policy, economics, and political science. Finally, we supplemented this review with analysis from non-profit and good governance organizations, and occasionally with contemporaneous media coverage of backlogs. We stress that, while fairly wide-ranging, our examination is not intended to be a comprehensive literature review on the topic. Instead, the review was designed to provide theoretical context for our analysis of timeliness in adjudication.

Next, we conducted a series of ten detailed case studies based almost entirely on federal government publications and academic studies which exist in the public domain. These studies, all of which are available as appendixes to this report, examine:

- Department of Commerce [Appendix B]
- Department of Health and Human Services (Medicare coverage and payment) [Appendix C]
- Departments of Homeland Security and Justice (immigration) [Appendix D]
- Department of Labor (black lung benefits) [Appendix E]
- Department of Veterans Affairs (veterans disability compensation) [Appendix F]
- Equal Employment Opportunity Commission [Appendix G]
- Federal Energy Regulatory Commission [Appendix H]
- Merit Systems Protection Board [Appendix I]
- National Labor Relations Board [Appendix J]
- Social Security Administration [Appendix K]

In selecting cases, we followed contemporary best practices in qualitative analysis and sought a representative sample of adjudicative systems that contained useful variation on a variety of important dimensions.[102] When considering agencies for inclusion in our study, we contemplated, inter alia, agency mission, policy, and structure; the type of claims involved;[103] the

[101] While we consulted some works on timeliness in judicial decision making for background on delays and backlogs the context of executive-branch decision making, we largely constrained our review of the literature to research on administrative agencies.

[102] *E.g.*, Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research*, 61 POL. RSCH. Q. 294, 296 (2008).

[103] For example, a key difference in adjudicative systems is whether claims are brought solely against private parties. Shannon M. Grammel & Joshua C. Macey, *The Costs of Aggregating Administrative Claims*, 70 STAN. L. REV. ONLINE 123, 130 (2018).

amount of adjudication an agency performs annually;[104] and political attention to timeliness in the agency. Our case studies include adjudicative systems in executive departments, administrations, and regulatory commissions designed to administer benefits, perform licensing functions, and enforce regulatory schemes. Some of the selected systems are among the government's highest volume in terms of number of cases, and others have comparatively lower caseloads. Some are the subject of regular oversight regarding their progress addressing backlogs and others receive less public attention. In sum, our case selection strategy had the primary objective of exploring variance across an array of dimensions.

We also designed our studies to consider timeliness in both a program and organizational context. Compare, for example, our case studies of the black lung benefits program and the Department of Commerce. Our analysis of timeliness in the black lung benefits program in the Department of Labor (DOL) considers the three DOL subcomponents with primary responsibility for adjudicating claims filed by miners alleging disability due to coal worker's pneumoconiosis and eligible surviving family members. This case study does not address other programs administered by those subcomponents, such as the longshore program, nor does it consider programs administered by other DOL subcomponents. In contrast, our examination of adjudication in the Department of Commerce takes a more birds-eye view of timeliness from the perspective of departmental leadership. Instead of providing an in-depth analysis of any one program or agency subunit, the case study considers the challenges of promoting and improving timeliness across all programs and units.

As with our review of the literature, we stress that our case studies are not comprehensive treatises on timeliness in the programs or agencies we consider. Instead, they are simple narrative accounts of some of the challenges that have arisen across time as agencies engage in adjudication. These accounts provide qualitative context for considering timeliness in adjudication across the federal government.

To provide additional qualitative background, we also considered, in a more limited fashion, the experience of a variety of other agencies, including the Department of Defense, the Department of Housing and Urban Development, the Department of the Interior, the Department of the Treasury, the Environmental Protection Agency, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission.

Finally, we held a series of closed forums and informal discussions on the issue. These discussions included adjudicators, agency managers, and individuals who represent parties in agency proceedings. We found these discussions tremendously helpful for providing perspective based on the experiences of those who regularly work within the systems of our study.

Before examining the factors that affect timeliness in adjudication and the measures that can promote or improve timeliness, we want to take a moment to stress the immensity of the task before us. Each section and subsection of this report deserves its own detailed study and set of

[104] For discussions of the importance of acknowledging differences between high-volume adjudication and other types of adjudication, *see* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1103 (2018); Daniel L. Skoler, *The Many Faces of High-Volume Administrative Adjudication: Structure, Organization, and Management*, 16 NAT'L ASS'N ADMIN. L. JUDGES 43, 45 (1996).

recommendations. We recognize that this report only scratches the surface and hope that our identification of key issues in timeliness in adjudication prompts additional research.

II. FACTORS AFFECTING TIMELINESS IN ADJUDICATION

Many factors affect the timeliness of agency adjudication, and the causes underlying concerns about timeliness are varied and complex. In part because of the complexity of factors that affect timeliness in adjudication, few studies have embarked upon a comprehensive assessment of the successful measures agencies across the federal government have adopted to promote or improve timeliness.

Our review of the literature and our series of case studies over time and agencies recognizes this complexity and utilizes them to identify common themes as agencies successfully tackle backlogs and delays in adjudication. While we cannot hope in this report to address all factors that have affected or might affect timeliness across agencies, we identify several common factors in this Part: (a) program startup and jurisdictional expansion, (b) agency structure, (c) program structure, (d) resource levels, (f) program integrity, and (g) changes in the policy environment.

All of these factors vary both across and within agencies. For example, backlogs in processing employment discrimination, immigration, patent, and veterans benefits cases often vary by geographical location or claim type.[105] In environmental and healthcare adjudication processes, differential challenges in promoting program integrity across all actors and programs can create operational difficulties that may lead to delays.[106] Successful management of timeliness in adjudication requires agencies to account for the interplay between these factors.

A. Program Startup and Jurisdictional Expansions

Many agencies inherit timeliness problems from other agencies and programs. Indeed, the creation of a new agency or transfer of new authority to an existing agency often is a response to prior administrative failures.[107] In this way, reorganization is intended to promote more effective and efficient policy implementation.[108]

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[105] *E.g.*, Jessica L. Gustafon & Abby Pendleton, *Medicare Appeals Adjudication Delays: Implications for Healthcare Providers and Suppliers*, 26 HEALTH LAW. 26, 29 (2014); Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1206 (2016); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1647 (2010); David Popp, Ted Juhl & Daniel K.N. Johnson, *Time in Purgatory: Examining the Grant Lag for U.S. Patent Applications*, 4 TOPICS IN ECON. ANAL. & POL'Y 1 (2004); U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (1976).

[106] E.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-266, MEDICARE FEE-FOR-SERVICE: OPPORTUNITIES REMAIN TO IMPROVE APPEALS PROCESS (2016).

[107] ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. POL. 89, 91 (2002).

[108] *See generally* PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905-1996 (2nd. Ed. 1998)

While implementation problems are identified clearly in the lead up to restructuring, solutions to those problems rarely are.[109] For example, the Federal Energy Regulatory Commission (FERC) was created as a replacement for the Federal Power Commission (FPC)—an independent regulatory agency originally established in the 1930s to help regulate hydroelectric projects, electric utilities, and natural gas—after the FPC had exhibited a "conscious disregard" of its responsibilities.[110] In the transition of adjudication from the FPC to FERC, FERC had to make fundamental changes to the old adjudicative systems to develop methods of handling the agency's workload and increase efficiency.[111]

The experience of FERC over the next few decades illustrates that agencies face a broad array of operational and management challenges when they inherit existing programs. As explained by Professors Berry, Burden, and Howell in their work on the lives and deaths of federal programs,

> The situation, we suggest, is like that of a person who inherits an old house . . . [S]he must decide whether to accept the house as it currently stands, to begin minor or major renovations, or to tear down the house and build a new structure. The likelihood of each of these actions is determined by both the costs involved and the similarity in preferences between the original builder of the structure and its current inhabitant.[112]

These decisions require a comprehensive strategy with clear goals and timelines for implementation; absorbing the new program typically is a more laborious process than anticipated.[113]

Relatedly, Congress regularly delegates new authority to agencies. [114] This requires an agency to perform a balancing act and can lead to backlogs and delays as the agency seeks to address its new mandate while managing preexisting duties.[115] During the implementation of a new program, there often is an increase in employee confusion over workflow patterns and

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[109] James G. March & Johan P. Olson, *Organizing Political Life: What Administrative Reorganization Tells Us about Government*, 77 AM. POL. SCI. REV. 281, 288, 291 (1983).
[110] House Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, Federal Regulation and Regulatory Reform, 94th Cong., 2nd Sess. 420 (1976).
[111] Mark L. Kerrigan, *Decision Making in the Management of Energy Regulation*, 39 PUB. ADMIN. REV. 553, 553-54 (1979).
[112] Christopher R. Berry, Barry C. Burden and William G. Howell, *After Enactment: The Lives and Deaths of Federal Programs*, 54 AM. J. POL. SCI. 1, 4 (2010)
[113] Charles R. Wise, *Organizing for Homeland Security*, 62 PUB. ADMIN. REV. 131, 139 (2002); Charles R. Wise, *Organizing for Homeland Security after Katrina: Is Adaptive Management What's Missing*, 66 PUB. ADMIN. REV. 302, 306 (2006).
[114] *See* Pamela J. Clouser McCann & Charles R. Shipan, *How Many Major U.S. Laws Delegate to Federal Agencies? (Almost) All of Them*, 10 POL. SCI. RSCH & METHODS 438 (2022) (finding that more than 99% of major laws delegate new policy authority to administrators in federal agencies).
[115] Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 8 (2009). *See also* Young Han Chun & Hal G. Rainey, *Goal Ambiguity in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RSCH. & THEORY 1 (2005) (discussing variation in the number of policy goals an agency must address during the implementation process).

objectives and how adjudicative tasks connect to the agency's overall goals and priorities.[116] Additionally, if new authority is delegated without a corresponding increase in resources to expand an agency's capacity (as often is the case), implementation problems tend to develop in some or all agency programs as the agency becomes overloaded and overall performance suffers.[117]

B. Agency Structure

An agency's organizational features can influence its ability to adjudicate in a timely manner. Aspects of an agency's structure such as its size, complexity, degree of centralization and hierarchy, and formalization of standard operating procedures not only can influence performance but also can result in differing organizational values and preferences within the agency.[118] For example, valuable time can be lost as investigators struggle to navigate large and complex organizational structures to obtain the information and approvals necessary for enforcement. Similarly, a lack of standard operating procedures with respect to an agency's pre-hearing, hearing, and decision practices can result in variation and delay as adjudicators proceed through the adjudication process. While the next subsection discusses the effects of process on timeliness, this subsection highlights three common structural features that contribute to backlogs and delays in adjudication.

1. Size and Multiplicity of Goals

Although all agencies must balance the performance of many tasks at once, some agencies have less concentrated operational missions than others. Compare, for example, the Chemical Safety and Hazard Investigation Board (CSB) and the Department of Commerce. The CSB's mission is to investigate (or cause to be investigated) and to determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release of chemicals resulting in fatality, serious injury or substantial property damages.[119] The agency employs approximately 32 people[120] and, as of October 1, 2023, has six open investigations.[121] In contrast, the Department of Commerce is tasked with fostering, promoting, and developing foreign and domestic commerce.[122] The agency employs over 48,000

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[116] Christopher Carrigan, *Unpacking the Effects of Competing Mandates on Agency Performance*, 78 PUB. ADMIN. REV. 669, 670 (2018); Robert S. Montjoy & Laurence J. O'Toole, Jr., *Toward a Theory of Policy Implementation: An Organizational Perspective*, 39 PUB. ADMIN. REV. 465 (1979).
[117] Christoph Knill, Yves Steinebach & Dionys Zink, *How Policy Growth Affects Policy Implementation: Bureaucratic Overload and Policy Triage*, J. EUR. PUB. POL'Y 2 (2023).
[118] Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION 1 (Luther Gulick & L. Urwick, eds., Rumford Press 1937); HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1960); George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRES. STUD. Q. 74 (2009); HAL G. RAINEY, UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS 216-17 (5th Ed. 2014); John T. Scholz & Feng Heng Wei, *Regulatory Structure in a Federalist System*, 80 AM. POL. SCI. REV. 1249 (1986); Andrew B. Whitford, *Decentralized Policy Implementation*, 60 POL. RSRCH.Q. 17 (2007).
[119] 42 U.S.C. § 7412(r)(6)(C).
[120] Office of Personnel Management, *FedScope Employment Cubes* (March 2023).
[121] Chemical Safety Hazard and Investigation Board, Current Investigations, https://www.csb.gov/investigations/current-investigations/?Type=1 (last accessed Oct. 1, 2023).
[122] 15 U.S.C. § 1512

people who work across 13 bureaus, each with its own set of tasks.[123] Just one of those bureaus, USPTO, processes over a million patent and trademark applications each year.[124] Given this variation in operational mission and agency size, ensuring timely adjudication likely is a much more complicated endeavor for the Department of Commerce than for CSB.

Simply put, it can be easier to achieve organizational efficiency if an agency has a cohesive set of functions. Uneven performance in agencies such as the Department of Commerce often can be traced to its diverse duties.[125] Multiple-purpose agencies must work hard to promote collaboration across organizational units and mitigate conflicts that may arise as different units operate under different time constraints and policy environments under limited resources.[126]

Furthermore, because of their varying sizes, agencies across the federal government face different administrative challenges when adjudicating.[127] While bigger agencies tend to have more resources and can accumulate more knowledge in the aggregate, they also tend to serve larger populations and likely contain more subunits that can complicate coordination. In contrast, smaller agencies are more likely to have a more cohesive set of employees and be more flexible, but they may have to manage with significantly fewer resources. Thus, organizational size is an important factor in considering administrative effectiveness.[128]

2. Decentralization

Agencies often respond to their varying task environments with decentralization. By creating smaller, more focused administrative units, agencies look to improve organizational performance. For example, in the 1980s, the Nuclear Regulatory Commission (NRC) transferred its inspection and enforcement authority from agency headquarters to field offices to create organizational units that were better able to respond to NRC's varying task environments across different regions of the country.[129]

However, agencies that choose or are statutorily required to create regional offices often wrestle with the role of those offices in the adjudicative process and how to allocate resources given the offices' varying workloads.[130] The precise variation in environment that prompts the development of field offices can create inefficiencies and slow down adjudication. These inefficiencies result from managerial investment of time and effort in understanding of how each

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[123] Office of Personnel Management, *FedScope Employment Cubes* (March 2023).
[124] U.S. Patent and Trademark Off., FY2024 Annual Performance Plan and FY 2022 Annual Performance Report (2023); U.S. Patent and Trademark Off. U.S. Patent Statistics Chart, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm..
[125] David. A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1469-70 (2014).
[126] *See generally* CHRISTOPHER CARRIGAN, STRUCTURED TO FAIL? REGULATORY PERFORMANCE UNDER COMPETING MANDATES (2017).
[127] *See* Fariborz Damanpour, *Organizational Size and Innovation*, 13 ORG. STUD. 375 (1992).
[128] Chan Su Jung, *Navigating a Rough Terrain of Public Management; Examining the Relationship between Organizational Size and Effectiveness*, 23 J. PUB. ADMIN. RSCH. & THEORY 663, 678 (2013).
[129] Andrew B. Whitford, *Decentralization and Political Control of the Bureaucracy*, 14 J. THEORETICAL POL. 167, 185 (2002).
[130] *See, e.g.*, Giovanni Patti & Peter Robau, *SEC Regional Offices*, 18 N.Y.U. J.L. & BUS. 471 (2022) (describing the Security and Exchange Commission's challenges in balancing the benefits and drawbacks of regional administration).

office operates and safeguarding consistent process across all offices,[131] allocating administrative and adjudicative responsibilities appropriately,[132] and ensuring that all administrators have appropriate training and buy-in to agency initiatives to improve decision timeliness and quality.[133]

Additionally, it can be difficult for an agency to satisfy timeliness goals while maintaining quality across all offices due to the difference in complexity of cases across regions. When adjudicators operate in the field, the differential factors that influence their decision making may result in a lack of uniformity. Agencies often attempt to eliminate this variation through practice manuals and performance targets, with varying levels of success.[134] The National Labor Relations Board (NLRB) provides a nice example. While headquarters staff identified and successfully worked towards the elimination of backlogs and delays in the aggregate, regional offices reported that the same emphasis on timeliness incentivized adjudicators in some field offices to direct resources towards cases that were less likely to have merit while more meritorious cases idled in the docket.[135]

3. Layers of Hierarchy

Closely related to considerations of decentralization in agency operations is the degree of hierarchy in the adjudicative process. Agencies tend to organize themselves both horizontally (distributing workload across many units at the same level, often because of geographical, programmatic, or process concerns) and vertically (distributing workload throughout a chain of command).[136] Vertical distribution of authority throughout layers of an agency's hierarchy is intended to promote efficiency by enabling administrators to capitalize on their roles in the implementation process.[137]

Notably, many agencies have established intermediate review boards to dispose of routine cases that do not raise significant issues of regulatory or administrative policy.[138] These boards

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[131] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 60-61 (1976); U.S. GEN. ACCOUNTABILITY OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 13-15 (2022).
[132] Russell L. Weaver, *Management of ALJ Offices in Executive Departments and Agencies*, 47 ADMIN. L. REV. 303, 310 (1995).
[133] Gerald Zeitz, *Employee Attitudes Toward Total Quality Management in an EPA Regional Office*, 28 ADMIN. & SOC'Y 120 (1996).
[134] Evelyn Z. Brodkin, *Bureaucracy Redux: Management Reformism and the Welfare State*, 17 J. PUB. ADMIN. RSRCH. & THEORY 1, 2, 10 (2007).
[135] U.S. GEN. ACCOUNTABILITY OFF., GAO-21-242, NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 28 (2021).
[136] Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick & L. Urwick, eds., Rumford Press 1937).
[137] Laurence E. Lynn, Jr., & Wobbie Waters Robichau, *Governance and Organizational Effectiveness: Towards a Theory of Government Performance,* 33 J. PUB. POL'Y 201 (2013) (highlighting the importance of hierarchical authority for administrative performance).
[138] Donald J. Berkemeyer, *Agency Review by Intermediate Boards*, 26 ADMIN. L. REV. 61 (1974); Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 998 (1990).

and similar review procedures are often intended to make more efficient use of agency time and resources and to help eliminate delay in the administrative process.[139] Some studies suggest they have had mixed success in doing so.[140] In some cases, intermediate review can result in additional adjudicative delays or simply shift timeliness concerns from one part of an agency to another.[141]

In part, this is because each layer of internal review before an agency action becomes final introduces additional consequential decision points and personnel.[142] Increasing layers of hierarchy can diffuse accountability, slow administrative routines, and generally contribute to decisional inertia.[143] Recognizing and accounting for these tradeoffs is an important part of the organizational design process.[144] When agencies adopt internal review without accounting for the secondary effects such review will have on the agency's ability to process cases in a timely manner, backlogs and delays can increase.[145]

C. Program Structure

Just as an agency's organizational features can influence its ability to adjudicate in a timely manner, the characteristics of the program of which adjudication is a part affect how quickly an agency is able to process and decide cases. While these characteristics are numerous, we highlight four that have the most impact on timeliness in adjudication: (1) claim type, (2) population served, (3) reliance on other organizational units, and (4) adjudicative process and standards.

1. Type of Claim

The types of claims that an agency adjudicates affect the speed at which the agency can make a decision. Some adjudicative processes evaluate property rights, whereas others consider liberty interests.[146] Some processes are initiated by government actors, others are initiated by private parties, and the modes by which government actors and private parties participate differ accordingly.[147] Some issues requiring adjudication involve extensive and frequently contested

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[139] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973).
[140] Jeffrey S. Lubbers, *Management of Federal Agency Adjudication*, 12 J. NAT'L ASS'N ADMIN. L. JUDGES 112, 141 (1992).
[141] George Ernest Marzloff, *Delay in Review of Initial Decisions: The Case for Giving More Finality to the Findings of Fact of the Administrative Law Judge*, 35 WASH. & LEE L. REV. 393, 403-04 (1978)
[142] U.S. GEN. ACCT. OFF., FPCD-78-25, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED 10 (1978).
[143] PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 64, 86 (1995)
[144] Thomas H. Hammond & Paul A. Thomas, *The Impossibility of a Neutral Hierarchy*, 5 J. L. ECON. & ORG. 155, 158 (1989) (finding that an agency's hierarchical structure affects the choices made by administrators and, therefore, that organizational design decisions involve tradeoffs).
[145] S. COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION: DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 95-72, 95TH CONG. (1972).
[146] A GUIDE TO FEDERAL AGENCY ADJUDICATION 10-18 (Michael Asimow, ed., Am. Bar Assoc. 2003).
[147] *E.g.*, Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

fact finding, some more typically involve disputes over the application of legal principles to specific facts. Others are routine and easily resolved without dispute.

These factors influence timeliness in a variety of ways. Licensing decisions, for example, may require a significant investment of agency time and resources to understand the nature of the application and to assess and analyze evidence. Backlogs and delays can occur when an adjudicator must wait for site visits, environmental assessments, and examinations. In contrast, adjudicative processes that require hearings may involve less agency investment in terms of information collection but include a variety of stages, each requiring their own time and resources to provide quality decision making. Timeliness issues can arise from late interventions, the need to address prehearing motions, complex docket management, and many other factors.

Even within the same program, the time and resources required to successfully adjudicate claims can vary.[148] Some types of cases are more complex and require greater technical expertise. [149] For example, DNA sequencing patent applications are much more expensive and take additional time for USPTO to evaluate than semiconductor patent applications.[150]

Even holding constant the expertise required for evaluation, some claims are more complex due to variation in the facts or circumstances of specific cases. Consider the experiences of USCIS adjudicators when evaluating claims for asylum. USCIS adjudicators face widely different claims for protection, often from persons who lack representation, may not be able to express themselves clearly in a legal proceeding, come from traditions and cultures that may differ substantially from the adjudicator, and have varying abilities to meet evidentiary standards.[151] Each of these things can add to the length of time it takes to conclude an adjudication fairly and accurately.

2. Population Served

As the example of variation in asylum cases demonstrates, the population an agency serves is closely related to the types of claims the agency adjudicates and can affect timeliness.[152] For example, when an agency serves those who have limited access to representation, adjudicators may have to spend time explaining the administrative process,

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[148] Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum System*s, 81 IOWA L. REV. 671, 674-75 (1996).
[149] Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: Case Study of FERC Dam Relicensing*, 22 J. L. ECON. & ORG. 258, 261 (2006); Nicola Ulibarri, *Does Collaboration Affect the Duration of Environmental Permitting Processes*, 61 J. ENV'T PLAN. & MGMT. 617 (2018)
[150] Eliot Marshall, *Patent Office Faces 90-Year Backlog*, 272 SCIENCE 643 (1996); Sean Tu, *Understanding the Backlog Problems Associated with Requests for Continued Examination Practice*, 13 DUKE L. & TECH. REV. 216, 231 (2014-2015).
[151] Philip H. Schrag, Jaya Ramhi-Nogales & Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOWARD L.J. 1, 10-11; 43-46 (2023).
[152] Sarah E. Anderson, Andrew J. Plantinga & Matthew Wibbenmeyer, *Inequality in Agency Response Evidence from Salient Wildfire Events*, 85 J. POL. 625 (2023); Daniel E. Chand, William D. Schreckhis & Marianne L. Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 27 J. PUB. ADMIN. RSRCH. & THEORY 182, 189-90 (2017).

figuring out legal parameters of claims, helping parties to develop the evidentiary record, or even addressing simple mistakes made on the variety of forms required to initiate adjudication.[153]

On the flip side, access to representation does not necessarily equate to ease in adjudication. Many agencies experience delays due to strategic action on the part of regulated parties. This is particularly true when adjudication has significant direct or indirect economic effects. In such instances, counsel may engage in strategic obstruction or delay through repeated procedural and substantive motions, objections, and the like.[154]

One underappreciated aspect of administration adjudication that impacts timeliness is the geographical distribution of regulated parties and interested persons. Certainly, this factor has been raised in the context of the distribution of benefits across the states and territories of the United States. Yet agencies increasingly must contend with the practical realities of a global, interconnected world. Globalization, by definition, has impacted both economic and social interactions and poses significant challenges for administrative adjudication.[155] Many agencies experience difficulties navigating the complexities of globalization—from discerning the economic, environmental, and security effects of a regulated entity's operations and accounting for the legal requirements imposed by other countries and international bodies, to tracking the movement of peoples, ideas, and goods across borders, to discerning the appropriate procedures to uphold statutory mandates, due process, and democratic accountability.[156] Statutory mandates, administrative procedures, and annual appropriations rarely account for or even recognize these continuously evolving challenges. As a result, adjudicators often are forced to slow decision making to develop strategies to obtain information across international borders and develop the processes necessary for quality decision making in an increasingly interconnected world.

3. Reliance on Other Organizational Units

Adjudication sometimes requires agencies to coordinate with and account for multiple subunits within the agency or even with other entities outside of the agency. Administrative determinations of the legality of imported and exported drugs are illustrative.[157] Federal law authorizes the Secretaries of Health and Human Services (HHS) and the Treasury to investigate and refuse admission of certain drugs into the country.[158] Through a complicated web of procedural delegations, the U.S. Customs and Border Protection (within the Department of Homeland Security) and the Food and Drug Administration (FDA, within HHS) have primary responsibility for these determinations, with the FDA having authority to conduct hearings on the matter.[159] Understandably, the complicated web of subdelegation and diffusion of responsibility

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[153] *E.g.*, Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1398 (2011); Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, 44 REGULATION 30, 34 (2021).
[154] *See, e.g.*, Donald K. Duvall, *Adjudication under Statutory Time Limits: The ITC Experience*, 32 ADMIN. L. REV., 733, 738 (1980) (providing an account of the hearing process at the International Trade Commission).
[155] Alfred C. Aman Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 IND. J. GLOBAL LEGAL STUD. 125 (2003).
[156] *See generally* Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695 (2005).
[157] Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 842 (2015).
[158] 21 U.S.C. § 381.
[159] Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 842 (2015).

across and within these agencies makes timely decision making much more arduous than in statutory and administrative schemes that involve one agency or agency subunit.[160]

HHS and Treasury are not alone in this regard. Many agencies' adjudicative processes rely on information or coordination from other governmental entities. In making hydropower licensing decisions, for example, FERC consults with its own regionally distributed branches, state agencies, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration.[161] Not only does this increase the number of participants and decision points in the adjudicative process, but the resulting coordination and communication costs associated with decision making can lead to adjudication backlogs and delays.[162]

4. Adjudicative Process and Standards

Within constitutional and statutory parameters, agencies establish processes for adjudicating claims. Agencies take the type of claims, populations served, and their need to coordinate with other organizational units into account when they develop their processes for adjudicating. In crafting their adjudicative systems, all agencies strive to secure fair, accurate, consistent, expeditious, and efficient decision making.[163] Yet achieving all of these goals simultaneously is difficult. Sensitivities to the nature and structure of the programs agencies implement often can contribute unintentionally and indirectly to problems in timeliness.

The standards for filing, settling, resolving, and reviewing cases help agencies pursue rule of law goals but also take time.[164] Consider, for example, agency procedures regulating intervention in adjudicative proceedings. Intervention by interested parties can provide agencies with information useful in assuring responsive and responsible decisions and even ease enforcement of administrative programs.[165] However, the number and timing of interventions can also prolong proceedings, in large part because intervenors often introduce voluminous amounts of evidence and raise new issues late in proceedings.[166] Several agencies have struggled

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[160] For a discussion of the complexities and implications of subdelegation, *see* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945 (2023); Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017).

[161] Brenda M. Pracheil, Aaron L. Levine, Taylor L. Curtis, Matthew S.P. Aldrovandi, Rocío Uría-Martínez, Megan M. Johnson & Timothy Welch, *Influence of Project Characteristics, Regulatory Pathways, and Environmental Complexity on Hydropower Licensing Timelines in the US*, 162 ENERGY POL'Y 1, 6-7 (2022).

[162] JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION 118 (3d Ed. 1984). *See, e.g.*, Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 815-819 (2015) (discussing multi-agency administrative adjudication processes the difficulties arising from an inability to coordinate effectively)..

[163] This includes considerations of influences on the process resulting from congressional, presidential, or other political relationships. Nicholas R. Bednar, *The Public Administration of Justice*, CARDOZO L. REV. (2023); Sanjay K. Pandey & Stuart I. Bretschneider, *The Impact of Red Tape's Administrative Delay on Public Organizations' Interest in New Information Technologies*, 7 J. PUB. ADMIN. RSCH. & THEORY 113, 119 (1997); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1395-97 (2011).

[164] *See* Roger Crampton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972); Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647 (2008).

[165] Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972).

[166] *Id*. at 382. *See also* U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION 35 (1980); Letter from

with the fact that some parties may benefit from a slower administrative process (either for strategic reasons or as a result of increased accuracy in decision making) than from increased speed.[167]

D. Resource Levels

An agency's capacity to decide cases in a manner that is timely and consistent with other values of administrative adjudication, adapt to changed circumstances, and address timeliness concerns depends heavily on the resources at the agency's disposal. As discussed in the following subsections, resources include funding, personnel, and information technology (IT).

1. Funding

Agencies have limited financial resources and thus make consequential choices regarding how best to marshal those resources in implementing the authority delegated to them. This can be a zero-sum game, as scarce resources force agencies to pick and choose; every choice about where to direct agency attention is also a choice about where *not* to direct attention.[168] This may seem an obvious observation but we warn against ignoring appropriations altogether or simply folding them into background considerations of adjudicative processes.[169] Funding levels have wide-ranging, underappreciated, and underexplored impacts on agency implementation of delegated authority.

That said, because the vast majority of agencies find their annual funding levels externally imposed,[170] our considerations of timeliness in adjudication hold funding levels constant. Put another way, we take as a given that agencies do not always have the financial resources required to perform all of the tasks delegated to them effectively. We then proceed to explore additional reasons for and solutions to issues of timeliness in adjudication.

2. Personnel

In addition to funding levels, the absence and frequent turnover of agency leadership can cause real problems for administrative performance.[171] As explained by former NLRB Chair John C. Truesdale:

Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 14-15 (February 13, 1979).

[167] Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: Case Study of FERC Dam Relicensing*, 22 J. L. ECON. & ORG. 258, 260 (2006)

[168] FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993); Amber E. Boydstun, Shaun Bevan & Herschel F. Thomas III, *The Importance of Attention Diversity and How to Measure It*, 42 POL'Y STUD. J. 173 (2014); SAMUEL WORKMAN, THE DYNAMICS OF BUREAUCRACY IN THE U.S. GOVERNMENT: HOW CONGRESS AND FEDERAL AGENCIES PROCESS INFORMATION AND SOLVE PROBLEMS (2015); Jian-Hua Zhu, *Issue Competition and Attention Distraction: A Zero-Sum Theory of Agenda-Setting*, 69 JOURNALISM Q. 825 (1992).

[169] *See generally* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021).

[170] JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 107-110 (2018).

[171] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 938 (2008).

> Why did it take so long (or if the case is still pending, why *is* it taking so long) [for the agency to adjudicate]? . . . Over the last 20 years, the Board has been at its full five-member strength only about 40 percent of the time. And many of the Board members who served during that period had less than full terms as recess appointees in the absence of a confirmed nominee. The result is that no fewer than 25 people have served as Board members during that period, 30 if appointees such as myself are counted for each time they were given a separate, nonconsecutive appointment. The problem is not unique to the NLRB.[172]

A consistent theme across all agencies is that the inefficiencies, uncertainties, and constraints that arise from this sort of turmoil have real effects on the job experiences of federal adjudicators and agencies' overall ability to make decisions in a timely manner.[173] Not only does absence of and turnover in leadership affect the ability of an agency to take final administrative action, but as a result of these disruptions, administrators lower in an agency's hierarchy may lack guidance, receive conflicting directives, or need to take on additional responsibilities.[174]

These concerns extend beyond agency leadership. A lack of personnel and frequent turnover in an agency fosters timeliness problems because these occurrences represent lost human capital and affect an agency's ability to manage its caseload.[175] Consider, for example, the difference between initial application decisions and appeals. Adjudicators who process applications for licenses, permits, benefits, or services must possess a high level of substantive expertise in their respective fields and nimbly apply that knowledge to the specifics of each case.[176] The ability to engage in quality fact finding is paramount. Adjudicators who hear administrative appeals must have substantive expertise and frequently must be familiar with a wide array of agency actions and the corresponding policies that guide those actions.[177] These adjudicators must apply issues of law to a variety of cases within the agency's jurisdictional mission. Recruiting and retaining adjudicators across both skill sets is challenging, and vacancies across an agency in either type of position can affect the agency's ability to adjudicate in a timely manner.

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[172] John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1, 1; 4 (2000).
[173] *See* Morgen Johnasen, *The Impact of Managerial Quality on Employee Turnover*, 15 PUB. MGMT. REV. 858 (2013).
[174] Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies,* 64 DUKE L.J. 571 (2015); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 938 (2008); Kathryn Dunn Tenpas, *White House Staff Turnover in Year One of the Trump Administration: Context, Consequences, and Implications for Governing*, 48 PRES. STUD. Q. 502 (2018).
[175] *See* Stuart L. Lustig, Niranijan Karnik, Kevin Delucchi & Lakshika Tennakoon, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIG. L.J. 57, 60 (2008) (finding administrative judges reported more burnout than any other group of professionals, including prison wardens and physicians in busy hospitals); Edward J. Schoenbaum, *Managing Your Docket Effectively and Efficiently*, 19 NAT'L ASS'N ADMIN. L. JUDGES 37, 38 (1999) (arguing that caseload management requires understanding of the present system); Russell L. Weaver, *ALJ Support Systems: Staff Attorneys and Decision Writers*, 16 J. NAT'L ASS'N ADMIN. L. JUDGES 89, 89-91 (1996) (finding agencies vary significantly regarding support staff).
[176] *E.g.*, Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601 (2016).
[177] *E.g.*, Nancy B. Firestone, *The Environmental Protection Agency's Environmental Appeals Board*, 1 ENVTL. LAW. 1 (1994).

Furthermore, many—perhaps most—personnel involved in administrative adjudication are not responsible for deciding cases. Adjudicators at many agencies depend on law clerks, paralegal professionals, technical experts, or other support personnel. As a result, many efforts to promote timeliness center on the allocation of duties between adjudicators and other personnel, funding to obtain, train, and retain personnel, and trends in federal employment. Pay scales can affect efforts to recruit and retain support personnel, for example, and retirement waves have affected staffing in agency components involved in adjudication. One participant in a forum held as part of this study suggested that policymakers cannot simply consider procedural adjustments to improve timeliness; rather, they need to consider federal agencies' success as employers.

3. Information Technology

Not only is the presence and capacity of agency personnel important for timely adjudication, but there are often real technological or other logistical challenges to efficient and effective adjudication. Consider the experience of the Department of the Interior's Office of Hearings and Appeals (OHA). Inadequate online security measures related to the preservation and maintenance of Indian Trust Fund data resulted in a court order to immediately disconnect from the internet all agency systems that housed or provided access to such data.[178] Understandably, this generated significant problems for OHA, and the office not only experienced an increase in the number of appeals but also detrimental effects on its ability to review those cases in a timely manner.[179]

Data security is not the only concern. Agencies have reported challenges related to records management, integration with legacy or future systems, and even the maintenance of email records.[180] Investment in new technology to address these challenges, of course, is contingent upon both financial and human resources. The same technologically obsolete systems that hamper the ongoing efficiency of adjudication in an agency are often the most complicated and expensive to replace.[181]

Furthermore, even among agencies that invest in high-quality information and communication technologies, agencies have a moderate track record of positive results. Automation, the use of computers, and digitalization have provided positive outcomes but often in areas not planned or anticipated.[182] For example, an agency's investment in new technologies may have unexpected benefits of improving interactions with interested persons but actually increase the agency's caseload as a result.

It is also important to recognize that new technologies often have unintended consequences that can reinforce existing communication gaps within an agency or between an

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[178] Cobell v. Norton, 310 F.Supp.2d 77 (D.D.C. 2004).
[179] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, BYU J. Pub. L. 1, 28 (2004).
[180] Giovanna Patterson & J. Timothy Sprehe, *Principal Challenges Facing Electronic Records Management in Federal Agencies Today,* 19 GOV'T INFO. Q. 307 (2002).
[181] Min-Seok Pan, *Politics and Information Technology Investments in the U.S. Federal Government in 2003-2016*, 28 INFO. SYS. RSCH. 33 (20170).
[182] Raquel Benbunan-Fich, Kevin C. Desouza & Kim Normann Anderson, *IT-Enabled Innovation in the Public Sector: Introduction to the Special Issue*, 29 EUR. J. INFO. SYS. 323 (2020).

agency and the population it serves, deepening existing digital divides.[183] Without appropriate planning, agencies experience backlogs and delays resulting from these unintended consequences. Simply put, investment in and use of technology requires organizational capacity, motivation, and quality management.[184]

E. Program Integrity

As agencies develop and maintain their adjudicative processes, they must do so in a way that safeguards against lapses in program integrity.[185] Agencies must work to prevent waste, fraud, abuse, or similar barriers to quality and efficient decision making. Not only can employee misconduct affect the integrity of an agency's administrative process and public trust in government,[186] misconduct can affect an agency's ability to adjudicate fairly, accurately, and in a timely manner.[187]

Threats to program integrity not only directly affect adjudicative processes but also indirectly affect timeliness in adjudication in a variety of ways. Operationally, efforts to preserve or enhance program integrity can result in additional delays or be incompatible with the need to make decisions quickly.[188] For example, high profile complications in the Medicaid Integrity Program at the Centers for Medicare and Medicaid Services led to delays and backlogs in adjudication of hospital appeals of fraud and systematic overcharging.[189]

Program integrity measures can also result in appeals, leading to caseload surges across an agency's adjudication system. Efforts to recoup potential overpayments from healthcare providers have contributed to backlogs at the Office of Medicare Hearings and Appeals. Efforts to more aggressively review whether beneficiaries remain entitled to benefits and redetermine decisions in which fraud is suspected have contributed to timeliness concerns at SSA.

Even in agencies that have offices or automated systems dedicated to program integrity, adjudicators and support personnel may be asked to perform program integrity activities on top

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[183] *Id*. at 325.
[184] Erin W. Welch & Mary K. Feeney, *Technology in Government: How Organizational Culture Mediates Information and Communication Technology Outcomes*, 31 GOV'T INFO. Q. 506 (2014).
[185] *See* U.S. CHIEF FIN. OFF. COUNCIL, PROGRAM INTEGRITY: THE ANTIFRAUD PLAYBOOK.
[186] Thomas M. Dowd, Timothy M. Comello, Megan E. Beckwith & Jeffrey C. Steinhoff, *Program Integrity = Public Trust*, 67 J. GOV'T FIN. MGMT 12 (2018).
[187] E.g., *Examining Employee Misconduct at EPA: Hearing Before the Comm. on Oversight and Gov't Reform*, 114th Cong. (2016) (statement of Patrick Sullivan, Assistant Inspector General for Investigation, Office of Inspector General, U.S. Environmental Protection Agency)
[188] *See* PANDEMIC RESPONSE ACCOUNTABILITY COMMITTEE, TOP CHALLENGE FACING FEDERAL AGENCIES: COVID-19 EMERGENCY RELIEF AND RESPONSE EFFORTS (2020); Ethan J. Raker & Tyler Woods, *Disastrous Burdens: Hurricane Katrina, Federal Housing Assistance, and Well-Being*, 9 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCI. 122, 134, 138 (2023).
[189] E.g., Reed Abelson & Eric Lichtblau, *Pervasive Medicare Fraud Proves Hard to Stop*, N.Y. TIMES (Aug. 15, 2014).

of their existing workloads.[190] This responsibility can create additional pressure on employees as they use their limited resources to balance the core adjudicative values of fairness and timeliness.

F. Changes in Policy Environment

Finally, problems with timeliness in adjudication also can develop because of changes in the complexity or salience of an agency's policy mission. Generally, administrative processes reflect both the extent to which an agency must engage with factual questions and the number of people the agency's decision making affects in a significant way.[191] Changes in either of these aspects can slow the pace of agency operations as the agency adapts to new circumstances.[192]

Many such changes result from exogenous shocks to an agency's operating environment. Unexpected or unpredictable events like the COVID-19 pandemic not only put a strain on agency resources but also increase uncertainty and variability in agency decision making.[193] While the pandemic is an extreme example, agencies regularly face assorted shocks to their adjudicative systems and must adapt accordingly.[194] For example, the Department of the Interior experienced delays in hiring ALJs as it adjusted its appointment process in the wake of the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*.[195] The Department recognized that these delays, combined with its lack of a comprehensive electronic case management system, significantly contributed to a backlog in adjudication.[196]

III. MEASURES TO PROMOTE OR IMPROVE TIMELINESS IN ADJUDICATION

As the previous section suggests, there is no single answer to addressing timeliness in administrative adjudication because the form and objective of adjudication varies substantially

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[190] Alan K. Holdhammer, *Evidentiary Considerations in Disability Adjudication – A Judge's Perspective*, 44 ADMIN. L. REV. 445, 450 (1992). *See, e.*g., U.S. Dep't of Agric., Food Safety & Inspection Serv., Directive 4735.7, Industry Complaints Against FSIS Program Employees.

[191] William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595, 598 (1986); *See also* Matthew Eshbaugh-Soha, *The Conditioning Effects of Policy Salience and Complexity on American Political Institutions*, 34 POL'Y STUD. J. 223, 227 (2006) (arguing different levels of complexity and salience affect the dynamics of the policy process and offer incentives for different actors to participate in administration).

[192] For example, agencies respond to an increase in the public visibility of an agency's enforcement activity by slowing down their decision making. Moshe Maor & Raanan Sulitzeanu-Kenan, *The Effect of Salient Reputation Threats on the Pace of FDA Enforcement*, 26 GOVERNANCE 31, 50-51 (2013).

[193] Leslie Birnbaum, *Due Process and Administrative Hearings in the Time of COVID-19: Help, I Need Somebody*, 41 J. NAT'L ASS'N ADMIN. L. JUDGES 140, 170 (2021) (discussing the effect of granted continuances, delayed proceedings, and suspended in-person hearings on backlogs); Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 189 (2014) (acknowledging that agencies who work in industries characterized by exogenous shocks may lack sufficient information to regulate and adjudicate with certainty); Ryan J. Fennell, *Stuck on the Backburner: An Analysis of USCIS's Backlog of Immigration Applications and Potential Reforms*, 37 GEO. IMMIG. L.J. 87, 96-97 (2022) (emphasizing the difficulties COVID created for agencies that rely on fee revenue for funding).

[194] Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985).

[195] 138 S.Ct. 2044 (2018).

[196] U.S. Dep't of the Interior, Presidential Transition 2020-2021 Briefing Book 110 (2020-2021), *available at* https://www.governmentattic.org/43docs/DOItransBriefBiden_2020.pdf.

across programs and agencies and the factors that contribute to surges, backlogs, delays, and other timeliness concerns are equally varied.

Each agency must define its approach to timeliness considering its own unique task environment, caseload, resources, statutory mandates, and policy mission.[197] At the same time, some commonalities exist across all agencies with respect to achieving high-quality, timely performance.[198] This Part introduces a general framework that agencies can use to foster an organizational culture of timeliness in adjudication in accord with principles of fairness, accuracy, and efficiency and to respond to timeliness concerns when they arise. Appendix A proposes a set of recommended best practices for consideration by ACUS.

A. Understanding the Problem

Most fundamentally, any attempt to improve timeliness in an agency's adjudication system must begin with a full understanding of the foundational causes of surges, backlogs, and delays in the agency and how those causes impact different aspects of their adjudicative systems.[199]

Agencies need high-quality management information to fully understand their operations and performance. Many agencies continually collect such data through electronic case management or other systems, and GAO and inspectors general consistently have encouraged them to do so. Agencies should collect data that can be used to assess factors that directly and indirectly contribute to issues of timeliness, identify and consider potential solutions to problems, and evaluate the effectiveness of agency efforts.[200] At a minimum, this data should include information on the number and type of proceedings concluded systemwide and at each level of an agency's adjudication system (and between levels), as well as the current status of each proceeding. An agency also should be able to disaggregate this information so that the agency can examine organizational performance within the same level of an agency's hierarchy (e.g., field offices or other decentralized units). Such data not only will help the agency organize its efforts to improve timeliness but also may help the agency identify other operational concerns.[201]

Agencies have also benefitted from information obtained through engagement with adjudicators and other personnel involved in the day-to-day work of adjudication and external stakeholders, including parties and representatives who regularly practice before them.[202]

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[197] FPCD-79-44, MANAGEMENT IMPROVEMENTS IN THE ADMINISTRATIVE LAW PROCESS: MUCH REMAINS TO BE DONE 4 (1978).
[198] Cary Coglianese, *Managing the Performance of Regulatory Agencies, in* HANDBOOK OF REGULATORY AUTHORITIES 285, 287 (Fabrizio Di Mascio, Martino Maggetti & Alessandro Natalini eds., Edward Elgar Publishing, 2022).
[199] Gregory L. Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPP. L. REV. 553, 558 (1979); Edward J. Schoenbaum, *Managing Your Docket Effectively and Efficiently*, 19 NAT'L ASS'N ADMIN. L. JUDGES 37, 424 (1999).
[200] Jessica L. Gustafon & Abby Pendleton, *Medicare Appeals Adjudication Delays: Implications for Healthcare Providers and Suppliers*, 26 HEALTH LAW. 26, 29 (2014).
[201] Martin Schneider, *Performance Management by Culture in the National Labor Relations Board's Division of Judges and the German Labor Courts of Appeal*, 14 J. PUB. ADMIN. RSRCH. & THEORY 19, 26 (2004)
[202] Edwin L. Felter, Jr., *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays without Sacrificing Due Process*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 5, 17 (1995).

Potential strategies for doing so include administering customer service surveys, holding public meetings and listening sessions, and publishing information requests. A consensus from our forum discussions was that engagement in this manner is most beneficial when it occurs at regular intervals or on an ongoing basis, as opposed to being initiated on an ad hoc basis.

Agencies have also benefitted from more continuous and sustained dialog with stakeholders. Agencies may find the use of ombuds helpful in this regard. Organizational ombuds operate as neutral parties who assist an agency in recognizing systemic problems in operations and help identify and explore forward-looking options to help resolve those problems.[203] Furthermore, ombuds help connect agencies and interested persons, particularly in times of change, by providing perspective based on significant interaction with the public.[204]

B. Developing a Plan

Once an agency has a full understanding of the factors that affect timeliness in adjudication and the potential adjustments the agency can make to address those factors, the agency should engage in significant strategic planning to identify a path forward, set priorities, and promote innovation. Indeed, one of the most consistently recognized barriers to successful agency actions to address timeliness is inadequate leadership and planning, including ineffective priority-setting by top agency personnel.[205]

To be done well, strategic planning must be fairly comprehensive. The agency must work to remain cognizant of the practical realities of agency operations. While it can be tempting for an agency to rely exclusively on quantitative data collected to understand the problem of timeliness, agencies must be sure to engage in candid discussions with members of leadership, front-line managers, adjudicators, other personnel, and external stakeholders to put that data in context.[206] This will allow the agency to fully and adequately consider the costs, benefits, and implications of all available options.[207]

Once an agency has performed a strategic evaluation of its operations, including an identification of internal and external stakeholders, an assessment of their views and needs, and a recognition of strategic and environmental challenges the agency faces in pursuit of its mission, the agency should develop measurable, time-based targets for organizational performance.[208] An

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[203] TREVOR BUCK, RICHARD KRIKHAM & BRIAN THOMPSON, THE OMBUDSMAN ENTERPRISE AND ADMINISTRATIVE JUSTICE 19-20 (2016) (arguing such advice enhances procedural justice).
[204] Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94316 (Dec. 23, 2016); Admin. Conf. of the U.S., Recommendation 90-2, The Ombudsman in Federal Agencies, 55 Fed. Reg. 34211 (Aug. 22, 1990). *See also* Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (1991).
[205] S. COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION: DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 95-72, 95TH CONG. (1972).
[206] Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION 1, 11(Luther Gulick & L. Urwick, eds., Rumford Press 1937); Henry Mintzberg, *The Fall and Rise of Strategic Planning*, 71 HARV. BUS. REV. 107 (1994); Theodore H. Poister, *The Future of Strategic Planning in the Public Sector: Linking Strategic Management and Performance*, 70 PUB. ADMIN. REV. S5, S248 (2010).
[207] Bert George & Richard M. Walker, *Does Strategic Planning Improve Organizational Performance? A Meta-Analysis*, 79 PUB. ADMIN. REV. 803, 816 (2019)
[208] Frances S. Berry, *Strategic Planning as a Tool for Managing Organizational Change*, 30 INT'L J. PUB. ADMIN. 331, 335-339 (2007)

ideal organizational performance measurement system takes the full range of information at an agency's disposal (from inputs to outcomes or impacts) and uses that information to guide program planning and to improve future performance.[209]

Agencies should incorporate organizational performance and timeliness goals into their regular strategic planning processes under the Government Performance and Results Act (GPRA), as amended by the GPRA Modernization Act of 2010.[210] GPRA's purposes include improving program effectiveness and helping "Federal managers improve service delivery, by requiring that they plan for meeting program objectives and by providing them with information about program results and service quality."[211] In addition to developing and regularly updating a strategic plan for program activities as required by law, agencies should identify timeliness in adjudication as a high-priority goal and establish quarterly targets for improving timeliness.[212]

Clear, measurable organizational performance targets are a necessary, but not sufficient, condition for improving timeliness.[213] Agencies should think of their strategic plan as a leadership document, which not only requires a statement of organizational performance goals, an agenda for program evaluation, operating plans, and an accountability system,[214] but also identification of persons within the agency who are responsible for carrying out the plan. GPRA requires each agency to identify two senior executive officials to assist with improving performance in this regard.[215] Due to the complexities of addressing timeliness in adjudication, agencies may find it helpful for at least one of these officials to be well-versed in the agency's adjudicative systems.

Additionally, to help promote forward-thinking during planning, agencies may find the designation of a Chief Innovation Officer to be helpful.[216] Agencies can fall behind on their workload as a result of strict adherence to past practices in the face of new, evolving pressures.[217] Chief Innovation Officers can help an agency avoid this pitfall by providing support for employees to try novel ideas and encouraging flexibility in organizational responses to timeliness

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[209] Carolyn J. Heinrich, *Measuring Public Sector Performance and Effectiveness*, *in* THE SAGE HANDBOOK OF PUBLIC ADMINISTRATION 32, 33 (B. Guy Peters & Jon Pierre, eds., 2d ed. 2012).
[210] 5 U.S.C. § 306; 31 U.S.C. §§ 1105, 1115-1125, 3515, 9703-9704; 39 U.S.C. 2810-2805. With a few exceptions, GPRA applies to all federal entities defined as an "executive agency" by 5 U.S.C. § 105. This includes executive departments, independent agencies, and government corporations. GPRA also applies to the U.S. Postal Service.
[211] Government Performance Results Act of 1993, Pub. L. No. 103-62 §2(a)(3)-(4) (1993).
[212] Agencies with statutorily mandated Chief Financial Officers must specify performance goals that are high-priority and establish quarterly targets for their performance. 31 U.S.C. §§ 901, 1120.
[213] *See* Stuart Kasdin, *Reinventing Reforms: How to Improve Program Management Using Performance Measures. Really*, 30 PUB. BUDGETING & FIN. 51, 58 (2010) (examining the design and use of performance measures to promote greater program efficiency and effectiveness).
[214] Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. VA. L. REV. 987, 1017 (2015) (describing varied performance in operating units across the Department of Labor).
[215] 31 U.S.C. §§ 1123–1124.
[216] Agencies which have established Chief Innovation Officers include the Departments of Energy, Health and Human Services, and Transportation; the Federal Reserve System; and the United States Agency for International Development.
[217] Kenneth J. Meier & John P. Plumlee, *Regulatory Administration and Organizational Rigidity*, 31 W. POL. Q. 80, 82-32 (1978).

concerns.[218] Additionally, the identification and involvement of employees who are dedicated to innovation can help agencies more effectively pursue organizational change.[219]

Agencies also may find pilot studies to be a useful tool when developing strategies to address timeliness in adjudication. Successful pilots and similar interventions allow agencies to take an experimental approach to timeliness where new processes are tested and refined at lower organizational levels and then assessed for their effectiveness.[220] However, for pilot projects to be informative, agencies must have a clear, defined plan for evaluation that sets out measurable objectives, contains quality data analysis, and has ways of isolating the effects of the pilot for evaluation.[221]

Effective strategic planning and organizational performance management requires attention to the institutional diversity and complexity of government agencies.[222] This is especially challenging in the larger agencies, including the executive departments, which employ thousands of personnel, contain numerous prominent subunits that perform adjudication across an array of policy, and often inherited their personnel, subunits, programs, and responsibilities from preexisting administrative structures.[223] To accounting for this diversity and complexity, it is essential for managers to obtain and incorporate reliable information and diverse perspectives from across the organization.

C. Efficiently and Effectively Allocating Resources

Once an agency has identified any timeliness concerns and developed a strategic plan to address those concerns, the agency must implement that plan efficiently and effectively. As Part I recognizes, ACUS has adopted many recommendations that identify organizational, procedural, technological, case management, and other techniques that agencies should consider using to promote timeliness in administrative adjudication. We build upon the valuable insights from the

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[218] Vanessa Peña, The Role of a Chief Innovation Officer in the Federal Government, Inst. for Def. Analysis 1 (2019). *See al*so Peter J. May, Samuel Workman & Bryan D. Jones, *Organizing Attention: Responses of the Bureaucracy to Agenda Disruption*, 18 J. PUB. ADMIN. RSRCH. & THEORY 517, 523 (2008) (arguing that greater flexibility and discretion, as well as the use of informal procedures, can speed organizational responses to important issues).

[219] Jean Hartley, John Benington & Peter Binns, *Researching the Roles of Internal-change Agents in the Management of Organizational Change*, 8 BRIT. J. MGMT. 61 (1997).

[220] Colleen V. Chien, *How Federal Agencies Have Used Rigorous Policy Pilots to Learn*, REGREVIEW (Dec. 9, 2019); James R. Thompson & Ronald P. Sanders, *Strategies for Reinventing Federal Agencies: Gardening versus Engineering*, 21 PUB. PRODUCTIVITY & MGMT REV. 137, 151 (1997).

[221] *E.g.*, U.S. GEN. ACCOUNTABILITY OFF., GAO-06-7538, EQUAL EMPLOYMENT OPPORTUNITY: DOD'S EEO PILOT PROGRAM UNDER WAY, BUT IMPROVEMENTS NEEDED TO DOD'S EVALUATION PLAN (2006); U.S. GEN. ACCOUNTABILITY OFF., GAO-08-387R, LIMITATIONS IN DOD'S EVALUATION PLAN FOR EEO COMPLAINT PILOT PROGRAM HINDER DETERMINATION OF PILOT RESULTS (2008); U.S. GEN. ACCOUNTABILITY OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS (2009).

[222] Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. VA. L. REV. 987, 998 (2015) (describing varied performance in operating units across the Department of Labor).

[223] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 29-33 (2018).

best practices in those recommendations to highlight the important roles that case and human resource management play in promoting or improving timeliness.

The question of resources underlies this entire section. Agencies and agency subunits need adequate resources to decide cases in a timely manner and to address concerns about timeliness when they occur. Congress, the Office of Management and Budget, and agencies must carefully consider the resources made available to agencies and agency subunits to perform this work. Congress, with its control over government spending, is a critical partner in efforts to promote and improve timeliness in administrative adjudication. Over the decades, agencies such as the Federal Mine Safety and Health Review Commission, HHS, SSA, and MSPB have depended on additional funding to address concerns about timeliness.

1. Case Management

Empirically, the path to systematic reform to promote timeliness in adjudicative processes likely lies in recognizing that lengthy, trial-type procedures are not necessarily the best, most timely, or even fairest means of adjudication for all cases.[224]

Both qualitative and quantitative evidence suggests that agencies should screen cases at intake to identify cases that are not ready for adjudication, can be resolved quickly, or may be amenable to resolution through alternative means.[225] This may require an agency to identify common procedural issues and dispense of them quickly or find ways to resolve large numbers of cases with recurring legal or factual issues through a single action (e.g., consolidation, mass settlement, rulemaking, or precedential decision making). Agencies also should consider providing procedural alternatives that offer processes tailored to case types, such as differentiating between small claims, cases conducive to settlement, and the like. Evidence suggests that informal mechanisms such as counseling, alternative dispute resolution, and mediation are highly effective in terms of reducing processing time.[226]

Agencies that experience strategic delay on the part of parties or intervenors may wish to adopt procedural rules or sanctions to incentivize against such behavior.[227] In these instances, agencies should also use case management to regulate parties' prehearing choices, for example by taking action to eliminate frivolous claims and defenses or reduce discovery delays.[228]

Agencies may also consider mechanisms to streamline and improve both the evidentiary process and adjudicative decision-writing. For example, when faced with pressure to speed up decision making, some agencies, like the Nuclear Regulatory Commission, have adopted

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[224] George A. Bermann, *Administrative Delay and its Control*, 30 AM. J. COMP. L. SUPP. 473, 474 (1982).
[225] Stuart Rothman, *Four Ways to Reduce Administrative Delay*, 28 TENN. L. REV. 332, 339-41 (1961)
[226] Tina Nabatchi & Anya Stanger, *Faster? Cheaper? Better? Using ADR to Resolve Federal Sector EEO Complaints*, 73 PUB. ADMIN. REV. 50, 56 (2013). *See also* Cindy Mazur, *ADR: Faster, Cheaper, Better – and Not Just for EEO Complaints*, 73 PUB. ADMIN. REV. 61 (2012).
[227] Lawrence G. Baxter, *Life in the Administrative Track: Administrative Adjudication of Claims against Savings Institution Receiverships*, 1988 DUKE L.J. 422, 536 (1988).
[228] Carolyn B. Kul & William F. Highberger, *A Unified Theory of Civil Case Management*, 107 JUDICATURE 34, 36 (2023).

common language to include in permitting documents.[229] In addition to increasing efficiency, these adoptions have the added benefit of making documents more consistent across decisions. Of course, agencies must be careful to use common language strategically and sparingly so as not to threaten procedural due process or decisional integrity.

In considering and adopting all of these case management strategies, agencies should include key internal and external actors (e.g., adjudicators, interested persons and their representatives) in the consideration and adoption of its processes and procedures, as well as publicly disclose those processes and procedures to the fullest extent feasible. Coordination and communication across agency units in this regard is essential for agencies' abilities to deal with their caseloads.[230]

2. Human Resource Management

Agencies must work continuously to ensure that they have systems in place to manage their human resources effectively. This requires a dynamic approach to recruiting, hiring, allocating, training, and retaining personnel, as well as performance management.[231]

a. Allocation and Training of Personnel

Much of the legwork regarding the use of human resource management to address timeliness in adjudication should be done through the strategic planning and case management processes. An agency's structure, policy environment (including the need to rely on technical or clinical staff and assessments during the adjudicative process), statutory directives, sources of revenue, and overall resources each affect, and therefore must be accounted for in, human resource management.[232] Strategic planning in this sense can help agencies identify cost savings that can be reinvested elsewhere to expand adjudicative capacity or to speed processing without sacrificing quality.

Modern human resource management in federal agencies requires flexibility in capitalizing on workforce capabilities to promote efficient and effective decision making.[233] Minimally, this means agencies should assign adjudicative tasks to the lowest-graded employee who can legally and competently perform them. In doing so, agencies should standardize their processes so that there is transparency in how agencies allocate tasks efficiently among adjudicators, support staff, contractors, and automation. More creatively, several agencies have temporarily expanded their staff to (successfully) manage surges, backlogs, and delays in adjudication through the use of, for example, detailees, temporary reassignments, or rehired

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[229] Tyler A. Scott, Nicholas Marantz & Nicola Ulibarri, *Use of Boilerplate Language in Regulatory Documents: Evidence from Environmental Impact Statements,* 32 J. PUB. ADMIN. RSRCH. & THEORY 576, 587 (2022).
[230] George A. Krause & Jungyeon Park, *Does Coordinated Administrative Leadership Improve US Federal Agency Management of Discrimination Problems*, 33 J. PUB. ADMIN. RSRCH. & THEORY 529, 533 (2022) (examining informal resolution of claims handled by the Equal Employment and Opportunity Commission)
[231] *See* Org. for Econ. Coop. & Dev., *OECD Guiding Principles for Regulatory Quality and Performance, in* REGULATORY POLICY AND GOVERNANCE: SUPPORTING ECONOMIC GROWTH AND SERVING THE PUBLIC INTEREST Annex C, 142 (OECD Publishing 2011).
[232] Laurel A. Fines, *The Human Services Management Task: A Time Allocation Study*, 41 PUB. ADMIN. REV. 686, 686-87 (1981).
[233] Kerry Brown, *Human Resource Management in the Public Sector*, 6 PUB. MGMT. REV. 303, 307 (2004).

annuitants. Many agencies have relied on the ALJ loan program[234] and senior ALJ program[235] to expand adjudicative capacity temporarily in response to surges, backlogs, and delays.

While training can be "a default solution to all manner of managerial challenges," training statistically and significantly affects an agency's ability to reach its performance goals.[236] Thus, in addition to strategically allocating personnel and tasks across adjudicative systems, agencies must train employees in both agency procedures and recognized best practices for case management, interactions with interested persons and their representatives, and adherence to the due process principles that ensure decisional integrity. Furthermore, training (if administered appropriately) can even encourage adjudicators to come up with new ways of doing things and to find the most effective solutions to timeliness problems.[237]

b. Performance Metrics

The idea of human resource and performance management is nothing new for federal agencies. Indeed, over a century ago, scholars argued for a more business-like approach to public management by setting standards for organizational performance and exercising controls to ensure employee conformity with those standards.[238] Performance metrics serve at least three primary functions: promoting accountability for the use of public funds, providing information to the public on agency activity, and stimulating improvement in program management.[239] Through performance management, agencies systematically plan and set expectations for personnel, continually monitor employee performance, and periodically assess that performance in a summary fashion.[240] Clear, objective performance management systems communicate what the agency expects of its adjudicators and allows leadership to asses and adjust workloads, staffing, and administrative processes as need to promote or improve timeliness in adjudication.[241]

However, two empirical realities of performance management are worth noting. First, complete objectivity in measurement is not attainable; all measures of performance are subjective.[242] Agencies must therefore account for a wide array of perspectives when developing them—perspectives from personnel at all levels within the agency, as well as audit or similar agencies, the President and Congress (including committees of jurisdiction and appropriators), and the public. Second, performance standards can help an agency focus on short-term outcomes, but the effect of performance management on long-term administrative efficiency and

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[234] 5 C.F.R. § 930.208.
[235] *Id*. § 930.209.
[236] Alexander Kroll & Donald P. Moynihan, *Does Training Matter? Evidence from Performance Management*, 75 PUB. ADMIN. REV. 411, 411; 417 (2015).
[237] *See* Sergio Fernandez & David W. Pitts, *Understanding Employee Motivation to Innovate: Evidence from Front Line Employees in United States Federal Agencies*, 70 AUSTL. J. PUB. ADMIN. 202, 216 (2011)..
[238] Frederick Taylor, *Principles and Methods of Scientific Management*, 12 J. ACCt. 117 (1911).
[239] *See* MARTIN MARSHALL, PAUL SHEKELLE, ROBERT BROOK & SHEILA LEATHERMAN, DYING TO KNOW: PUBLIC RELEASE OF INFORMATION ABOUT QUALITY OF HEALTH CARE (2000).
[240] U.S. OFF. PERS. MGMT., A HANDBOOK FOR MEASURING EMPLOYEE PERFORMANCE 4-6 (2017).
[241] U.S. GEN. ACCT. OFF., FPCD-78-25, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED vii (1978); U.S. GEN. ACCT. OFF., FPCD-79-44, MANAGEMENT IMPROVEMENTS IN THE ADMINISTRATIVE LAW PROCESS: MUCH REMAINS TO BE DONE 3 (1978).
[242] Gene A. Brewer, *All Measures of Performance Are Subjective: More Evidence on U.S. Federal Agencies*, *in* PUBLIC SERVICE PERFORMANCE: PERSPECTIVES ON MEASUREMENT AND MANAGEMENT 35, 37 (George A. Boyne, Kenneth J. Meier, Laurence J. O'Toole Jr., & Richard M. Walker, eds., Cambridge University Press 2006).

effectiveness is questionable.[243] Metrics are useful for things like allocating resources, projecting future needs, and assessing the experiences of adjudicators when performing a variety of tasks. They are less appropriate for addressing systemic problems in timeliness.

Thus, agencies should use performance standards in combination with other measures to promote or improve timeliness in adjudication. These standards should be realistic, stated clearly in writing (or otherwise recorded), and contain expectations for how much and quickly work should be completed, and include criteria for evaluating quality.[244] In adopting and applying performance metrics, agencies must account for shocks that are outside of employees' control and minimize risks faced by personnel who unexpectedly encounter particularly complex problems in their daily work.[245] Additionally, while the same quantitative and qualitative requirements for performance should apply for all employees in the same job, agencies also must be sensitive to requests for reasonable accommodation.[246]

Transparency in the development and application of performance metrics is essential. Agencies must be specific regarding the precise measures used for evaluation and how agencies will maintain consistency in measurement and expectations across employees and time.[247] Agencies should think carefully about supervisory structures and align appraisals so that assessment is performed by supervisors who have a full understanding of the complexities of the adjudicative process.

The NLRB's historical actions to address timeliness provide a nice illustration of these practices. The NLRB adopted a control system that significantly reduced delay through use of uncomplicated statistical reports on the movement of cases through the adjudicative process, the adoption of performance standards that included controls for quality and fairness in case handling, and clear reporting structures that relied on supervisors with experience in the offices they supervised.[248]

As noted before, agencies must be mindful of limitations on individual performance evaluation, in particular the statutory restriction on appraising the performance of ALJs. Some agencies, such as SSA, have instead adopted productivity expectations for ALJs.[249] If agencies establish performance expectations for officials who are not subject to performance appraisal, they must ensure that such expectations are reasonable and do not interfere with adjudicators'

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[243] James J. Heckman, Carolyn Heinrich & Jeffrey Smith, *The Performance of Performance Standards* 35 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9002, 2002).
[244] U.S. Gen. Acct. Off., *Developing Performance Standards*, https://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/planning/developing-performance-standards/#Writing%20Standards.
[245] Pascal Courty, *Setting the Standard in Performance Measurement Systems*, 8 INT'L PUB. MGMT. J. 321, 337-38 (2005).
[246] 29 C.F.R. pt. 1620 app.-1630.2(n); EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2008-3, APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES (2008); EQUAL EMP. OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II (2.3); IV (4.4) (1992).
[247] *See* Daniel L. Nagin, *Goals v. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50, 65-71 (2015).
[248] Les Garner, *Management Control in Regulatory Agencies: A Modest Proposal for Reform*, 34 ADMIN. L. REV. 465, 477-78 (1982).
[249] *See, e.g.*, Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402 (7th Cir. 2015).

decisional independence or affect the quality, fairness, or integrity of proceedings. Agencies should also publicly disclose performance expectations, explain how they were developed, and periodically reevaluate them, particularly with respect to their effect on decisional quality and the fairness and integrity of proceedings.[250]

D. Clearly and Consistently Communicating

As with any change in agency process, improving timeliness in adjudication not only requires sustained commitment from agency leadership but also necessitates unambiguous, consistent communication of the agency's policies to all levels of the agency and to the public.[251] This communication must establish clear objectives and frameworks for implementation and leave room for feedback and openness to new ideas.[252]

1. Internal Communication

Strategies for organizational change often are distinguished by whether they are imposed from leadership or made subject to approval by employees lower in an agency's hierarchy ("top-down" versus "bottom-up"). However, innovations to promote or improve timeliness can and should emerge from all levels of the agency.[253] Agency leadership must find ways to ensure that all personnel, regardless of place in an agency's hierarchy, who are directly or indirectly involved in its adjudicative processes can effectively collaborate and coordinate their efforts to improve timeliness.

This is particularly important in agencies where leadership may not engage regularly in adjudication or in agencies where there has been frequent turnover and vacancies in leadership.[254] Regular communication between leadership and adjudicators regarding the complexities of case and staff management, the role of adjudication in the agency's overall policy environment, and the challenges the agency faces in terms of efficiency and effectiveness can go a long way in the development of strategies for improving timeliness. Such communication provides a positive organizational culture in which all agency personnel are committed toward a common goal and understand how their part of the adjudicative process fosters the effectiveness of others.[255] Additionally, communication throughout the agency can

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[250] *See* GOV'T ACCOUNTABILITY OFF., GAO-21-341, SOCIAL SECURITY DISABILITY: PROCESS NEEDED TO REVIEW PRODUCTIVITY EXPECTATIONS FOR ADMINISTRATIVE LAW JUDGES (2021).

[251] OECD, *OECD Guiding Principles for Regulatory Quality and Performance, in* REGULATORY POLICY AND GOVERNANCE: SUPPORTING ECONOMIC GROWTH AND SERVING THE PUBLIC INTEREST Annex C, 142 (OECD Publishing 2011).

[252] Glenn W. Rainey, Jr. & Hal. G. Rainey, *Structural Overhaul in a Government Agency: Implications of Social Security Claims Modularization for Central OD Principles and Techniques*, 10 PUB. ADMIN. Q. 206, 220-21 (1986); Stuart Rothman, *Four Ways to Reduce Administrative Delay*, 28 TENN. L. REV. 332, 341 (1961)

[253] James R. Thompson & Ronald P. Sanders, *Strategies for Reinventing Federal Agencies: Gardening versus Engineering*, 21 PUB. PRODUCTIVITY & MGMT REV. 137 (1997).

[254] *See* James G. Gilbert & Robert S. Cohen, *Administrative Adjudication in the United States*, 37 J.NAT'L ASS'N ADMIN. L. JUDICIARY 222, 244 (2017); Fatima Hussein, F*ederal Safety Panel Member's Departure Could Affect Case Docket,* BLOOMBERG LAW (March 25, 2021).

[255] *See* Martin Schneider, *Performance Management by Culture in the National Labor Relations Board's Division of Judges and the German Labor Courts of Appeal*, 14 J. PUB. ADMIN. RSRCH. & THEORY 19, 25-26 (2004) (identifying commonly found mechanisms for influencing culture and improving performance, including a comprehensive reward system; clear and consistent messages from management; and publication of performance data).

ensure that concerns resulting from changes in agency processes and employee responsibilities are addressed as they arise.[256]

Our conversations with both adjudicators and parties' representatives across a variety of agencies suggested that the actions and communications of agencies themselves set expectations regarding timeliness. Yet, agencies often significantly underestimate the true time needed during the filing, investigation, and decisional processes of adjudication.[257] Enhanced internal communication can help alleviate this problem.

2. External Communication

It is equally important that an agency clearly and consistently communicate with external actors as the agency endeavors to improve timeliness. This communication should come in a variety of forms and include other agencies, the President and Congress, professional associations, and the public. Efforts improve efficiency and effectiveness of government programs require collaboration and information sharing to promote innovation.[258]

Many agencies and collaborative working groups exist within the executive branch to help agencies develop and implement best practices for managing various aspects of the adjudicative process. Federal entities such as ACUS, Chief Information Officers Council, U.S. Digital Service, General Services Administration, and the Office of Personnel Management have valuable resources to guide agencies in their pursuits to leverage administrative procedures, IT, and human resource management when working to promote or improve timeliness in adjudication. Agencies should take full advantage of these resources.

Additionally, agencies should maintain open dialogue with the President and Congress regarding recommended legislative and appropriation changes that would promote or improve timeliness in adjudication. This dialogue should extend beyond simple advocacy for additional resources and instead rely on the data collected and analyzed during strategic planning to highlight how and why requested changes would increase efficiency and effectiveness.

Agency leadership, adjudicators, and other administrative personnel should, as appropriate, participate in bar associations, academic forums, and other similar professional development engagement. Not only can this help foster innovation through information sharing, but it also can help agencies confirm that, in their pursuit of timeliness, they have taken steps to

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[256] For an example of breakdowns in this regard, *see* Daniel J. Baum, *Reorganization, Delay and the Federal Trade Commission*, 15 ADMIN. L. REV. 92, 96- (1963) (citing Address by Chairman Dixon, *The Federal Trade Commission in 1961*, to the Section on Antitrust Law of the New York State Bar Association, New York, N.Y., Jan. 25, 1962) (describing inefficiencies in the Federal Trade Commission's efforts to reorganize its investigation, litigation, and enforcement departments to address backlogs in adjudication).

[257] *See, e.g.*, David. Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 61 (2002) (utilizing a detailed survey of wetlands permit applicants and Army Corps of Engineers' processes compiling timeliness statistics to demonstrate the Corps significantly and regularly underestimated the time need to prepare, negotiate, and grant permits).

[258] Rosemary O'Leary, Yujin Choi & Catherine M. Gerard, *The Skill Set of the Successful Collaborator*, 72 PUB. ADMIN. REV. S70, S71 (2012).

guard against ex parte contacts, protect impartiality, and ensure meaningful opportunity for all sides to be heard.[259]

Relatedly, agencies must recognize that many members of the public are not aware of the administrative process and many not even have heard of adjudication before filing a claim.[260] As such, agencies should provide parties and their representatives with resources to help them navigate their adjudicative systems, understand procedural alternatives that may expedite decision making, and learn about best practices for efficient and effective advocacy. Agency personnel who develop and engage in this sort of communication must have appropriate training in doing so. A lack of such training and correspondingly insufficient knowledge can hinder the adjudicative process and contribute to timeliness issues.[261]

E. Effectively Using Technology

When taking action to understand timeliness, developing a plan, allocating resources, and communicating policy, agencies should take full advantage of advances in technology and limit reliance on paper-based processes.[262] In today's governance, the use of technology is essential in the pursuit of efficiency and effectiveness.[263] Because technology can help agencies more effectively store, analyze, calculate, and process information,[264] agency use of technology enhances operational efficiency by reducing costs, increasing productivity, and improving the quality of adjudication.[265]

However, the challenge agencies face is to design, develop, and introduce new technological initiatives in a way that is sensitive to managerial, institutional, and legal considerations.[266] Some of the most common barriers to successful adoption of technology include unclear objectives for its use, inconsistencies between the design and execution of the technology, and lack of skill to utilize the technology effectively.[267] Most fundamentally, when adopting new technology, an agency must be aware of its current capabilities.[268] This requires an assessment of employee technological skill and the impact technology will have on other agency

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[259] Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practitioners, Judges, and Academicians Can Do*, 53 ADMIN. L. REV. 575, 596 (2001).
[260] William D. Schreckhise, *Administrative Law Judges and Agency Adjudication*, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 12, 15 (Jack Rabin, ed., Taylor & Francis 2005).
[261] U.S. GEN. ACCT. OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 13-15 (2009).
[262] Memorandum from Off. Mgmt. & Budget, M-23-22, Delivering a Digital-First Public Experience 23 (Sept. 22, 2023).
[263] ORG. FOR ECON. COOP. & DEV., RECOMMENDATION OF THE COUNCIL OF DIGITAL GOVERNMENT STRATEGIES 2 (2014) (addressing the cross-cutting role of technology in the design and implementation of public policies and in the delivery of outcomes).
[264] M. Jae Moon, Joohoo Lee & Chul-Young Roh, *The Evolution of Internal IT Applications and e-Government Studies in Public Administration: Research Themes and Methods*, 46 ADMIN & SOC'Y 3, 9 (2014).
[265] J. Ramón Gil-García & Theresa A. Pardo, *E-Government Success Factors: Mapping Practical Tools to Theoretical Foundations*, 22 GOV'T INFO. Q. 187, 188 (2005).
[266] J. Ramón Gil-García & Theresa A. Pardo, *E-Government Success Factors: Mapping Practical Tools to Theoretical Foundations*, 22 GOV'T INFO. Q. 187, 188 (2005).
[267] Leonidas Anthopoulos, Christopher G. Reddick, Irene Giannakidou & Nikolaos Mavridis, *Why E-Government Projects Fail? An Analysis of the Healthcare.gov Website*, 33 GOV'T INFO. Q. 161, 164 (2016).
[268] U.S. CHIEF INFO. OFF. COUNCIL, THE STATE OF FEDERAL IT REPORT SOFIT 5-6 (2017).

functions. Agencies should compile a comprehensive list of ongoing initiatives to avoid duplication of systems, practices, and data collection.[269] Additionally, if the agency regularly shares or relies on information from other agencies in its adjudicative process, the agency will need to plan and communicate with those agencies to ensure that the new technology does not inadvertently hinder information-sharing.[270]

Of fundamental importance is the preservation of due process (and procedural fairness more broadly). While new technologies, including artificial intelligence, can speed information processing and help agencies do more with less, they can raise concerns relating to transparency, accountability, and erroneous deprivation of protected interests.[271] Agencies must be cognizant of these concerns when using technology to address timeliness in adjudication. For example, while automation of processes may be helpful for static, rule-based, repetitive activities requiring minimal decision making, they may not be appropriate in other settings.[272]

Once an agency has considered fully when and how it will adapt to and implement the new technology, the agency may find it helpful to conduct an early sharing, testing, and evaluation of the technology with expected users.[273] Such pilot studies can aid agencies in identifying challenges to adoption and make adjustments as needed.

Equally as important as pre-adoption planning when introducing new technological initiatives is an agency's continued evaluation of those technologies post-adoption. Agencies should assess their use of technologies to get a sense of its values, as well as its shortcomings.[274] This assessment requires sustained leadership engagement so that agencies can be flexible and continuously adapt.[275] For example, the adoption of technology to speed workflows in one aspect of the adjudicative process may have implications for the design of operations in another area.[276]

Throughout all stages, the agency should work closely with and engage its Chief Information Officer or equivalent.[277] These officers can provide insight into the costs and benefits of various technological solutions and help identify strategies that previously have helped the agency adapt to new technologies.[278] Agencies may also find it help for create a new

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[269] ORG. FOR ECON. COOP. & DEV., RECOMMENDATION OF THE COUNCIL OF DIGITAL GOVERNMENT STRATEGIES 8 (2014).
[270] Sharon S. Dawes, *The Evolution and Continuing Challenges of E-Government*, 68 PUB. ADMIN. REV. S86, S92-93 (2008).
[271] *E.g.,* Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021); Frank Pasquale, *Normative Dimensions of Consensual Application of Black Box Artificial Intelligence in Administrative Adjudication of Benefits Claims*, 84 Law & Contemp. Probs. 35 (2021).
[272] U.S. Chief Info. Off. Council White Paper on Robotic Process Automation in Federal Agencies 3 (2023).
[273] ORG. FOR ECON. COOP. & DEV., RECOMMENDATION OF THE COUNCIL OF DIGITAL GOVERNMENT STRATEGIES 8 (2014).
[274] Julianne Mahler & Priscilla M. Regan, *Learning to Govern Online: Federal Agency Internet Use*, 32 AM. REV. PUB. ADMIN. 326, 341 (2002).
[275] U.S. CHIEF INFO. OFF. COUNCIL, THE STATE OF FEDERAL IT REPORT SOFIT 5-6 (2017).
[276] *See* Gene A. Brewer, Bruce J. Neubauer & Karin Geiselhart, *Designing and Implementing E-Government Systems: Critical Implications for Public Administration and Democracy*, 38 ADMIN. & SOC'Y 472, 480 (2006).
[277] U.S. CHIEF INFO. OFF. COUNCIL, THE STATE OF FEDERAL IT REPORT REC-2 (2017).
[278] *See* Sanjay K. Pandey & Stuart I. Bretschneider, *The Impact of Red Tape's Administrative Delay on Public Organizations' Interest in New Information Technologies*, 7 J. PUB. ADMIN. RSCH. & THEORY 113, 126-28 (1997)

organizational unit or group to coordinate the agency's use of technology. For example, the Federal Trade Commission recently launched a new Office of Technology to support the agency's investigations, assist in review and analysis of data and documents, and work with FTC staff, the Commission, and the public to provide technological expertise in its enforcement efforts.[279]

CONCLUSION

Many values inform the structure, implementation, and operation of federal administrative adjudication, among them: decisional quality; due process and procedural fairness, including the decisional independence of agency adjudications; customer experience; efficiency; and program integrity. Timeliness is also an important value of administrative adjudication, particularly in contexts in which delay itself results in the denial of justice.

Agencies, and programs of agency adjudication, are extraordinarily complex systems. It is no easy feat for policymakers to promote timeliness in these systems—and respond to surges, delays, backlogs, and other timeliness concerns when they occur—while simultaneously promoting other values of administrative adjudication.

Policymakers have devoted much time and effort to considering how best to promote timeliness in agency adjudication without negatively impacting decisional quality, procedural fairness, and other values. They have tested the effectiveness of a wide array of procedural, organizational, personnel, technological, and other techniques—some more successful than others. ACUS has addressed many of these techniques in previous recommendations.

Yet despite the critical role of timeliness in adjudication, and the amount of time and effort spent addressing it, there has been little systematic study of the factors that contribute to timeliness concerns and how policymakers address them. This study begins to fill that gap. Based on our research, we propose a set of modest best practices, described in Appendix A, to help agencies foster an organizational culture of timeliness in administrative adjudication in accord with principles fairness, accuracy, and efficiency and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

At the same time, we recognize this study uncovers many questions that warrant additional study. Much work remains to be done.

(arguing the effectiveness of information technology solutions in solving delay can be limited to those organizations that have committed to IT use in other settings).

[279] Press Release, Fed. Trade Comm'n, FTC Launches New Office of Technology to Bolster Agency's Work (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work.

APPENDIX A:
PROPOSED RECOMMENDATIONS

It is often said that justice delayed is justice denied. Indeed, one rationale underlying the adjudication of many types of cases by executive branch agencies is that they can often decide them more quickly through administrative methods than the courts can through judicial methods.

Federal agencies adjudicate millions of cases each year, including applications for benefits and services, applications for licenses and permits, and enforcement actions against persons suspected of violating the law. Members of the public depend on the timely adjudication of their cases. Delayed adjudication, especially given the added time of possible judicial review, can have significant consequences, particularly for members of historically underserved communities.

The time it takes an agency to decide a case depends on, among other variables, the evidentiary and procedural demands of the case, the volume of cases pending before the agency, and the resources available to the agency to adjudicate cases. Many factors can affect these variables, such as the funds appropriated by Congress, which directly impact the resources that agencies can allocate to adjudication. Other factors include the establishment and expansion of programs by Congress, economic and demographic changes, trends in federal employment, disruptions to agency operations such as the COVID-19 pandemic, and agency organizational structures and procedures.[1] When delays or backlogs increase, agencies frequently face pressure from parties, representatives, Congress, the media, and others to process and decide cases more promptly.

Agencies rely on a wide range of procedural, organizational, personnel, technological, and other initiatives to promote timeliness and to respond to concerns about timeliness when they arise. The Administrative Conference has adopted many recommendations identifying specific methods that agencies have used or might use to improve timeliness. One of its earliest recommendations encourages agencies to collect and analyze case processing data to "develop improved techniques fitted to [their] particular needs to reduce delays" and measure the effectiveness of those techniques.[2] Later recommendations address options including:

- Delegation of final decisional authority subject to discretionary review by the agency head;[3]
- Use of precedential decision making by appellate decision makers;[4]
- Adoption of procedures for summary judgment[5] and prehearing discovery;[6]

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[1] Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication (Oct. 11, 2023) (draft report to the Admin. Conf. of the U.S.).

[2] Admin. Conf. of the U.S., Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 38 Fed. Reg. 19,784 (July 23, 1973).

[3] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); *see also* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

[4] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

- Use of a broad suite of active case management techniques;[7]
- Establishment of quality assurance systems;[8]
- Development of reasonable time limits or step-by-step time goals for agency action;[9]
- Use of alternative dispute resolution (ADR) techniques;[10]
- Use of simplified or expedited procedures in appropriate cases;[11]
- Use of remote hearings;[12]
- Aggregation of similar claims;[13]
- Use of personnel management devices;[14] and
- Implementation of electronic case management and publicly accessible online processes.[15]

These recommendations remain valuable resources for policymakers charged with promoting and improving timeliness in agency adjudication. As technologies develop, policymakers are also increasingly looking to artificial intelligence and other advanced algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive processes.[16]

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[5] Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).
[6] Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973).
[7] Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).
[8] Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).
[9] Recommendation 86-7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).
[10] Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23,635 (June 24, 1987).
[11] Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990); Recommendation 86-7, *supra* note 7, ¶ 3.
[12] Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86-7, *supra* note 7.
[13] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Recommendation 86-7, *supra* note 7, ¶ 9.
[14] Recommendation 86-7, *supra* note 7, ¶ 1.
[15] Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).
[16] *Cf.* David Freeman Engstrom et al., Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); *see also* Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Nov. 1, 2023).

At the same time, no single method will promote timeliness at all agencies in all circumstances. Each agency has its own mission, serves different communities, adjudicates according to a distinct set of legal requirements, has different resources available to it, and faces different operational realities. Moreover, in promoting timely adjudication, agencies must remain sensitive to other values of administrative adjudication such as decisional quality, procedural fairness, consistency, transparency, customer service, and equitable treatment. Building on earlier recommendations, this Recommendation provides a general framework that agencies and Congress can use to foster an organizational culture of timeliness in agency adjudication in accord with principles of fairness, accuracy, and efficiency and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

RECOMMENDATION

Information Collection

1. Agencies should ensure their electronic or other case management systems are collecting data necessary to accurately monitor and detect changes in case processing times at all levels of their adjudication systems (e.g., initial level, hearing level, appellate review level), identify the causes of changes in case processing times, and devise methods to promote or improve timeliness without adversely affecting decisional quality, procedural fairness, or other objectives. Agencies should identify the kinds of data or records that Congress, media representatives, researchers, or other stakeholders frequently request, to ensure that agency personnel responsible for responding to such requests can do so in an efficient manner. Agencies should ensure that electronic or other case management systems track the following information:

    a. The number of proceedings of each type pending, commenced, and concluded during a standard reporting period (e.g., week, month, quarter, year) within and across different levels of their adjudication systems;

    b. The current status of each case pending at every level of their adjudication systems; and

    c. For each case, the number of days required to meet critical case processing milestones within and across different levels of their adjudication systems.

2. To meet organizational goals and clarify stakeholder expectations, agencies should communicate regularly with internal and external stakeholders. In addition to formal engagements, agencies should provide ongoing opportunities for interested persons within and outside the agency to provide feedback and suggestions. Methods for obtaining information include:

    a. Stakeholder surveys;

    b. Listening sessions and other meetings;

    c. Requests for information published in the *Federal Register*;

d. Online feedback forms; and

e. Use of ombuds.

Performance Goals and Standards

3. Agencies should adopt organizational performance goals that encourage and provide clear expectations for timeliness. Performance goals may take several forms, including goals contained in agency strategic plans, rules establishing time limits for concluding cases, or policies instituting step-by-step time goals. In developing organizational performance goals for timeliness, agencies should:

   a. Use the information described in Paragraphs 1 and 2 to develop goals that are reasonable and objective;

   b. Encourage interested persons within and outside the agency to participate in the development of such goals; and

   c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable; (ii) encourage and provide clear expectations for timeliness; and (iii) do not adversely affect decisional quality or the fairness or integrity of proceedings.

4. When agencies consider timeliness or productivity in appraising the performance of employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service, and in setting timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, they should:

   a. Use the information described in Paragraphs 1 and 2 to develop measures that are reasonable and objective and provide clear expectations for timeliness;

   b. Encourage interested persons within and outside the agency, including employees to whom the measures apply, to participate in the development of such measures;

   c. Ensure measures reflect tasks within the control of individual employees;

   d. Ensure measures take into account the range of case types and tasks performed by individual employees as well as resources (e.g., staff support, technology) at their disposal;

   e. For employees who decide cases, ensure measures do not inadvertently lead them to decide cases in a particular way;

   f. For all employees, ensure measures do not inadvertently lead them to take actions that would adversely affect decisional quality or the fairness or integrity of proceedings; and

   g. Periodically reevaluate such measures.

Organizational, Procedural, Technological, and Case Management Techniques

The Administrative Conference has adopted many recommendations, listed in the Preamble, that identify organizational, procedural, technological, and case management techniques that agencies should use, in appropriate circumstances, to promote timeliness in adjudication or respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies should also implement the following best practices, as appropriate.

5. Agencies should narrow disputes and resolve cases at the earliest possible level of their adjudication systems and, at each level, through the least time- and resource-intensive processes available and appropriate to the circumstances, such as informal prehearing procedures, alternative dispute resolution, streamlined procedures, or decision making on the written record.

6. As appropriate, agencies should adopt procedures for: (i) resolving multiple cases in a single proceeding, such as the aggregation of similar claims; or (ii) resolving recurring legal or factual issues, such as precedential decision making or substantive rulemaking.

7. Agencies should adopt processes for screening cases at intake to: (i) resolve procedural issues as early as possible; (ii) identify cases that may be appropriate for less time- and resource-intensive processes, such as those listed in Paragraphs 5 and 6; (iii) identify cases that can be resolved quickly because they are legally and factually straightforward; and (iv) identify cases that should be prioritized or expedited.

8. Agencies should adopt procedures that standardize the allocation of tasks among adjudicators, managers, and legal and paralegal support staff.

9. Agencies should review and update as necessary their Human Capital Operating Plans (5 C.F.R. pt. 250) to ensure their hiring and position management needs are properly aligned with their operational goals for adjudication.

10. Agencies should automate—using artificial intelligence, for example—routine tasks that do not require a significant exercise of discretion when automation will not adversely affect quality or program integrity. Such tasks may include receiving filings and evidence, establishing new case files, associating records with case files, de-duplicating records, assigning cases to agency personnel for action, screening cases as described in Paragraph 7, and generating and releasing standardized correspondence.

11. Agencies should outsource routine tasks that do not require a significant exercise of discretion—such as transcription, scanning records, or mailing correspondence—when it would be more efficient and cost-effective for a contractor to perform them.

12. Agencies should adopt rules and policies that reflect best practices for case management, including evidentiary development, motions practice, intervention, extensions of time, decision writing, and methods for encouraging prompt action and discouraging undue delay by parties. At the same time, agencies should ensure that adjudicators, managers, and support staff have sufficient flexibility to manage individual cases fairly, accurately, and efficiently,

and test alternative case management techniques that may reveal new best practices. Agencies should periodically reevaluate such rules and policies, using the information described in Paragraphs 1 and 2, to ensure they continue to reflect best practices for case management and provide relevant personnel with sufficient flexibility to manage individual cases and test alternative case management techniques.

13. Agencies should establish organizational units, supervisory structures, and central and field operations that reinforce timeliness and facilitate appropriate communication among agency personnel involved in adjudication at all levels of an adjudication system.

14. Agencies should update public websites and electronic case management systems so that they are able to handle the volume of current and future cases efficiently and effectively.

Strategic Planning

15. Agencies should engage in evidence-based and transparent strategic planning to anticipate and address concerns about timeliness, including increased caseloads, delays, and backlogs. In undertaking such strategic planning, agencies should:

    a. Use the information described in Paragraphs 1 and 2 to identify case processing trends such as geographical or temporal variations in case intake or case processing times, assess the causes of timeliness concerns, and identify points at all levels of their adjudication systems that are causing delays;

    b. Review previous efforts to address timeliness concerns to understand what initiatives have been attempted and which have been effective;

    c. Consider a wide range of options for improving timeliness in the adjudication process without adversely affecting decisional quality, procedural fairness, program integrity, or other objectives. Options may include organizational, procedural, technological, case management, and other techniques, including those identified in previous Conference recommendations and Paragraphs 5–14;

    d. Engage in candid discussions with adjudicators, managers, and support staff at all levels of their adjudication systems, as well as interested persons outside the agency, regarding the benefits, costs, and risks associated with different options for improving timeliness;

    e. Develop proposed plans for addressing timeliness concerns, and solicit feedback on the plan from interested persons within and outside of the agency;

    f. Consider pilot studies and demonstration projects before implementing interventions broadly to test the effectiveness of different interventions and identify unintended consequences; and

    g. Designate a senior official responsible for coordinating the activities described in this Paragraph.

Communication, Coordination, and Collaboration

16. Agencies should enhance communication between components involved in their adjudication systems and other components that carry out functions necessary for timely adjudication, such as those that oversee information technology, human resources, budget planning, office space, and procurement.

17. Agencies should coordinate with the President, when required, and with Congress by providing information on recommended legislative changes and appropriations that would promote timeliness generally or address ongoing timeliness concerns.

18. Agencies should partner with federal entities such as the Chief Information Officers Council, the U.S. Digital Service, the General Services Administration, and the Office of Personnel Management to develop and implement best practices for leveraging information technology, human capital, and other resources to promote or improve timeliness.

19. Agencies should share information with each other about their experiences with and practices for promoting timeliness generally and addressing ongoing timeliness concerns. The Office of the Chair of the Administrative Conference should provide for the interchange of such information, as authorized by 5 U.S.C. § 594(2).

20. Agencies should institutionalize partnerships with relevant legal service providers, other nongovernmental organizations, and state and local government agencies that advocate for or provide assistance to individuals who participate as parties in agency adjudications.

21. Agencies should make informational materials available to adjudicators, managers, and legal and paralegal support staff and conduct regular training sessions for such personnel on best practices for fair, accurate, and efficient case management.

22. Agencies should provide parties and representatives with resources to help them navigate their adjudication systems, understand procedural alternatives that may expedite decision making in appropriate cases, and learn about best practices for efficient and effective advocacy before the agency. Such resources may include informational materials (e.g., documents written in plain language and available in languages other than English, short videos, decision trees, and visualizations), navigator programs, and counseling for self-represented parties.

23. As early as possible and at key points throughout the adjudication process, agencies should provide self-represented parties with plain-language materials informing them of: (i) their right to be represented by an attorney or qualified nonlawyer legal service provider; (ii) the potential benefits of representation; and (iii) options for obtaining representation.

24. Agencies should publicly identify those case management priorities and procedures that have been adopted to improve timeliness and may result in parties' cases being identified for aggregation, expedition, or similar alternative techniques.

25. Agencies should publicly disclose average processing times and aggregate processing data for claims pending, commenced, and concluded during a standard reporting period; any deadlines or processing goals for adjudicating cases; and information about the agency's plans for and progress in addressing timeliness concerns.

26. When agencies consider timeliness or productivity in appraising the performance of employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service, and when they set timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, they should disclose such measures publicly and explain how they were developed. For employees who are subject to performance appraisal, agencies should disclose publicly: (i) how they use such measures to appraise employees, and (ii) whether employees are eligible for incentive awards based on timeliness or productivity.

Consideration for Congress

27. Congress ordinarily should not impose statutory time limits on agency adjudication. If Congress does consider imposing time limits on adjudication by a particular agency, it should first seek information from the agency and stakeholders. If Congress does decide to impose time limits, it should do so only after determining that the benefits of such limits outweigh the costs. If Congress then decides time limits are necessary or warranted, it should require agencies to adopt reasonable time limits or, in rare circumstances, impose such limits itself. In setting any statutory time limits, Congress should:

    a. Recognize that preexisting statutory or regulatory frameworks or special circumstances (e.g., a sudden substantial increase in an agency's caseload or the complexity of the issues in a particular case) may justify an agency's failure to conclude a case within the proposed statutory time limit;

    b. State expressly what should occur if the agency does not meet its statutory deadline; and

    c. State expressly whether affected persons may or may not enforce the time limit through judicial action and, if so, the nature of the relief available for this purpose.

APPENDIX B:
DEPARTMENT OF COMMERCE

[Forthcoming.]

APPENDIX C:
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Medicare Coverage and Payment

This case study provides an overview of efforts to improve or promote timeliness under the Medicare program. Established in 1965 and administered by the Department of Health and Human Services (HHS), Medicare provides health insurance to individuals aged 65 or older and younger individuals with a long-term disability or end-stage renal disease.[1]

Many types of cases are adjudicated under the Medicare program, including entitlement, calculation of premiums, coverage of and payment for services provided to individual beneficiaries, reimbursement for costs reported by providers, and geographical classification of hospitals for cost reimbursement purposes. This report focuses on claims filed by providers and beneficiaries for coverage of and payment for services.

Part I provides an overview of the Medicare program, its historical development, and the process for adjudicating claims and appeals. Part II describes timeliness as a value in Medicare adjudication. Part III describes factors that have affected the timeliness of Medicare adjudication. Part IV describes efforts by HHS and Congress to promote or improve timeliness since 2005, when the Office of Medicare Hearings and Appeals (OMHA) became operational.

I. BACKGROUND

A. The Program

Medicare consists of four parts. Original Medicare, established in 1965, consists of Part A and Part B. Part A covers inpatient hospital care, skilled nursing facility care, nursing home care, hospice care, and home health care. Part B covers outpatient, physician, and preventive services. Together, these parts make up the "fee-for-service" components of Medicare, under which the government reimburses health care providers for specified units of service at predetermined rates set forth by regulation.[2]

The two "managed care" components of Medicare were created later. Part C, formalized in 1997, allows beneficiaries to obtain covered services through private managed care plans, typically health maintenance organizations. Part D, established in 2003, covers prescription drugs. Under both Part C and Part D, private insurance entities provide benefits in exchange for monthly capitated payments from the government.[3]

B. The Agency

Medicare was administered originally by the Social Security Administration (SSA), then a subunit of the Department of Health, Education, and Welfare (HEW). In 1977, Congress

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[1] Individuals receiving Social Security Disability Insurance (SSDI) become eligible for Medicare after a two-year waiting period. 42 U.S.C. § 426(b)(2)(A). The waiting period is waived for SSDI beneficiaries diagnosed with amyotrophic lateral sclerosis.

[2] PATRICIA A. DAVIS ET AL., CONG. RSCH SERV., R40425, MEDICARE PRIMER (2020).

[3] *Id*.

established a separate HEW subunit—the Health Care Financing Administration (HCFA), later renamed the Centers for Medicare and Medicaid Services (CMS)—to administer the Medicare and Medicaid programs. SSA continued (and still continues) to process Medicare applications, enroll beneficiaries, and process premium payments. SSA administrative law judges (ALJs) continued to hear appeals from CMS determinations, including coverage and payment claims, until 2005, when that function was transferred to a new office, OMHA, within HHS.

Today, three HHS subunits adjudicate Medicare coverage and payment cases: CMS, OMHA, and the Departmental Appeals Board (DAB). Claims are adjudicated initially by contractors according to policies set by CMS. OMHA is a subunit of HHS, independent of CMS, that is headed by a Chief ALJ who reports directly to the Secretary of HHS. Most cases appealed to OMHA are heard and decided by ALJs who are stationed in field offices around the country and supported by legal and paralegal staff. Like OMHA, DAB is subunit of HHS independent of CMS. DAB is headed by a Chair who reports directly to the Secretary.[4] DAB reviews cases arising under more than 60 statutory provisions including, since 1995, Medicare coverage and payment cases. Medicare cases are reviewed by the Medicare Appeals Council (MAC), which is a subunit of DAB. MAC consists of administrative appeals judges and appeals officers, who are supported by legal and paralegal staff.[5]

C. The Adjudication Process

The current process for adjudicating individual coverage and payment claims consists of an initial determination, four levels of administrative appeals, and judicial review:

- **Initial Determination.** A claim for coverage and payment under Part A or B is determined initially by a Medicare administrative contractor,[6] which is a private health care insurer that has been awarded a contract to process claims within a specific region. A claim for coverage and payment under Part C or D is determined initially by a Medicare Advantage plan or a prescription drug plan, respectively.

- **Redetermination (Level 1).** A beneficiary or provider who is dissatisfied with an initial determination may request redetermination by the initial decision maker. There is also a process for requesting an expedited determination by a Quality Improvement Organization (QIO), which is an entity working under contract with CMS that performs quality improvement initiatives and consists of representatives of health care providers and consumers.

- **Reconsideration (Level 2).** A beneficiary or provider who is dissatisfied with the outcome of a Level 1 appeal under Part A or Part B may request reconsideration by a Qualified Independent Contractor (QIC) working under contract with CMS. There is also a process for requesting expedited reconsideration of a QIO's redetermination. A

[4] *About OMHA*, DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/omha/about/ index.html (last visited Oct. 6, 2023).
[5] *About DAB*, DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/about-dab/index.html (last visited Oct. 6, 2023).
[6] CMS uses the acronym "MAC" to refer to Medicare administrative contractors. The same acronym is used to refer to the Medicare Appeals Council. For clarity, "MAC" in this report refers only to the Medicare Appeals Council.

claimant who is dissatisfied with the outcome of a Level 1 appeal under Part C or D may request reconsideration by an Independent Review Entity retained by CMS.

- **Hearing (Level 3).** A beneficiary or provider who is dissatisfied with the outcome of a Level 2 appeal under any Part may request a formal, adversarial hearing before an OMHA ALJ.

- **Administrative Review (Level 4).** A beneficiary or provider who is dissatisfied with the outcome of a Level 3 appeal under any Part may request MAC review.

- **Judicial Review.** A beneficiary or provider who is dissatisfied with the outcome of a Level 4 appeal may seek judicial review in federal district court, which is sometimes called a Level 5 appeal.[7]

II. TIMELINESS AS A VALUE IN MEDICARE APPEALS ADJUDICATION

Because the Medicare program was created to improve access to healthcare among older individuals and individuals with disabilities, timeliness—critical to ensuring that individuals receive the healthcare they need—has always been an integral value animating administration and oversight of the program.

Concerns about the timeliness of Medicare adjudication date to at least the 1980s and 1990s. Stakeholders raised concerns about the time it took to transfer paper files between different levels of adjudication and differences in substantive outcomes at different levels, which seemed to incentivize unnecessary appeals. Stakeholders also attributed delays to the fact that Medicare appeals consisted of nonadversarial hearings before SSA ALJs, who were already overwhelmed by a high volume of claims under the Social Security Disability Insurance (SSDI) and Supplemental Security Income programs.[8]

Several proposals were floated to address these concerns. Congress considered proposals to establish a separate ALJ corps within HCFA.[9] HHS's Office of Inspector General (OIG) recommended that HHS develop consistent substantive standards and training programs for adjudicators at all levels, develop special procedural rules for Level 3 appeals, conduct Level 3 as adversarial proceedings, and treat significant DAB rulings as precedent binding on lower-level adjudicators.[10]

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[7] For an overview of the appeals process, see *The Appeals Process*, DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/omha/the-appeals-process/index.html (last visited Oct. 5, 2023).

[8] *See, e.g.*, *Adjudicatory Procedures of the Department of Health and Human Services: Hearings Before the Subcomm. on Admin. L. & Gov't Relations of the H. Comm. on the Judiciary*, 101st Cong. (1989); *Proposed New Administrative Appeals Process for Medicare Claims: Hearing Before the Subcomm. on Admin. L. & Gov't Relations of the H. Comm. on the Judiciary*, 110th Cong. (1987).

[9] *See Proposed New Administrative Appeals Process for Medicare Claims: Hearing Before the Subcomm. on Admin. L. & Gov't Relations of the H. Comm. on the Judiciary*, 110th Cong. (1987).

[10] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-04-97-00160, MEDICARE ADMINISTRATIVE APPEALS: ALJ HEARING PROCESS (1999).

Congress enacted a series of reforms in the 2000s to improve the timeliness of the Medicare appeals system. The Medicare, Medicaid, and State Children's Health Insurance Program Benefits Improvement and Protection Act of 2000 (BIPA) established strict statutory timeframes for decision making at each level of the administrative process: 45 days for initial determinations, 30 days for Level 1 appeals, 30 days for Level 2 appeals, 90 days for Level 3 appeals, and 90 days for Level 4 appeals. BIPA permitted parties to escalate their cases to the next level if a QIC, an ALJ, or MAC failed to meet the statutory timeframe for their appeal. BIPA also lowered the amount in controversy required for Level 3 and Level 4 appeals and required that adjudicators at all appeals levels, including MAC, review claims de novo.[11]

It soon became clear that components responsible for processing appeals would be unable to meet BIPA's timeliness standards. OIG reported that the current system was "backlogged, overwhelmed, and untimely, and the problems could be exacerbated by BIPA provisions." It found that "[e]levations of appeals not adjudicated in mandated time frames could further overload the system and provide opportunities for 'gaming.'" It found further that competing workload pressures on SSA ALJs and MAC's small size ("two judges and a small support staff") left them unprepared to handle a large surge in cases. OIG recommended reassigning Level 3 appeals from SSA ALJs to a new, specialized cadre of ALJs within HHS.[12]

OIG also noted that "tight time frames could compromise program integrity efforts and fraud investigations." To balance different goals and competing priorities, and avoid unintended consequences, OIG recommended that Congress "[e]nsure adequate resources for each level of the appeals process" and modify timeframes to "[p]rovide adequate time for fair and effective processing, but ensure timely and efficient resolution of appeals.[13]

The Government Accountability Office (GAO) also found that both SSA's Office of Hearings and Appeals (OHA) and MAC "continued to operate without time frames for rendering decisions." Like OIG, it attributed delays to factors including (1) a "large backlog of pending cases at OHA and MAC"; (2) competing pressures at OHA to adjudicate SSA disability appeals, which made up 85 percent of the office's total caseload and were experiencing their own backlog; (3) BIPA's escalation provision; (4) the de novo review requirement for MAC review; (5) "difficulties in transferring and locating files"; (6) "outdated technology"; (7) lack of coordination among CMS, OHA, and the MAC; (8) a lack of management data; and (9) limited resources for implementing BIPA. GAO concluded that meeting BIPA's timeframes would "demand a level of performance that the appeals bodies have not demonstrated they can meet."[14]

Responding to these concerns, Congress provided in the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) that SSA should transfer its responsibility for adjudicating Medicare appeals to an entity within HHS, but independent of CMS, in 2005. To

[11] Pub. L. No. 106-554, § 521, 114 Stat. 2763, 2763A-534–43 (2000).
[12] DEP'T OF HEALTH & HUM. SERVS., OEI-04-01-00290, MEDICARE ADMINISTRATIVE APPEALS: THE POTENTIAL IMPACT OF BIPA (2002).
[13] *Id*.
[14] U.S. GEN. ACCT. OFF., GAO-03-841, MEDICARE APPEALS: DISPARITY BETWEEN REQUIREMENTS AND RESPONSIBLE AGENCIES' CAPABILITIES (2003).

prepare for the transition, the MMA directed SSA and HHS to prepare a comprehensive transfer plan that addressed, among other matters:

- the number of ALJs and support staff needed to decide cases "in a timely manner, taking into account the current and anticipate claims volume, appeals, number of beneficiaries, and statutory changes";
- the development of a case management system that would "facilitate the maintenance and transfer of specific data" across all adjudication levels;
- the feasibility of developing a system of precedential decision making for DAB rulings addressing "broad legal issues";
- the feasibility of improving access to ALJs through electronic filing and telephone or video teleconference (VTC) hearings;
- the appropriate geographic distribution of ALJs across the country to "ensure timely access to such judges"; and
- the "appropriateness of establishing performance standards for [ALJs] with respect to [statutory] timelines for decisions in cases," consistent with MMA and APA requirements for decisional independence and impartiality.[15]

SSA and HHS transmitted their transfer plan to Congress and GAO in March 2004,[16] and GAO reviewed the plan and evaluated the agencies' progress over the next year.[17]

The MMA also included several other measures that were consistent with OIG's recommendations or otherwise intended to improve timeliness. First, it "increased financial support" to "ensure timely action on appeals" before ALJs and MAC. Specifically, it made funds available, as needed, to hire additional adjudicators and support staff, improve education and training opportunities for adjudicators and support staff, and expedite processing of certain types of appeals. Second, the statute extended the timeframes for Level 1 and Level 2 appeals from 30 days to 60 days. Third, responding to concerns about the scope of review on appeal, the MMA mandated "fully and early presentation of evidence by providers" by prohibiting them from introducing evidence on appeal before an ALJ or MAC that was not presented during reconsideration before a QIC absent "good cause which precluded the introduction of such evidence at or before that reconsideration." Fourth, the MMA required the Secretary to develop a

[15] Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396–98 (2003).
[16] SEC'Y OF HEALTH & HUM. SERVS. & COMM'R OF SOC. SEC., PLAN FOR THE TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS (2004), https://www.ssa.gov/legislation/medicare/medicare_appeal_transfer.pdf.
[17] U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-703R, MEDICARE: CONCERNS REGARDING PLANS TO TRANSFER THE APPEALS WORKLOAD FROM SSA TO HHS REMAIN (2005); U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-45, MEDICARE: INCOMPLETE PLAN TO TRANSFER APPEALS WORKLOAD FROM SSA TO HHS THREATENS SERVICE TO APPELLANTS (2004).

less time-consuming process by which providers could correct minor errors and omissions without pursuing the formal appeals process.[18]

Interest in the operation of the reformed Medicare appeals system remained high after SSA transferred its ALJ hearing function to OMHA. OIG conducted several studies of the timeliness of Level 2 appeals. A 2008 report found that Part A QICs generally met the 60-day processing timeframe but that Part B QICs did not. Delays were attributed to factors including delays in transferring case files, "unexpected" case volumes, and problems with the agency's electronic case management system. OIG recommended that CMS take further action to ensure that QICs meet timeliness requirements.[19]

At the request of members of Congress, OIG also examined whether OMHA was deciding cases within the statutory timeframe of 90 days. Although OMHA "did not decide a number of its cases in a timely manner" during its first thirteen months, by its third year in operation it was deciding about 95 percent of cases within 90 days. Processing times averaged 67.5 days, even despite a growing caseload.[20]

A significant backlog of appeals had developed by 2013, however. Many appellants took advantage of BIPA's escalation provisions, but because they were reluctant to sacrifice the right to a hearing before an ALJ, the backlog was concentrated at OMHA. Facing significant public, congressional, and judicial pressure, HHS spent the next decade addressing the backlog and implementing or advocating for reforms to prevent a recurrence. That experience provides most of the evidence for this report.

III. FACTORS AFFECTING TIMELINESS

Recent concerns about timeliness in the Medicare appeals system are largely a function of the explosive growth in the number of coverage and payment cases filed by providers since 2009. (The number of requests for an ALJ hearing increased 1,222 percent between FY 2009 and FY 2014.) HHS attributed the growth of this caseload to four factors:

(1) the "expanding Medicare beneficiary population and utilization in services across that population" as Baby Boomers became Medicare-eligible and the number of SSDI beneficiaries increased;

(2) "enhanced monitoring of payment accuracy in the Medicare Part A and Part B (fee-for-service) programs";

(3) "growth in appeals from State Medicaid agencies for beneficiaries dually enrolled in both Medicare and Medicaid"; and

[18] Pub. L. No. 108-173, §§ 931–933, 117 Stat. 2066, 2398–406 (2003).
[19] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-06-06-00500, EARLY IMPLEMENTATION REVIEW OF QUALIFIED INDEPENDENT CONTRACTOR PROCESSING OF MEDICARE APPEALS RECONSIDERATIONS (2008).
[20] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-02-06-00111, MEDICARE ADMINISTRATIVE LAW JUDGE HEARINGS: UPDATE, 2007–2008 (2009); DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-02-06-00110, MEDICARE ADMINISTRATIVE LAW JUDGE HEARINGS: EARLY IMPLEMENTATION, 2005–2006 (2008).

(4) "national implementation of the Medicare fee-for-service Recovery Audit [RA] program."[21]

Implementation of the RA program had by far the greatest impact on the appeals system.[22]

The RA program originated with the Medicare Integrity Program, created by Congress in 1996 to control costs and combat fraud and waste. The program directed HHS to enter into contracts with eligible entities to review the activities of providers under Parts A and B.[23]

The MMA directed HHS to conduct a temporary demonstration project under which the agency contracted with eligible entities, called recovery audit contractors (RACs), to identify underpayments and overpayments to providers under Parts A and B. Under the demonstration, when a RAC identified an improper payment—typically an overpayment—they notified the Medicare administrative contractor, who reopened the initial determination and adjusted the claim to reflect the proper payment amount. The provider could appeal the adjustment using the ordinary multilevel appeals process for Part A and Part B claims. The RAC was entitled to payment on a contingent fee basis (i.e., a percentage of the improper payment recovered from or returned to the provider). CMS was responsible for evaluating the performance of RACs and taking action to address vulnerabilities identified through RA activities.[24]

The demonstration lasted three years, from 2005 to 2008, and included six states. Congress made the program permanent and expanded it nationwide.[25] The program was fully operational by October 2009, at which point four contractors were performing RA functions in four geographical regions. In fiscal years 2010 and 2011, RACs reviewed 2.6 million claims from about 292,000 providers and found that almost half were improperly paid. The vast majority—about 1.1 million—involved overpayments. Only about six percent of overpayments, or 65,198 claims, were appealed during fiscal years 2010 and 2011. Of those claims, however, 44 percent were overturned on appeal. The number of appeals grew quickly over the next couple years, resulting in a substantial backlog at OMHA by 2013.[26]

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

A majority of appeals resulting from RAs involved claims for hospital admissions that had been denied under Part A. To curb the growing number of appeals, CMS clarified its inpatient admission policy in a March 18, 2013, ruling and an August 22, 2013, final rule. Separately, CMS suspended most recovery audits of Part A inpatient hospital admissions under the new rule while providers became familiar with it. Congress subsequently extended the suspension of audits for new admissions through March 31, 2015. CMS also made improvements

[21] 82 Fed. Reg. 4974, 4976 (Jan. 17, 2017).
[22] *See* SEN. REP. NO. 114-177, at 2–5 (2015).
[23] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 202, 110 Stat. 1936, 1996–98 (1996).
[24] Pub. L. No. 108-173, § 306, 117 Stat. 2066, 2256–57 (2003).
[25] Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 302, 120 Stat. 2922, 2991–92 (2006).
[26] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-04-11-00680, MEDICARE RECOVERY AUDIT CONTRACTORS AND CMS'S ACTIONS TO ADDRESS IMPROPER PAYMENTS, REFERRALS OF POTENTIAL FRAUD, AND PERFORMANCE (2013).

to the recovery audit program designed, in part, to reduce "the number of payment denials that providers and suppliers appeal."[27]

Some stakeholders have argued that the only way to prevent a future backlog is to reform the RA program,[28] and Congress has considered legislation that would limit the period during which RACs could audit and recover overpayments from providers and establish a system of incentives and disincentives to encourage compliance among RACs and providers.[29]

To address the large backlog of already pending appeals, especially at OMHA, HHS adopted a three-pronged approach to addressing the backlog. First, the agency planned to "[r]equest new resources to invest at all levels of appeal to increase adjudication capacity and implement new strategies to alleviate the current backlog."[30] HHS officials advocated at the Office of Management and Budget and before Congress for additional funding. HHS also urged Congress to consider two additional revenue sources: (1) RA program recoveries, and (2) filing fees. Under the first proposal, HHS would retain a portion of RA program recoveries and use them to cover the costs of adjudicating RA-related appeals at Levels 3 and 4. Under the second proposal, providers would pay a filing fee at each level of appeal, which would be refunded to appellants who received a fully favorable decision. HHS believed a filing fee "would encourage those who frequently file to more carefully assess the merits of their appeals before filing."[31]

Second, HHS planned to "take administrative actions to reduce the number of pending appeals and implement new strategies to alleviate the current backlog."[32] HHS implemented a range of informational, organizational, procedural, personnel, educational, and technological measures, which are discussed below.

Third, HHS planned to "propose legislative reforms that provide additional funding and new authorities to address the volume of appeals."[33] HHS proposed a suite of legislative proposals, many of which were included in the Audit & Appeals Fairness, Integrity, and Reforms in Medicare (AFIRM) Act, which Senator Orrin Hatch introduced in 2015. The bill was reported out of the Senate Finance Committee but never voted on in the Senate. Senators Chuck Grassley and Ron Wyden reintroduced the AFIRM Act again in 2019.[34]

Before discussing actions taken by HHS, it is important to note the important role that judicial oversight has played in addressing the backlog. In May 2014, the American Hospital Association (AHA) and other plaintiffs filed suit in the U.S. District Court for the District of

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[27] 79 Fed. Reg. 63,398 (Oct. 23, 2014).
[28] *See, e.g.*, Jessica L. Gustafson & Abby Pendleton, *Medicare Appeals Adjudication Delays: Implications for Healthcare Providers and Suppliers*, HEALTH LAW., June 2014, at 26, 29–30.
[29] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015).
[30] 82 Fed. Reg. 4974, 4976 (Jan. 17, 2017).
[31] *Creating a More Efficient and Level Playing Field: Audit and Appeals Issues in Medicare: Hearing Before the Sen. Comm. on Finance*, 114th Cong. 40 (2015) (statement of Nancy J. Griswold, Chief Admin. L. Judge, Off. of Medicare Hearings & Appeals, Dep't of Health & Hum. Servs.) [hereinafter *Audit and Appeals Issues in Medicare*].
[32] 82 Fed. Reg. 4974, 4976 (Jan. 17, 2017).
[33] 82 Fed. Reg. 4974, 4976 (Jan. 17, 2017).
[34] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015).

Columbia requesting a writ of mandamus to compel the Secretary to adjudicate their appeals according to the statutory deadlines. The district judge initially dismissed the case for lack of jurisdiction,[35] but the D.C. Circuit reversed and remanded in 2016, directing the court to "determine whether 'compelling equitable grounds' now exist to issue a writ of mandamus."[36]

Finding equitable grounds for mandamus, the district judge denied the Secretary's motion to "stay the proceedings until September 30, 2017, the close of the next full appropriations cycle, to permit HHS to pursue various administrative and legislative efforts designed to tackle the significant appeals backlog."[37] Recognizing that it "could not practicably order HHS to resolve each of the pending appeals by the statutorily prescribed deadlines," however, the court asked the parties to provide briefing on the appropriate form of mandamus relief. Plaintiffs proposed that the court require the Secretary to take certain actions or, alternatively, require the Secretary to meet numeric targets for reducing the backlog. Believing it "should intrude as little as possible on the Secretary's specific decisionmaking processes and operations," the court adopted the timetable proposed by plaintiffs and ordered HHS to reduce the backlog of cases then pending at the ALJ level by 30 percent by December 31, 2017; 60 percent by December 31, 2018; 90 percent by December 31, 2019; and 100 percent by December 31, 2020. The court also ordered the agency to submit status reports every 90 days. The court administratively terminated the case but retained jurisdiction to review status reports and rule on any challenges.[38]

HHS appealed the district court's order, arguing it would be impossible to meet the court-ordered deadlines through lawful means. The D.C. Circuit remanded in 2017 for further consideration of that argument.[39] On remand, the district court found it would be possible for the agency to comply with the timetable. In a November 1, 2018, order, the court directed HHS to reduce the backlog of cases then pending at the ALJ level (426,594) by 19 percent by September 30, 2019; 49 percent by September 30, 2020; 75 percent by September 30, 2021; and 100 percent by September 30, 2022.[40] The court revised the timetable in an October 26, 2022, order, directing HHS to reduce the backlog of appeals pending at the ALJ level by 98 percent by March 31, 2023.[41] The most recent status report, dated April 7, 2023, shows that HHS had reduced the backlog by 99.84 percent, with only 663 of the 426,594 appeals remaining.[42]

A. Informational Measures

HHS has required data to improve timeliness. Access to reliable management information has been critical to (1) monitor the agency's caseload and available resources, (2) predict caseload trends and future resource needs, (3) track organizational and individual performance, (4) identify sources of delay and areas for improvement, (5) measure the effectiveness of

[35] Am. Hosp. Ass'n v. Burwell, 76 F. Supp. 3d 43 (D.D.C. 2014).
[36] Am. Hosp. Ass'n v. Burwell, 812 F.3d 183 (D.C. Cir. 2016).
[37] Am. Hosp. Ass'n v. Burwell, 2019 F. Supp. 3d 221 (D.D.C. 2016).
[38] Am. Hosp. Ass'n v. Burwell, Civil Action No. 14-851, 2016 U.S. Dist. LEXIS 167291 (D.D.C. Dec. 5, 2016).
[39] AHA v. Price, 867 F.3d 160 (2017).
[40] AHA v. Azar, Civil Action No. 14-851, 2018 U.S. Dist. LEXIS 186853 (D.D.C. Nov. 1, 2018).
[41] Am. Hosp. Ass'n v. Becerra, No. 14-851 (D.D.C. Oct. 26, 2022).
[42] Am. Hosp. Ass'n v. Becerra, No. 14-851 (D.D.C. filed Apr. 7, 2023) (joint status report).

improvement initiatives, and (6) determine whether improvement initiatives have unintended consequences on other values such as substantive accuracy and procedural fairness.

Some of OMHA's earliest efforts to address the backlog involved improving how it collects, analyzes, and uses data about the operation of the Medicare appeals system. The transition from paper-based processes to electronic case management has been critical to these efforts.[43] OMHA has relied on several sources of information in addition to data collected through its electronic case management systems, which are discussed in greater detail below.

First, OMHA's quality assurance (QA) program has proved a source of useful information. OMHA introduced a rudimentary QA program—a peer-review process—in 2012. By 2016, OMHA was also using its QA program to identify procedural trends and disseminate best practices to improve efficiency.[44]

Second, OMHA has made extensive use of pilots and demonstration projects to test and refine improvement initiatives before implementing them broadly. Many measures that HHS has implemented to reduce the backlog began as pilot or demonstration projects, including: (1) the digital transfer of cases between appeals levels, (2) the Medicare Appeals Template System, (3) the opportunity for informal conferences at Level 2, (4) the Settlement Conference Facilitation initiative, (5) the use of statistical sampling and extrapolation, and (6) the disposition of certain Level 3 appeals by staff attorneys rather than ALJs. These initiatives are discussed below.

Third, OMHA and other HHS components have relied extensively on stakeholder engagement, not only to keep appellants informed about the backlog and efforts to address it but also to solicit feedback on proposed and ongoing initiatives and ideas for additional reforms. Stakeholder engagement efforts have included:

- **Public Forums.** OMHA invited appellants to day-long Medicare Appellant Forums on February 12, 2014, October 29, 2014, June 25, 2015, and February 25, 2016.[45] OMHA conducted a series of "open door calls" beginning in FY 2017.[46]

- **Information Requests.** After the October 29 forum, OMHA published a request for information in the *Federal Register* seeking input on its ongoing initiatives to address the surge in hearing requests and the backlog of pending cases, suggestions for additional initiatives, and information about regulations that "could be revised to streamline the adjudication process" without adversely affecting procedural fairness.[47] HHS also requested and considered public comments in developing a rule intended, in part, to "expand the pool of available OMHA adjudicators and improve

[43] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 39.
[44] *Id.* at 39; Dep't of Health & Hum. Servs., Off. of Medicare Hearings & Appeals, Medicare Appellant Forum (Feb. 25, 2016), https://www.hhs.gov/sites/default/ files/omha/OMHA%20Medicare%20Appellant%20Forum/ presentations_feb_25,_2016.pdf [hereinafter February 2016 Appellant Forum].
[45] *Appellant Forums*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF HEARINGS & APPEALS, https://www.hhs.gov/ about/agencies/omha/about/special-initiatives/appellant-forums/index.html (last visited Oct. 5, 2023).
[46] DEP'T OF HEALTH & HUM. SERVS., OFF. OF HEARINGS & APPEALS, CONGRESSIONAL JUSTIFICATION FOR FY 2019, at 9 (2018) [hereinafter FY 2019 CONGRESSIONAL JUSTIFICATION].
[47] 79 Fed. Reg. 65,660 (Nov. 5, 2014).

the efficiency of the appeals process by streamlining so less time is spent by adjudicators and parties on repetitive issues and procedural matters."[48]

HHS components have also used their websites to, among other objectives, invite feedback and suggestions on an ongoing basis. Since DAB established a system for designating decisions as precedential, for example, it has used its website to invite suggestions for decisions that should be so designated.[49]

- **Customer Satisfaction Surveys.** OMHA administers surveys to gauge appellants' satisfaction with OMHA processes, particularly the use of remote hearings.[50]

- **Ombuds.** CMS and OMHA institutionalized processes to receive, learn from, and act on parties' concerns. In June 2014, CMS established a Provider Relations Coordinator to "improve communications" between providers and CMS; "[w]ork collaboratively with interested parties to address challenges, complaints, and concerns"; and "look at process issues," including issues that caused delays or led providers to appeal contractors' determinations. CMS took remedial action based on providers' complaints, such as by clarifying policies for contractors.[51] OMHA launched a Customer Service Center in FY 2016 to provide a "central contact point for appellant inquiries."[52]

  The AFIRM Act would have required HHS to appoint a Medicare Reviews and Appeals Ombudsman to identify, investigate, and help resolve providers' complaints; identify trends and recommend improvements to the Secretary for improving the "efficacy and efficiency" of the claims review and appeals process; provide administrative and technical assistance to current and potential appellants; publish data on appeals; and assist in education and training efforts.[53]

B. Organizational Measures

OMHA has structured and periodically refined its central and field operations to promote timeliness. In establishing OMHA, Congress directed HHS to "provide for an appropriate geographic distribution of [ALJs] . . . throughout the United States to ensure timely access to

[48] 82 Fed. Reg. 4974 (Jan. 17, 2017); 81 Fed. Reg. 43,789 (July 5, 2016).
[49] *Stakeholder Feedback*, DEP'T OF HEALTH & HUM. SERVS., DEP'T APPEALS BD., https://www.hhs.gov/about/agencies/dab/stakeholders.html (last visited Oct. 5, 2023).
[50] February 2016 Appellant Forum, *supra* note 44.
[51] Dep't of Health & Hum. Servs., Off. of Medicare Hearings & Appeals, Medicare Appellant Forum (Oct. 29, 2014), https://www.hhs.gov/sites/default/files/omha/files/appellant_forum_presentations.pdf [hereinafter October 2014 Appellant Forum]; Dep't of Health & Hum. Servs., Off. of Medicare Hearings & Appeals, Medicare Appellant Forum (June 25, 2015), https://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/presentations_june_25_2015.pdf [hereinafter June 2015 Appellant Forum].
[52] February 2016 Appellant Forum, *supra* note 44.
[53] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015). The MMA required HHS to appoint a Medicare Beneficiary Ombudsman responsible for, among other duties, receiving complaints, grievances, and information requests from beneficiaries; helping beneficiaries appeal determinations and decisions; and recommending administrative improvements. 42 U.S.C. § 1395b-9(c).

such judges."[54] To accomplish this goal, HHS established four OMHA field offices—three in the Eastern time zone (Arlington, Cleveland, Miami) and one in the Pacific time zone (Irvine).[55]

Although the near-universal use of remote hearings for Level 3 appeals has meant that cases can be assigned or reassigned to distant field offices depending on available resources, there were concerns that the concentration of field offices in the Eastern time zone limited the hours during which OMHA could schedule and hold hearings. To enable more flexible scheduling of appeals nationwide, OMHA in 2014 established a new field office in the Central time zone (Kansas City).[56] With additional funding in FY 2016, OMHA opened a sixth field office in Seattle.[57] Today, there are ten field offices and one satellite office, with offices operating in all four time zones of the continental United States.[58]

OMHA has also experimented with the organization of individual field offices. In response to the backlog, for example, OMHA "re-engineered" its field office staffing structure, freeing up resources that OMHA used to "increase ALJ support to include two legal assistants and two attorneys per ALJ."[59]

At the same time, the shift to electronic case management and the widespread use of remote hearings for Level 3 appeals has given OMHA significant flexibility to centralize its processes. OMHA established Central Operations (CO) in 2012 to centralize case intake and assignment functions nationwide.[60] OMHA established a standard process by which support staff reviewed case files at intake to identify and resolve procedural issues before assignment to an ALJ and to identify the relatively small number of appeals filed by individual beneficiaries (rather than providers), which received priority processing.[61] Since 2013, OMHA has also relied on centralized case intake and case assignment processes to balance workloads between field offices and thereby improve case processing times systemwide.[62]

MAC established a similar process, creating the position of Escalation Appeals Officer in December 2014 to manage the surge in escalations from Level 3. The Escalation Appeals Officer was responsible for ensuring that appeals were properly escalated, sending appropriate correspondence, and taking action in limited cases.[63]

OMHA and other HHS subcomponents have also centralized various functions in order to foster innovation and provide systemwide leadership on improvement efforts. As discussed

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[54] Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396–98 (2003).
[55] 74 Fed. Reg. 65,295 (Dec. 9, 2009).
[56] October 2014 Appellant Forum, *supra* note 51; Dep't of Health & Hum. Servs., Off. of Medicare Hearings & Appeals, Medicare Appellant Forum (Feb. 12, 2014), https://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/omha_medicare_appellant_forum_presentations.pdf [hereinafter February 2014 Appellant Forum].
[57] February 2016 Appellant Forum, *supra* note 44.
[58] *Contact the Office of Medicare Hearings and Appeals*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF MEDICARE HEARINGS & APPEALS, https://www.hhs.gov/about/agencies/omha/contact/index.html (last visited Oct. 3, 2023).
[59] FY 2019 CONGRESSIONAL JUSTIFICATION, *supra* note 46, at 15.
[60] February 2014 Appellant Forum, *supra* note 56.
[61] February 2014 Appellant Forum, *supra* note 56; 79 Fed. Reg. 63,398, 63,400 (Oct. 23, 2014).
[62] October 2014 Appellant Forum, *supra* note 51; February 2014 Appellant Forum, *supra* note 56.
[63] June 2015 Appellant Forum, *supra* note 51.

above, both CMS and OMHA created ombuds-like positions to learn from and act on parties' complaints.[64] DAB established the Process Management Attorney position to "[m]anage the increasing number of appeals," "[f]ocus on improving procedures and processes," and "[i]ncrease efficiencies and adjudicatory capacity to achieve higher case dispositions." The Process Management Attorney was also responsible for overseeing the development and implementation of the electronic filing system and electronic records, which was a key component of DAB's plan to address the growing number of requests for review.[65]

C. Procedural Measures

One of the first initiatives OMHA undertook in response to the backlog was the development of a manual setting forth best practices for adjudication. In early 2015, OMHA publicly released the OMHA Case Processing Manual (OCPM), which "standardize[d] the day-to-day procedures for carrying out adjudicative functions" at OMHA. The new OMHA Case Processing Manual (OCPM) was released in early 2015 and updated periodically thereafter.[66]

In addition to institutionalizing best practices, HHS has also engaged in a fair amount of experimentation, developing procedural mechanisms intended to resolve proceedings as speedily and efficiently as possible without sacrificing substantive accuracy or procedural fairness. Most procedural measures that HHS seek to promote timeliness in one of three ways, discussed below: (1) by encouraging the resolution of claims at the earliest level possible, (2) by resolving Level 3 appeals without an oral hearing when possible, or (3) by aggregating claims.

1. Encouraging Early Resolution of Claims

HHS introduced some procedural measures to reduce the number of appeals to OMHA by encouraging the resolution of claims at earlier stages of the Medicare adjudication system. For example, stakeholders at the February 2014 Medicare Appellant Forum told HHS officials that "[a]ppellants need an opportunity to dialogue with adjudicators before the ALJ level of appeal." It was hoped that an earlier opportunity for face-to-face dialogue would increase the likelihood of resolving disputes at Level 1 or Level 2, without the need for comparatively formal proceedings at OMHA. CMS launched a limited, voluntary pilot program in early 2016 to provide opportunities for "appellants and adjudicators to ask questions and supplement the case file" and for "adjudicators to consider the additional information received through this process prior to issuing their decision."[67]

To "provide[] a strong incentive for all evidence to be produced early in the appeals process," HHS proposed legislative action that would have required adjudicators at Level 2 and higher, except in limited circumstances, to remand cases for a de novo redetermination when

[64] February 2016 Appellant Forum, *supra* note 44; June 2015 Appellant Forum, *supra* note 51; October 2014 Appellant Forum, *supra* note 51.
[65] February 2016 Appellant Forum, *supra* note 44.
[66] 80 Fed. Reg. 39,785 (July 10, 2015); *Audit and Appeals Issues in Medicare*, *supra* note 31, at 40; October 2014 Appellant Forum, *supra* note 51; February 2014 Appellant Forum, *supra* note 56.
[67] February 2016 Appellant Forum, *supra* note 44; October 2014 Appellant Forum, *supra* note 51.

providers introduced new evidence into the administrative record.[68] The AFIRM Act would have implemented this reform.[69]

2. Resolving Level 3 Appeals Without an Oral Hearing

HHS introduced some procedural measures to resolve appeals to OMHA through less formal means than an oral, adversarial hearing whenever possible. One of the first interventions OMHA introduced to address the backlog was an alternative dispute resolution (ADR) pilot, called the Settlement Conference Facilitation initiative.[70] Under this initiative, OMHA attorneys trained in mediation techniques facilitated settlement conferences between appellants and CMS representatives.[71] The AFIRM Act would have formalized ADR procedures for Medicare reimbursement appeals.[72]

In lieu of case-by-case settlement, CMS twice made generally applicable offers of settlement. A majority of appeals pending at OMHA involved claims denied under a single, commonly misinterpreted policy. After CMS clarified the policy, it offered an administrative agreement to hospitals willing to withdraw their pending appeals in exchange for payment of 68 percent of denied claims.[73]

Four years later, CMS launched the Low Volume Appeals (LVA) initiative. Under this initiative, CMS agreed to settle qualifying appeals at 62 percent of the net allowed amount. Appellants with fewer than 500 appeals pending at OMHA and MAC, and a total billed amount of $9,000 or less per appeal, were generally eligible for the program. CMS accepted expressions of interest for the LVA settlement option between February and June 2018.[74]

Recognizing that an oral hearing may not be necessary in all cases, HHS officials "recommended that appellants consider waiving their right to hearing (i.e., ask for an 'on the record' decision) in an effort to expedite the decision-making process."[75] OMHA assigned senior staff attorneys to screen incoming appeals to identify, and in some cases resolve, cases that could be resolved without a hearing.[76] HHS later urged Congress to allow OMHA to "issue decisions

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[68] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 41.
[69] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015).
[70] October 2014 Appellant Forum, *supra* note 51.
[71] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 39; 79 Fed. Reg. 63,398, 63,400 (Oct. 23, 2014); *Settlement Conference Facilitation*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF MEDICARE HEARINGS & APPEALS, https://www.hhs.gov/about/agencies/omha/about/special-initiatives/settlement-conference-facilitation/index.html (last visited Oct. 5, 2023).
[72] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015).
[73] 79 Fed. Reg. 63,398, 63,400 (Oct. 23, 2014).
[74] *Low Volume Appeals Initiative*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF MEDICARE HEARINGS & APPEALS, https://www.hhs.gov/about/agencies/omha/lva-initiative/index.html (last visited Oct. 5, 2023).
[75] Jessica L. Gustafson & Abby Pendleton, *Medicare Appeals Adjudication Delays: Implications for Healthcare Providers and Suppliers*, HEALTH LAW., June 2014, at 26, 29.
[76] February 2014 Appellant Forum, *supra* note 56; FY 2019 CONGRESSIONAL JUSTIFICATION, *supra* note 46, at 15.

without holding a hearing when there is no material fact in dispute and the decision is governed by a binding authority."[77] The AFIRM Act would have implemented this reform.[78]

3. Aggregating Claims

The laws and rules governing Medicare appeals have long permitted adjudicators to consolidate similar or related claims with appellants' consent.[79] In some instances, cases are consolidated to meet jurisdictional amount-in-controversy requirements. In other cases, cases are consolidated for purposes of efficiency. QICs are required to consolidate different requests for redetermination on the same claim.[80] ALJs have discretion to hold a consolidated hearing and issue a consolidated decision upon an appellant's request or on their own motion "if one or more of the issues to be consolidated at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ."[81]

HHS adjudicators made extensive use of consolidation to address the backlog. At the first Medicare Appellant Forum in February 2014, officials recommended that providers achieve efficiencies by consolidating "as many similar claims as possible into one appeal request starting at Level 1."[82] The DAB informed appellants it would consolidate "[a]ppeals filed by a single appellant with identical issues of law and no significant factual dispute" and issue a single decision for consolidated appeals. The MAC expected consolidation would "allow the affected appeals to be processed more quickly."[83]

As proposed by HHS, the AFIRM Act would have authorized adjudicators at all levels to consolidate certain claims without appellants' consent. Bills were introduced in 2015 and 2019 to achieve this objective but never enacted.[84]

A 2016 report to the Administrative Conference of the United States (ACUS) found that although ALJs rarely formally consolidated appeals, they often "informally combine appeals to be heard in the same proceeding even without a formal consolidation order or process, when the appeals involve the same organization, issues of law or fact, or the same representative."[85] OMHA informally encouraged consolidation by strategically assigning "appellants with a large number of filings to a single ALJ, . . . facilitating potential consolidated proceedings and more efficient adjudication."[86]

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[77] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 41.
[78] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015).
[79] *See* 59 Fed. Reg. 12,172 (Mar. 16, 1994).
[80] 70 Fed. Reg. 11,419 (Mar. 8, 2005).
[81] 42 C.F.R. § 405.1044.
[82] February 2014 Appellant Forum, *supra* note 56.
[83] *Id*.; October 2014 Appellant Forum, *supra* note 51.
[84] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015); *Audit and Appeals Issues in Medicare*, *supra* note 31, at 40.
[85] MICHAEL SANT'AMBROGIO & ADAM ZIMMERMAN, AGGREGATE AGENCY ADJUDICATION 49 (2016) (report to the Admin. Conf. of the U.S.).
[86] FY 2019 CONGRESSIONAL JUSTIFICATION, *supra* note 46, at 15.

HHS also undertook a related initiative, permitting the use of statistical sampling and extrapolation to resolve large numbers of similar or related claims. SSA ALJs "organically" began using statistical sampling as early as the late 1990s to "manage Medicare disputes that involved large numbers of similar claims before the same adjudicator."[87] In 2014, OMHA launched a statistical sampling pilot, under which providers with between 250 and 10,000 claims could obtain a decision based on a sampling of those claims.[88]

Statistical sampling was available upon request by an appellant or at OMHA's invitation. An earlier report to ACUS identified concerns and challenges with the initiative but concluded that it could "help overcome some of the challenges faced by many mass government benefits programs."[89] As proposed by HHS, the AFIRM Act would have authorized adjudicators to use sampling and extrapolation techniques without appellants' consent.[90]

In addition to aggregation, policymakers have long considered whether precedential decision making might provide an effective means for promoting timeliness (as well as consistency) in Medicare adjudication. As discussed earlier, OIG recommended in 1999 that the agency give MAC authority to establish binding precedent to "keep the appeals pipeline clear of many 'mistaken' decisions,"[91] and the MMA required HHS and SSA's transfer plan to address the "feasibility of developing a process give [DAB decisions] addressing broad legal issues binding, precedential authority."[92]

Although HHS concluded it would not be "feasible" or "appropriate" to treat MAC opinions as precedential, it committed to "reevaluate the merits of granting binding, precedential authorities to some or all decisions of the MAC" at a later time.[93] Instead, the agency implemented an online database of MAC opinions to facilitate parties' and adjudicators' reliance on them as guidance. MAC continues to maintain a database of "significant decisions and actions" that "involve the adjudication of issues that may be of interest to various stakeholders in the Medicare appeals process."[94]

As part of a suite of measures adopted to manage the appeals backlog more effectively, CMS adopted a rule in January 2017 giving the DAB Chair authority to designate select MAC

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[87] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1678 (2017).
[88] *Statistical Sampling Initiative Update*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF MEDICARE HEARINGS & APPEALS, https://www.hhs.gov/about/agencies/omha/about/special-initiatives/statistical-sampling/index.html (last visited Oct. 5, 2023); 79 Fed. Reg. 63,398, 63,400 (Oct. 23, 2014); February 2014 Appellant Forum, *supra* note 56; October 2014 Appellant Forum, *supra* note 51.
[89] Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 49 (2016) (report to the Admin. Conf. of the U.S.).
[90] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015); *Audit and Appeals Issues in Medicare*, *supra* note 31, at 40.
[91] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN. OEI-04-97-00160, MEDICARE ADMINISTRATIVE APPEALS: ALJ HEARING PROCESS 16–17 (1999).
[92] Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396–98 (2003).
[93] SEC'Y OF HEALTH & HUM. SERVS. & COMM'R OF SOC. SEC., PLAN FOR THE TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS 12–13 (2004), https://www.ssa.gov/legislation/medicare/medicare_appeal_transfer.pdf.
[94] *Medicare Appeals Council (Council) Decisions*, DEP'T OF HEALTH & HUM. SERVS., DEP'T APPEALS BD., https://www.hhs.gov/about/agencies/dab/decisions/council-decisions/index.html (last visited Oct. 5, 2023).

opinions as precedential and binding on lower-level adjudicators, including ALJs and Medicare contractors. The rule clarified that, in determining whether to designate a decision as precedential, the Chair "may take into consideration decisions that address, resolve, or clarify recurring legal issues, rules or policies, or that may have broad application or impact, or involve issues of public interest." CMS explained that designating certain MAC decisions would streamline the appeals process in two ways—by "providing clear direction on repetitive legal and policy questions, and in limited circumstances, factual questions" and by "help[ing] parties better determine the likelihood of success on appeal and assist parties in making decisions regarding whether to pursue administrative appeal of their cases."[95]

Although DAB continues to invite stakeholders' suggestions for precedential decisions on its website,[96] the Chair has not yet designated a MAC decision as precedential.

D. Personnel Measures

HHS has introduced several measures to increase its adjudicative capacity. First, OMHA relied on additional funding and cost savings to hire new ALJs and staff to support them. OMHA also temporarily hired retired ALJs under the Office of Personnel Management-administered Senior ALJ Program.[97]

Second, OMHA explored options for non-ALJ employees—who are less costly than ALJs and may be easier to hire—to decide cases in limited circumstances. In 2015, for example, OMHA launched a pilot program under which senior attorneys could decide certain cases in which appellants waived their right to an oral hearing before an ALJ.[98] Two years later, HHS adopted a rule that permits qualified "attorney adjudicators" to decide cases when a decision can be issued without a hearing, for example when the evidence supports a finding in favor of the appellant on every issue or when all parties waive the right to an oral hearing before an ALJ. The rule also permits attorneys to take action in other cases in which a hearing is not required, for example by issuing a dismissal when an appellant requests to withdraw their hearing request.[99]

OMHA anticipated this authority would enable it to redirect more than 24,000 appeals annually from ALJs to attorneys. It explained that the use of attorney adjudicators would "reduce the wait time for appellants to receive decisions in cases in which no hearing is required or conducted" and "help address the volume of appeals OMHA continues to receive by channeling some of those appeals through a less costly adjudicator, which will allow OMHA to hire more adjudicators than the same resources would allow if allocated to hiring ALJs and support staff, while reserving ALJs and their support staff for appeals that require a hearing."[100]

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[95] 82 Fed. Reg. 4974, 4977–81 (Jan. 17, 2017).
[96] *Stakeholder Feedback*, DEP'T OF HEALTH & HUM. SERVS., DEP'T APPEALS BD., https://www.hhs.gov/about/agencies/dab/stakeholders.html (last visited Oct. 5, 2023).
[97] February 2016 Appellant Forum, *supra* note 44; FY 2019 CONGRESSIONAL JUSTIFICATION, *supra* note 46, at 15; *see also* 5 U.S.C. § 3323(b)(2) (senior ALJ program).
[98] June 2015 Appellant Forum, *supra* note 51.
[99] 82 Fed. Reg. 4974, 4981–89 (Jan. 17, 2017).
[100] *Id*.

The AFIRM Act would have authorized non-ALJ adjudicators, called "Medicare magistrates," to hear claims valued at less than the amount required to file an appeal in district court.[101]

Third, in standardizing business processes, OMHA assigned tasks that legally could be performed by non-ALJ employees to staff attorneys and paralegals. For example, it established—and used supplemental funding to expand the number of—"enhanced processing teams" which included attorneys and other support staff who performed most of the operational work, procedural review, correspondence, and writing associated with adjudication. By reallocating tasks in this way, OMHA ensured that ALJs could devote the bulk of their time to tasks that only they could perform (e.g., holding hearings and issuing decisions).[102]

Policymakers have also considered whether performance evaluation of individual employees provides an effective means for promoting timeliness in Medicare adjudication. The MMA, for example, directed SSA and HHS to assess the "appropriateness of establishing performance standards for [ALJs] with respect to timelines for decisions in cases" consistent with other provisions of the MMA regarding decisional independence and the ALJ impartiality provisions in Title 5.[103] Citing 5 U.S.C. § 4302, SSA and HHS acknowledged that agencies are legally prohibited from "establishing performance appraisal systems for the periodic appraisal of an ALJ's job performance and using the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing ALJs."[104]

E. Educational Measures

OMHA has attempted to foster best practices among its adjudicators and support staff through a continuing education program that includes yearly judicial education training and in-service training days. Lessons learned through OMHA's QA program have been disseminated through continuing education events.[105]

OMHA has also undertaken initiatives to educate appellants on best practices and options for expedited decision making. Because appellants generally have the right to an individualized hearing before an ALJ, the effectiveness of many of the interventions discussed in this report (e.g., decision making without an oral hearing, disposition of appeals by attorney adjudicators, consolidation, statistical sampling and extrapolation, settlement) depends entirely on the willingness of appellants to waive their hearing rights. OMHA used the four public forums it held between 2013 and 2016, the listserv it launched in February 2015, and other outreach channels to raise awareness and encourage appellants to take advantage of opportunities for alternative or expedited procedures.[106]

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[101] Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2019, S. 3078, 116th Cong. (2019); Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, 114th Cong. (2015); *see also Audit and Appeals Issues in Medicare*, *supra* note 31, at 41.
[102] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 38; October 2014 Appellant Forum, *supra* note 51.
[103] Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396–98 (2003).
[104] SEC'Y OF HEALTH & HUM. SERVS. & COMM'R OF SOC. SEC., PLAN FOR THE TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS 17 (2004), https://www.ssa.gov/legislation/medicare/medicare_appeal_transfer.pdf.
[105] *Audit and Appeals Issues in Medicare*, *supra* note 31, at 39.
[106] FY 2019 CONGRESSIONAL JUSTIFICATION, *supra* note 46, at 9; June 2015 Appellant Forum, *supra* note 51.

Officials also used stakeholder engagement opportunities to educate appellants on best practices for pursuing their appeals efficiently and effectively. Senior management officials and adjudicators discussed actions appellants could take to reduce processing times, for example by consolidating similar claims into a single appeal, ensuring that they correctly completed hearing requests, sending copies of hearing requests to other parties, waiting until assignment to an ALJ before submitting additional information, not submitting duplicative hearing requests or documentation, submitting documents electronically, and using standardized forms.[107]

F. Technological Interventions

HHS has made extensive use of two technological innovations to promote timely decision making: remote proceedings and electronic case management. Some have been suggested that HHS might use artificial intelligence to expedite processing,[108] but there is little evidence that HHS has seriously considered doing so.

1. Remote Proceedings

Remote proceedings can promote timeliness in at least three ways—by reducing travel time for agency personnel, by providing more flexibility to schedule proceedings, and by allowing cases to be assigned to available adjudicators and other agency personnel without regard to their location. Remote proceedings are also frequently less expensive than in-person proceedings, allowing agencies to reallocate scarce resources to alternative uses.

Since at least the 1970s, administrative agencies have considered whether they might reduce delay and expense by conducting conferences and hearings remotely. HHS's Departmental Grant Appeals Board was among the first federal adjudication offices to make widespread use of telephone conferences and hearings to effectively manage its caseload.[109] SSA began exploring the potential for hearings conducted by VTC as early as 1996 and launched a series of pilots soon after. In 2001, it proposed a rule that would permit the agency to schedule parties to appear before ALJs by VTC when parties did not object to appearing in that manner, and it adopted the rule in 2003.[110]

As part of its proposed rules to implement BIPA, CMS in 2002 proposed giving appellants the option to participate in ALJ hearings by telephone or VTC. It explained that doing so would "enable ALJs to complete more cases within the 90-day adjudication period [required by BIPA]."[111] A year later, the MMA directed SSA and HHS to consider the feasibility of "conducting hearings using tele- or video-conferencing technologies."[112] In their report to

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[107] *Appellant Forums*, DEP'T OF HEALTH & HUM. SERVS., OFF. OF HEARINGS & APPEALS, https://www.hhs.gov/about/agencies/omha/about/special-initiatives/appellant-forums/index.html (last visited Oct. 5, 2023).
[108] DAVID FREEMAN ENGSTROM ET AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 41 (2020) (report to the Admin. Conf. of the U.S.); WILLIAM D. EGGERS ET AL., DELOITTE CTR. FOR GOV'T INSIGHTS, AI-AUGMENTED GOVERNMENT: USING COGNITIVE TECHNOLOGIES TO REDESIGN PUBLIC SECTOR WORK 9–10 (2017).
[109] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).
[110] 68 Fed. Reg. 5210 (Feb. 3, 2003).
[111] 67 Fed. Reg. 69,311 (Nov. 15, 2002).
[112] Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396–98 (2003).

Congress, the agencies found that the "availability of [VTC] and telephone hearings as service delivery options creates the opportunity to conduct hearings more efficiently." HHS planned to adopt "wider use" of remote hearings, particularly VTC hearings, which the agency concluded would "provide an excellent alternative to in-person hearings."[113] In March 2005, CMS finalized its rule giving appellants the option to participate remotely in ALJ hearings.[114]

To meet statutory timeframes for decision making, OMHA planned to conduct most hearings remotely. In its first 13 months, OMHA conducted 90 percent of hearings remotely—78 percent by telephone and 12 percent by VTC. OMHA relied on the flexibility provided by remote hearings to "reallocate[] resources in order to meet the mandatory 90 day processing time frames." In early 2008, for example, the Irvine, California, field office temporarily transferred 25 appeals per week to the Arlington, Virginia, field office.[115]

Although the agency's heavy reliance on remote hearings was the subject of some initial congressional and public scrutiny,[116] OIG found that most appellants were "satisfied with their hearing format."[117] Since 2008, OMHA has also used its annual Appellant Climate Survey to gauge participants' views on remote proceedings.

Satisfied with the effectiveness of remote hearings for Medicare appeals, CMS in 2009 adopted a rule establishing remote hearings as the default for Level 3 appeals and requiring that appellants show good cause for appearing in person. CMS explained that it was "necessary and appropriate to generally conduct hearings by VTC or telephone" in order to "avoid the backlogs and delays that historically plagued the hearing process."[118]

2. Electronic Case Management

One of the most important shifts in the adjudication of Medicare claims over the past two decades has been the shift at all appeals levels from a primarily paper-based system to a system that is now primarily electronic. The implementation of electronic case management addressed several sources of delay. First, it simplified and expedited the process for transferring records and information between levels. Second, it simplified and expedited the process for transferring records and information between offices at the same level, which allowed OMHA to centralize pre-case assignment processes like docketing and case intake. Third, the launch of public-facing online processes simplified and expedited case intake because hearing requests and other submissions arrived electronically. HHS has relied on data collected through these systems to identify and address systemic issues and calculate resource needs.

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[113] SEC'Y OF HEALTH & HUM. SERVS. & COMM'R OF SOC. SEC., PLAN FOR THE TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS 14 (2004), https://www.ssa.gov/legislation/medicare/medicare_appeal_transfer.pdf.
[114] 70 Fed. Reg. 11,419 (Mar. 8, 2005).
[115] *Detailed Information on the Office of Medicare Hearings and Appeals Assessment*, EXPECTMORE.GOV, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/expectmore/detail/10003554.2008.html (last visited Oct. 5, 2023).
[116] *See, e.g.*, Justice for Medicare Beneficiaries Act of 2005, S. 1335, 109th Cong. (2005).
[117] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-02-06-00110, MEDICARE ADMINISTRATIVE LAW JUDGE HEARINGS: EARLY IMPLEMENTATION, 2005–2006 (2008).
[118] 74 Fed. Reg. 65,295, 65,321 (Dec. 9, 2009).

Electronic case management developed in stages. In 2012, OIG recommended that OMHA and CMS standardize case files and make them electronic, and that OMHA accelerate its initiative to transition from paper to electronic files.[119] At the first Medicare Appellant Forum in February 2014, OMHA announced several electronic case management initiatives. The long-term focus was a comprehensive electronic case management system called the Electronic Case Adjudication and Processing Environment (ECAPE). ECAPE was released in three stages between 2016 and 2017. The first release allowed appellants to file hearing requests electronically and digitized the process for case intake, the second facilitated appeal adjudication from intake through case closure, and the third release offered a more robust, public-facing portal for appellants.

As an interim measure until ECAPE was available, OMHA introduced two interim measures: (1) the ALJ Appeal Status Information System, a website where appellants could see the status of their cases online, and (2) the Medicare Appeals Template System, a document generation system that used "fillable forms and population of data to create individualized templates."[120] During this period, OMHA also began to prepare for the shift to fully electronic case management by standardizing business processes and contracting with an outside entity to scan paper records in unassigned cases.[121]

[119] DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-02-10-00340, IMPROVEMENTS ARE NEEDED AT THE ADMINISTRATIVE LAW JUDGE LEVEL OF MEDICARE APPEALS (2012).
[120] February 2014 Appellant Forum, *supra* note 56; October 2014 Appellant Forum, *supra* note 51; February 2016 Appellant Forum, *supra* note 44.
[121] February 2014 Appellant Forum, *supra* note 56; October 2014 Appellant Forum, *supra* note 51; June 2015 Appellant Forum, *supra* note 51.

APPENDIX D:
DEPARTMENT OF HOMELAND SECURITY
DEPARTMENT OF JUSTICE

Immigration Adjudication

[Forthcoming.]

APPENDIX E:
DEPARTMENT OF LABOR

Black Lung Benefits Program

This case study provides an overview of efforts to improve or promote timeliness under the black lung program. Established in 1969 and administered by the Department of Labor (DOL) since 1973, the black lung program provides monthly payments and medical treatment to miners totally disabled due to coal workers' pneumoconiosis (CWP), better known as "black lung disease," and to eligible surviving family members.

Part I provides an overview of the black lung program, its historical development, and DOL's process for adjudicating cases under it. Part II describes timeliness as a value in black lung benefits adjudication. Part III describes factors that have affected the timeliness of black lung benefits adjudication since DOL began administering the program in 1973. Part IV identifies historical concerns about timeliness since 1973 and describes efforts undertaken by DOL and Congress to promote or improve timeliness in response to such concerns.

I. BACKGROUND

A. The Program

CWP is a pulmonary disease caused by the inhalation of coal mine dust. The dangers of CWP were not well known until the 1950s, after which there was a concerted effort in the top coal-mining states to provide benefits to miners affected by CWP. The push for legislation at the federal level was spearheaded by the United Mine Workers of America (UMWA). Prompted by the November 1968 explosion at a mine near Farmington, West Virginia, which killed 78 miners, Congress enacted the Federal Coal Mine Health and Safety Act of 1969 (Coal Act).[1]

The Coal Act, substantially amended by the Black Lung Benefits Act (BLBA) in 1972, established a regime for the regulation of mine safety and health and created a program to provide monthly payments and medical treatment for miners who were totally disabled as a result of CWP, and monthly payments to eligible surviving family members.[2]

The benefits program originally was intended to be temporary. Many expected that states would expand their workers' compensation programs to provide adequate income support to disabled miners and surviving dependents and that standards adopted under the Coal Act would eliminate CWP as a serious problem. Neither expectation came to pass, and as soon as 1972, Congress abandoned the expectation that state workers' compensation programs would assume responsibility for providing benefits to miners with CWP. As a result of a series of legislative

[1] Pub. L. No. 91-173, 83 Stat. 742 (1969). For a history of the passage of the Coal Act, *see* PETER S. BARTH, THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE 6–29 (1987).
[2] 30 U.S.C. § 901 *et seq*.

actions in the 1970s and 1980s, the black lung program has become a permanent benefits program administered by the federal government.[3]

The Social Security Administration (SSA) was responsible for adjudicating claims filed before June 30, 1973. DOL has had primary responsibility for adjudicating and managing all claims filed since then. Most administrative expenses for the program are provided from the Black Lung Disability Trust Fund. Created in 1977, the Trust Fund is funded through an excise tax paid by mine operators on the sale of coal. Coal mine operators are liable for paying benefits to eligible former employees or their survivors and must maintain insurance or self-insure for that purpose. When no operator can be assigned liability, benefits are paid out of the Trust Fund.[4]

B. The Agency

Three DOL subcomponents have primary responsibility for adjudicating claims:

- **Division of Coal Mine Workers' Compensation (DCMWC).** DCMWC is a subunit of the Office of Workers' Compensation Programs (OWCP). The OWCP is headed by a Director who reports directly to the Secretary of Labor. Before 2009, OWCP was a subcomponent of the Employment Standards Administration (ESA). In addition to the black lung program, OWCP administers disability compensation programs for federal employees, energy workers, and longshore and harbor workers.[5]

- **Office of Administrative Law Judges (OALJ).** OALJ is responsible for adjudicating cases arising under workers' compensation programs administered by DOL, including the black lung program, and more than 80 other laws, executive orders, and regulations. It is headed by a Chief Judge who reports directly to the Secretary of Labor. Organizationally, OALJ is divided into separate operations for adjudication under the black lung program and adjudication under other programs. The black lung operation consists of a National Office, headed by an Associate Chief Judge, and four District Offices, each managed by a District Chief Judge. Administrative law judges (ALJs) are supported by law clerks appointed for two-year terms, which may be extended.[6] Among other duties, law clerks review case files, advise ALJs on factual and legal issues, and prepare decisions and orders for review and signature by ALJs.

- **Benefits Review Board (BRB).** BRB hears appeals from ALJ decisions and orders under the black lung program and the longshore program. Created by statute in 1972, BRB today consists of five members, called administrative appeals judges (AAJs),

[3] BARTH, *supra* note 1, at 276; Jonathan P. Nase, *The Surprising Cost of Benefits: The Legislative History of the Federal Black Lung Benefits Program*, 4 J. MIN. L. & POL'Y 277, 318 (1989).
[4] 26 U.S.C. § 9501; Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978).
[5] An organization chart for OWCP is available at https://www.dol.gov/agencies/owcp/owcpchrt.
[6] An organization chart for OALJ is available at https://www.dol.gov/sites/dolgov/files/OALJ/OALJ_OrgChart.pdf.

who are appointed by the Secretary. BRB is chaired by a Chief Judge who reports directly to the Secretary.[7] AAJs are supported by attorney-advisors or law clerks.

C. The Adjudication Process

A miner or surviving family member files a claim by completing an application form and an employment history and submitting it to DCMWC. DCMWC maintains a field operation that currently consists of five district offices and two field offices.

A claim is adjudicated initially by a district director. The district director is responsible for developing the medical evidence, which includes obtaining a pulmonary examination, paid for by the Trust Fund, from an authorized physician or medical facility; verifying the miner's employment and earnings history; and identifying and notifying any coal mine operator that may be liable for payment of benefits. A schedule is established for the submission of evidence by the claimant and any potentially liable operators. The district director may conduct informal conferences and informal discovery, issue subpoenas to compel the production of documents, prepare documents for the signature of parties, and issue orders. Following development of the evidentiary record and any conference proceedings, the district director issues a proposed decision and order. If no party objects to the proposed decision and order, the district director issues the initial determination. If a party, typically a claimant or a coal mine operator, objects to the proposed decision and order, they may request that the district director revise it. Alternatively, a party may request a formal hearing before an ALJ.[8]

If a party requests a formal hearing before an ALJ, the district director refers the claim to OALJ. Upon request by a party, an ALJ conducts a de novo hearing according to rules of practice and procedure modeled on the Federal Rules of Civil Procedure. Proceedings are adversarial between the claimant and the responsible operator. In cases where the district director found there was no operator liable for payment of benefits, DOL's Office of the Solicitor represents the Trust Fund.[9] The ALJ typically issues a decision and order or remands the case to DCMWC to correct procedural errors or further develop the evidentiary record.[10]

A party dissatisfied with an ALJ's decision and order may appeal to BRB. The BRB, typically as a three-member panel, reviews the ALJ decision and order to determine whether the findings are supported by substantial evidence and are in accordance with law. The panel restricts its review to the record before the ALJ and accepts as conclusive all findings of fact that are supported by substantial evidence.[11] The proceeding is conducted according to generally

[7] An organization chart for BRB is available at https://www.dol.gov/agencies/brb/orgchart.
[8] 30 U.S.C. § 932(a); 20 C.F.R. § 725.351(a). *See generally* DEP'T. OF LABOR OFFICE OF WORKERS' COMP. PROGRAMS, DCMWC PROCEDURE MANUAL (2010), https://www.dol.gov/agencies/owcp/dcmwc/procedure-manual.
[9] *See* 30 U.S.C. § 932(k).
[10] 29 C.F.R. pt. 18, subpt. A. For more information, see OALJ's *Judge's Benchbook*, available at https://www.dol.gov/agencies/oalj/PUBLIC/BLACK_LUNG/REFERENCES/REFERENCE_WORKS/USDOL_OALJ_BLACK_LUNG_BENCHBOOK_CONTENTS_2013.
[11] 33 U.S.C. § 921(b).

applicable rules of practice and procedure.[12] The panel typically issues a final order or remands the case to the ALJ for additional action.

Any person adversely affected or aggrieved by a BRB final order may seek judicial review of the order in the applicable court of appeals.[13]

II. TIMELINESS AS A VALUE IN BLACK LUNG ADJUDICATION

The core objective of the black lung program is to provide wage replacement to vulnerable populations: miners who are totally disabled due to CWP and surviving family members of miners who have died as a result of CWP. It has therefore always been a priority for DOL and external stakeholders to ensure the timely adjudication of claims and the timely delivery of benefits to eligible miners and their families.

External pressure on DOL to decide cases more quickly has come from several quarters. To achieve that objective, members of Congress—especially members from the top coal-producing areas—have on many occasions introduced legislation, held hearings in Washington, D.C., and in the Appalachian region, requested studies by the Government Accountability Office (GAO) and DOL's Inspector General (IG), and formally and informally communicated with senior DOL officials. Congressional staffs have been in frequent contact with DOL when they receive requests for assistance from constituents. Labor organizations such as the UMWA and community advocates such as the National Black Lung Association and Appalachian Citizens' Law Center have also urged DOL and Congress to take steps to reduce case processing times.

Timeliness has always existed as a value alongside other values, especially decisional quality, procedural fairness (including adjudicators' decisional independence), and the financial solvency of the Black Lung Trust Fund. For example, Congress periodically has adopted or considered presumptions that have the practical effect of diminishing the burden on claimants to prove their eligibility and reduce the time required to develop evidentiary records for decision making by DOL. The adoption of additional presumptions has always prompted questions by some stakeholders about whether such presumptions are consistent with the program's purpose, whether decisions that rely on such presumptions are accurate, and whether the use of such presumptions and the resulting increase in allowed claims imposes too great a financial cost.[14]

III. FACTORS AFFECTING TIMELINESS

Many factors have affected the timeliness of adjudication under the black lung program since 1973. This Part provides a brief overview of several factors, most external to DOL, that have impacted the agency's ability to process claims in a timely manner. Internal factors have

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[12] 20 C.F.R. pt. 802. For more information, see BRB's *Black Lung Deskbook*, available at https://www.dol.gov/agencies/brb/References/reference_works/bla/bldesk.

[13] 33 U.S.C. § 921(c).

[14] *See, e.g.*, BARTH, *supra* note 1, at 109–28; U.S. GEN. ACCOUNTING OFF., GAO/HRD-82-26, LEGISLATION AUTHORIZED BENEFITS WITHOUT ADEQUATE EVIDENCE OF BLACK LUNG OR DISABILITY (1982); *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 97th Cong. (1981); *Hearings on Legislation to Amend the Federal Black Lung Program: Hearings Before the Subcomm. on Labor Standards of the H. Comm. on Education & Labor*, 102d Cong. 45–49 (1991) (statement of Samuel D. Walker, Acting Assistant Sec'y for Emp. Standards, U.S. Dep't of Labor).

also affected timeliness, of course, such as the central and field organization of the components responsible for adjudicating black lung claims, the allocation of adjudicators and support staff, the processes used by adjudicators and support staff, and the adoption of new technologies. Internal factors, and efforts to address them, are discussed in greater detail in Part IV.

Fluctuations in the volume of claims filed with DOL over the years have had a significant impact on the timeliness of adjudication under the black lung program. The program was established after the dangers of CWP became well known and was intended primarily to provide benefits to miners who were totally disabled due to CWP before the Coal Act became effective in 1970, as well as survivors of miners who had died as a result of CWP before then. It was widely expected that regulation of coal mines would largely eradicate CWP as a serious risk to miners and that the number of new claims would decline with time.

Although the prevalence of CWP among mine workers decreased about 90 percent from 1969 to 1995, it has been on the rise since 1995.[15] Today, the prevalence of CWP is higher among miners than it was in 1969, especially among miners under 50.[16] A number of causes have been suggested for the increased prevalence of CWP, including changed business practices and increased exposure to respirable coal mine dust due to changed mining conditions. The Mine Safety and Health Administration (MSHA), a subagency of DOL, issued a rule in May 2014 to lower miners' exposure to respirable coal mine dust[17] and recently proposed another rule to protect miners from exposure to respirable silica dust.[18] Since 2014, MSHA has also prioritized enforcement of laws and regulations limiting miners' exposure to respirable silica dust.[19]

Coal mine closures in the last two decades may also have led to an increase in the number of claims filed with DOL.[20]

Legislative changes have had a significant effect on the timeliness of adjudication under the black lung program. There have been several important legislative changes to the program. Amendments to the BLBA in 1972 extended eligibility to additional surviving family members and liberalized eligibility criteria.[21] Amendments in 1977 further liberalized eligibility criteria and granted individuals with previously denied and pending claims the right to request that SSA or DOL re-review their claims under the new criteria.[22] The 1977 amendments reintroduced several hundred thousand claims into the system, which had a significant effect on the operation

[15] NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, COAL MINE DUST EXPOSURES AND ASSOCIATED HEALTH OUTCOMES: A REVIEW OF INFORMATION PUBLISHED SINCE 1995 12-16 (2011).
[16] Evan Barret Smith, *Black Lung in the 21st Century: Disease, Law, and Policy*, 120 W. VA. L. REV. 797, 801–03 (2018).
[17] 79 Fed. Reg. 24,814 (May 1, 2014).
[18] 88 Fed. Reg. 44,852 (July 13, 2023).
[19] *See* U.S. DEP'T OF LABOR, MINE SAFETY & HEALTH ADMIN., *Silica Enforcement Initiative*, https://www.msha.gov/safety-and-health/safety-and-health-initiatives/2022/06/08/silica-enforcement-initiative (last visited Aug. 24, 2023).
[20] DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 05-17-003-01-060, EFFECT OF OALJ STAFFING LEVELS ON THE CURRENT BLACK LUNG CASE BACKLOG 1–2 (2017).
[21] Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).
[22] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).

and performance of DCMWC in the late 1970s and OALJ and BRB through the early 1990s.[23] Amendments in 1981 restricted eligibility criteria, largely in response to concerns about the program's financial viability,[24] but several pre-1981 provisions were restored in 2010 as part of the Patient Protection and Affordable Care Act.[25]

Resource levels have also had a significant impact on DOL's ability to process fluctuating case volumes in a timely manner. Like other agencies, components involved in the adjudication of black lung cases have been affected by events such as reductions in force, furloughs, sequestration, and shutdowns.[26] DOL has at times faced difficulty obtaining sufficient office space through the General Services Administration.[27] DOL has also at times faced difficulty recruiting ALJs, for example to help manage caseload surges seen as temporary or to work in offices in the top coal-producing areas.[28]

The fact that funds for the black lung program are appropriated out of the Black Lung Disability Trust Fund has also affected the program's operation. Historically, revenue generated by the excise tax on coal sales has been insufficient to cover the payment of benefits and the program's administrative costs. Congress has taken several measures to improve the Trust Fund's financial conditions, such as increasing the excise tax, providing repayable loans from general revenue, forgiving interest on loans from general revenue, and restructuring. The Trust Fund remains in debt despite these efforts,[29] and some have argued that "coal production is no longer a reliable source of revenue to fund the Black Lung Program."[30]

It is important to recognize that case processing times are also affected by two aspects of the black lung program's structure that may not be amenable to reform. First, because benefits are paid by coal mine operators (or their insurers), adjudication is adversarial. Most operators found initially liable for the payment of benefits request a hearing, requiring additional time before DOL can issue a final decision. The process for adjudicating claims filed before June 30, 1973, was nonadversarial, with benefits paid out of general revenue, and UMWA and others would have preferred this approach for claims filed later. Congress, however, has long favored a

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[23] *Black Lung Disability Trust Fund Supplemental Appropriation for Fiscal Year 1978: Hearings Before a Subcomm. Of the H. Comm. on Appropriations*, 95th Cong. 2 (1978) (statement of Donald Elisburg, Assistant Sec'y for Emp. Standards Admin, U.S. Dep't of Labor); U.S. GEN. ACCOUNTING OFF., GAO/HRD-80-111, FOLLOWUP ON DEPARTMENT OF LABOR'S ACTIONS ON GAO'S JULY 1977 REPORT ON ADMINISTRATION OF THE BLACK LUNG BENEFITS PROGRAM 2–3 (1980).

[24] Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 201–205, 95 Stat. 1635, 1643–45 (1981).

[25] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010).

[26] *See, e.g.*, *Coal Miners' Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck Against Black Lung Claimants: Hearing Before the Subcomm. on Emp. & Workplace Safety of the Sen. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. 13 (2014) (statement of Christopher P. Lu, Deputy Sec'y, Dep't of Labor & Patricia Smith, Solicitor, Dep't of Labor); U.S. GEN. ACCOUNTING OFF, GAO/HRD-83-5, REDUCTION-IN-FORCE AT THE CHARLESTON, WEST VIRGINIA, BLACK LUNG DISTRICT OFFICE AND FACTORS AFFECTING THE CHARLESTON OFFICE'S WORKLOAD (1982).

[27] *See Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 99th Cong. 140 (1985).

[28] *See Id.* at 32, 136.

[29] SCOTT D. SZYMENDERA, MOLLY F. SHERLOCK & ANTHONY A. CILLUFO, CONG. RSCH. SERV., R45261, THE BLACK LUNG PROGRAM, THE BLACK LUNG DISABILITY TRUST FUND, AND THE EXCISE TAX ON COAL 11–18 (2023).

[30] SIDDHI DOSHI & ADELE C. MORRIS, BROOKINGS, PUTTING THE TRUST FUND BACK IN THE BLACK LUNG DISABILITY TRUST FUND 3 (2021).

program that places financial responsibility for the program on the coal industry rather than the general public.[31]

Second, unlike many state-administered workers' compensation programs, the black lung program includes no option for partial disability. Because adjudication is essentially zero-sum, there is no meaningful opportunity for settlement. As a result, efforts to resolve contested claims informally have not been very successful, and a very high percentage of initial determinations are appealed to OALJ and BRB. With a right to a hearing and limited restriction on the introduction of new evidence at the hearing level,[32] some operators reportedly "skip the initial stage of the claims altogether and do not begin to develop a defense until the hearing before OALJ." Some have proposed amending the BLBA to permit partial disability and settlement—or at least limit the introduction of new evidence at OALJ—but there are conflicting views on whether such changes would be beneficial.[33] (The Fourth Circuit has held that the BLBA forbids settlement.[34])

A side effect of the long duration of cases—and the relatively low rate at which claims are allowed—is that very few attorneys specialize in black lung claims and represent claimants before DOL.[35] Representatives by law are not compensated until there has been a successful prosecution of the claim and all appeals are exhausted, and so there is little financial incentive for attorneys to represent black lung claimants. The limited number of practicing representatives has, in turn, adversely affected past efforts by DOL to speed up case processing. In a 2017 report, DOL's IG found that the shortage of representatives may affect the agency's ability to reduce the hearing-level backlog. As OALJ explained: "the black lung bar is near capacity on being able to prepare for and participate in the hearings presently being scheduled. Given the current capacity of the private bar, increasing the number and frequency of ALJ hearings may not be realistic.[36]

Various efforts have been considered or proposed to expand the pool of attorney or other qualified representatives who represent black lung claimants before DOL, such as encouraging additional pro bono representation, collaborating with law school clinics, awarding interim fees from the Trust Fund, and permitting fee-shifting for claimants who meet certain criteria.[37]

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[31] BARTH, *supra* note 1, at 43, 49–50, 149–50, 162, 182–83.
[32] *See* 20 C.F.R. § 725.456 (permitting submission of new medical reports "if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim" and after that date upon a showing of good cause).
[33] *Compare* U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 05-15-001-50-598, PROCEDURAL CHANGES COULD REDUCE THE TIME REQUIRED TO ADJUDICATE FEDERAL BLACK LUNG BENEFIT CLAIMS 26–27 (2015); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 17–18 (2009); Brandon Kenney, Note, *Recalibrating the Black Lung Benefits Program: Removing Systematic Procedural Barriers from Administrative Proceedings*, 18 J. CONST. LAW 329, 344–48 (2015), *with* BLACK LUNG BENEFITS IMPROVEMENT ACT OF 2022, H.R. REP. NO. 117-589, pt. 1, at 38–39 (2022); Smith, *supra* note 16, at 797, 818–819.
[34] Ramey v. Dir., OWCP, 326 F.3d 474 (4th Cir. 2003).
[35] Smith, *supra* note 16, at 797, 813, 816–17.
[36] DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 05-17-003-01-060, *supra* note 20, at 10–11 (2017).
[37] *Id*. at 11; *see also* Relief for Survivors of Miners Act of 2023, S. 2416, 118th Cong. (2023); Black Lung Benefits Improvement Act of 2022, S. 4511, 117th Cong. (2022).

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

This Part describes historical concerns about timeliness since 1973 and efforts undertaken by DOL and Congress to promote or improve timeliness in response to such concerns. It presents such concerns and efforts chronologically, dividing the black lung program's history into four parts: (1) a new program (1973–1978), (2) backlog at DCMWC (1978–1981), (3) backlog at OALJ and BRB (1981–1995), and (4) increasing prevalence of CWP (1995–present). As discussed in the following sections, it is clear that DOL and Congress have introduced or considered a wide range of measures to promote or improve timeliness, including procedural, organizational, personnel, informational, and other types of interventions.

D. A New Program (1973–1978)

DOL began adjudicating claims for black lung benefits in 1973, three years after the program was established. SSA was delegated responsibility for adjudicating claims filed before June 30, 1973. As described in a separate case study, SSA experienced significant challenges adjudicating black lung claims. Observing delays and lower approval rates than expected, Congress liberalized the program's eligibility criteria in 1972. Most significantly, the BLBA established a rebuttable presumption that a miner who had worked in an underground coal mine for at least fifteen years and had a totally disabling respiratory or pulmonary impairment was totally disabled due to or had died as a result of CWP.[38]

After DOL began adjudicating claims in 1973, its own system was, in the agency's own words, "plagued with delays." By June 1976, more than 50,000 claims were awaiting a decision, and claimants were waiting up to two years to receive an initial determination. Appeal rates were high. Some amount of delay was attributed to pending constitutional challenges levied against the program,[39] but operational factors were also seen as impacting DOL's performance.

Long wait times at DOL attracted substantial congressional and public attention. To reduce wait times, Congress authorized 30 new staff positions in June 1976.[40] Some members of Congress proposed imposing timeframes for decision making at the initial level and on appeal.[41] Proposals to liberalize evidentiary requirements and eligibility criteria—including the addition of additional presumptions that would reduce the need for individualized factfinding in many cases—culminated in the Black Lung Benefits Reform Act of 1977.[42]

The House Appropriations Committee, GAO, DOL's Office of Organization and Manpower Utilization, and the Prudential Insurance Company all undertook reviews of the black lung program in 1976.[43] GAO recommended that DOL allocate its staff and resources more

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[38] Nase, *supra* note 3, at 277, 288–96.
[39] The Supreme Court found the program constitutional in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).
[40] U.S. GEN. ACCOUNTING OFF., GAO/HRD-77-77, PROGRAM TO PAY BLACK LUNG BENEFITS TO COAL MINERS AND THEIR SURVIVORS—IMPROVEMENTS ARE NEEDED iv (1977).
[41] *See, e.g.*, Black Lung Benefits Reform Act of 1976, S. 3183, 94th Cong. (1976).
[42] *See* Pub. L. No. 95-239, 92 Stat. 95 (1978).
[43] U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT OF 1972: ANNUAL REPORT ON ADMINISTRATION OF THE ACT DURING CALENDAR YEAR 1976 13 (1977).

effectively, establish timeliness criteria for initial determinations, and make better use of management information to identify and address sources of delays.[44]

Based on these reviews and "detailed discussions with labor, management, Congress and other government officials," the Assistant Secretary for Employment Standards established a task force in June 1976 to develop a strategy for improving ESA's administration of the black lung program. The task force analyzed the program's operation and performance, sought input from key agency personnel, and held a three-day conference to develop recommendations. The task force made 31 recommendations in its December 1976 report to the Assistant Secretary, many of which were approved for implementation. Key recommendations included:

- **Improve Data Collection.** The task force recommended that DOL improve the collection of case processing data that could be used to manage individual cases and monitor systemwide performance.

- **Ensure Adequate Staffing.** The task force recommended DOL reconsider how positions were allocated across all levels of the adjudication system and develop a personnel recruiting plan for DCMWC.

- **Establish Performance Goals and Standards.** The task force recommended reducing the time for issuing an initial determination from 630 days to 225 days. The agency adopted a goal of issuing determinations within 180 days. The task force also recommended establishing performance standards for individual claims examiners.

- **Streamline the Collection and Evaluation of Evidence from Medical Sources.** To ensure evidence received from medical sources was sufficient to render an initial determination without additional action, the task force recommended that the agency establish a list of authorized medical providers and consider developing a handbook for physicians to ensure that evidence initially received from medical sources was sufficient to render an initial determination. To further reduce delays, the task force also recommended that DCMWC forward x-rays to reviewing physicians—called B Readers—immediately upon receipt.

- **Improve Resources for Claims Examiners.** The task force recommended that the agency clearly define the purpose and use of the program manual used by claims examiners and update it to accurately reflect current procedures. DOL developed the *Black Lung Resource Book* and *Black Lung Benefits Program Manual* and distributed them to every claims examiner and every district office, respectively.

- **Streamline Routine Administrative Tasks.** The task force recommended that the agency establish a process for ensuring that incoming mail was associated with claims files in a timely manner. It also recommended that the agency consider automating or outsourcing routine administrative tasks when appropriate.

[44] U.S. GEN. ACCOUNTING OFF., GAO/HRD-77-77, *supra* note 40, at iv.

- **Establish Sanctions for Uncooperative Parties.** To reduce delays resulting from inaction by coal mine operators, the task force recommended that the agency develop legislation or regulations that would authorize it to impose sanctions on coal mine operators who failed to cooperate in the adjudication of cases.[45]

E. Backlog at DCMWC (1978–1981)

Concerned about still-lower-than-expected allowance rates, Congress passed the Black Lung Benefits Reform Act of 1977, and President Carter signed it into law in March 1978.[46] As previously discussed, the Act liberalized eligibility criteria and granted claimants with previously denied and pending claims the right to request that SSA or DOL re-review their claims under the new criteria. DCMWC received more than 200,000 cases for re-review. DOL undertook many initiatives over the next few years to manage its surging caseload.

Organizationally, DOL decentralized claims processing through a newly created network of eight district offices and 33 field offices located in the top coal-producing areas to provide in-person service and expedite claims processing. A centralized Branch of Field Operations, staffed by experienced claims examiners, was established to help the new offices become operational. To staff these offices fully, DOL requested and obtained supplemental funding from Congress to add more than 100 permanent jobs and, to handle the temporary surge in cases, several hundred term-limited appointments. In 1981, after DCMWC had processed the bulk of the re-review cases, DOL reorganized it—closing several field offices, for example—to "accommodate a change in program emphasis from claims processing to claims maintenance."[47]

Procedurally, DOL developed streamlined processes for scheduling informal conferences, through which it hoped to resolve contested claims without resort to a formal hearing before OALJ. The agency also established a centralized Pre-Hearing Review Unit, staffed with experienced claims examiners, "to expedite the handling of cases for which hearings and further appeals are requested." Pre-Hearing Review Unit staff were responsible for reviewing claims files to ensure they were accurate and complete before adjudication by an ALJ.[48]

Other measures introduced this period included the development of training programs and case processing guides for claims examiners, an internal review process to help standardize adjudication procedures, and implementation of the electronic Black Lung Information System, which enabled personnel to track the status and location of cases, identify claims appropriate for

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[45] U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT OF 1972: ANNUAL REPORT ON ADMINISTRATION OF THE ACT DURING CALENDAR YEAR 1976 13–14, A5–A-13 (1977).

[46] Nase, *supra* note 3, at 277, 297–98; Donald T. DeCarlo, *The Federal Black Lung Experience*, 26 HOW. L.J. 1335, 1342 (1983).

[47] U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT: ANNUAL REPORT ON ADMINISTRATION OF THE ACT DURING CALENDAR YEAR 1981 6 (1982); *see also* U.S. GEN. ACCOUNTING OFF., GAO/HRD-80-111, *supra* note 23, at 2.

[48] U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT: ANNUAL REPORT ON ADMINISTRATION OF THE ACT DURING CALENDAR YEAR 1978 AND JANUARY 1, 1979–JUNE 30, 1979 15 (1979); *see also* U.S. GEN. ACCOUNTING OFF., GAO/HRD-80-111, FOLLOWUP ON DEPARTMENT OF LABOR'S ACTIONS ON GAO'S JULY 1977 REPORT ON ADMINISTRATION OF THE BLACK LUNG BENEFITS PROGRAM 6 (1980).

expedited processing, and produce reports to assist in the overall management of DOL's black lung caseload more effectively.[49]

F. Backlog at OALJ and BRB (1981–1995)

Many claimants denied benefits and most operators found liable for paying benefits requested hearings, and by the 1980s the backlog of re-review cases had shifted to OALJ and BRB. By 1984, appellants were waiting an average of more than two years for a hearing decision, and GAO estimated that a new appeal filed with OALJ in October 1984 would take more than 3.5 years to decide. Processing time at the BRB was about 27 months and expected to rise.[50]

The hearings and appeals components of the black lung program came under increasing public and congressional scrutiny. GAO was asked in 1984 to study the status of and efforts to reduce the backlog, and several congressional hearings were held in 1985.[51] Several bills were also introduced in Congress targeting the backlog of cases at OALJ and BRB.[52]

Initial efforts to reduce case processing times centered on expanding adjudicator and staff capacity. OALJ hired additional support staff and recruited adjudicators. Efforts to hire additional ALJs were challenging given widespread recognition that because the surge in cases would likely subside within a few years, the need for additional ALJs was likely temporary. DOL also found it difficult to recruit ALJs to relatively remote offices in the top coal-producing areas.[53] To expand its capacity, OALJ reemployed retired ALJs and recruited ALJs from other agencies to serve 120-day details with OALJ. GAO and members of Congress encouraged these practices and provided supplemental funding to expand OALJ's capacity.[54]

Because Congress established BRB as a three-member body, expanding capacity at the BRB required legislative action. The Secretary replaced two members in 1983 in an attempt to boost productivity,[55] an action upheld by the Court of Appeals for the D.C. Circuit.[56] In 1984,

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[49] U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT: ANNUAL REPORT ON ADMINISTRATION OF THE ACT 10, 16 (1980); U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT: ANNUAL REPORT ON ADMINISTRATION OF THE ACT 12 (1979); U.S. GEN. ACCOUNTING OFF., GAO/HRD-80-111, FOLLOWUP ON DEPARTMENT OF LABOR'S ACTIONS ON GAO'S JULY 1977 REPORT ON ADMINISTRATION OF THE BLACK LUNG BENEFITS PROGRAM 3–7 (1980).

[50] U.S. GEN. ACCOUNTING OFF., GAO/HRD-85-19, ADJUDICATION OF BLACK LUNG CLAIMS BY LABOR'S OFFICE OF ADMINISTRATIVE LAW JUDGES AND BENEFITS REVIEW BOARD 3 (1984).

[51] *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the H. Comm. on Education & Labor*, 99th Cong. (1985); *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 99th Cong. (1985).

[52] *See, e.g.*, S. 1217, 99th Cong. (1985); H.R. 1222, 99th Cong. (1985); H.R. 2833, 99th Cong. (1985); H.R. 4576, 98th Cong. (1983).

[53] *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, *supra* note 51, at 136.

[54] *See Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 100th Cong. 66 (1988) (statement of Rep. Robert E. Wise); *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, *supra* note 51, at 4, 116.

[55] U.S. GEN. ACCOUNTING OFF., GAO/HRD-85-19, *supra* note 50, at 14.

[56] Kalaris v. Donovan, 697 F.2d 376, 391 (D.C. Cir. 1983).

Congress expanded BRB's size from three to five members, authorized the Secretary to designate up to four ALJs to serve temporarily as BRB members, and permitted BRB to decide cases in three-member panels.[57] Congress expected that the Secretary would quickly appoint additional permanent and temporary members and provide staff to support them and provided supplemental funding to do so.[58]

Facing continued pressure, the new Secretary of Labor, William Brock, established a task force in July 1985 to recommend solutions for reducing the backlog. The task force consisted of senior officials representing the ESA, OALJ, BRB, the Office of the Assistant Secretary for Policy, the Office of the Assistant Secretary for Administration and Management, the Office of the Solicitor, and the Office of Congressional Affairs. Based on its study of OALJ's and BRB's operation and performance as well as discussions with members of Congress, the Office of Personnel Management, and the Office of Management and Budget, the task force recommended several actions. Many were adopted by the Secretary, including:

- **Obtaining an Independent Evaluation of Agency Practices.** The task force recommended contracting with an outside entity (e.g., the Administrative Office of the U.S. Courts or the Administrative Conference of the United States) to study case file preparation and processing practices. The Secretary explored contracting with a consultant to conduct an independent study of DOL's practices for processing black lung cases and recommend actions to improve productivity.

- **Using Personnel Flexibilities to Temporarily Increase the Number of Adjudicators and Support Staff.** DOL employed retired ALJs and others to assist with the surge in black lung cases, requested the loan from SSA of personnel employed in field offices in the Appalachian region who were experienced in the adjudication of disability claims, detailed personnel from other DOL programs to assist with the adjudication of black lung cases, and contracted with former law clerks and retired ALJs to work as law clerks.

- **Coordinating with Congress to Obtain Necessary Resources.** The agency cooperated with key congressional committees and the Congressional Coal Caucus on a yearly review of resource needs.

- **Ensuring ALJs Could Hold as Many Hearings as Possible.** The agency identified common reasons why hearings were rescheduled, postponed, or continued and took steps to reduce the chance that future hearings would be rescheduled, postponed, or continued.

[57] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984).
[58] U.S. GEN. ACCOUNTING OFF., GAO/HRD-85-19, *supra* note 48, at 16; *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, *supra* note 51, at 112, 127 (statements of Sen. Robert C. Byrd and Robert L. Ramsey, Chairman & Chief Admin. Appeals Judge, Benefits Rev. Bd., U.S. Dep't of Labor).

- **Improve the Availability of Information to External Stakeholders.** The agency coordinated with UMWA, the coal industry, and the private bar to "ensure that all parties are capable of adjusting to the increased claims disposition effort." It also took steps to improve the accessibility of BRB decisions "so that the community of those interested in Black Lung cases will be able to determine whether seeking further review of a case will indeed be productive."[59]

GAO and DOL's IG made additional recommendations. GAO estimated that with 35 additional staff attorneys and additional support staff, however, the BRB could eliminate its backlog of cases within three years—compared with ten years if no additional resources were provided.[60] GAO also recommended that DOL consider whether it could achieve greater efficiencies at current resource levels. The IG recommended that DOL establish timeliness goals for OALJ adjudication and, at the BRB, establish a career executive director position to manage and direct the BRB's administrative activities, consider the impact of future reorganizations on productivity, develop a "crisis approach to eliminating the root causes of congressional and other complaints" about timeliness, increase production standards for BRB staff attorneys, and establish a task force to develop more efficient procedures.[61]

G. Increasing Prevalence of CWP (1995–Present)

As noted earlier, although the prevalence of CWP among mine workers decreased about 90 percent from 1969 to 1995, it began to increase after 1995. This increase received significant attention, especially following the publication of a report by the National Institute of Occupational Safety and Health (NIOSH) in April 2011.[62]

Based on its more than 25 years administering the black lung program, DOL in 2000 substantially amended its rules to streamline the procedures used by DCMWC. Specifically, DOL eliminated the process by which district directors issued initial findings and parties were required to respond to them; streamlined procedures for informal conference to "reduce delay and to ensure that conferences are held only in appropriate cases"; and introduced a process by which district directors, after gathering the necessary evidence, issued a schedule for the parties to submit additional evidence. DOL expressed the hope that these changes would "encourage a less adversarial and less formal development of the necessary evidence," "promote more timely evidentiary development," and "reduce, if not eliminate, hearing requests filed before the conclusion of a district director's claims processing." The rules also imposed certain limits on the introduction of evidence, including witness testimony, at the hearing level.[63]

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[59] Letter from William E. Brock, Sec'y of Labor, to Rep. Barney Frank (Sep. 30, 1985), *in Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations supra* note 51 at 145–46*,* 147–54.

[60] U.S. GEN. ACCOUNTING OFF., GAO/HRD-90-75, BLACK LUNG PROGRAM: FURTHER IMPROVEMENTS CAN BE MADE IN CLAIMS ADJUDICATION 6 (1990).

[61] U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT TO THE CONGRESS: APRIL 1–SEPTEMBER 30, 1993 6–7 (1993); U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT TO THE CONGRESS: APRIL 1–SEPTEMBER 30, 1990 26–27 (1990).

[62] NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, COAL MINE DUST EXPOSURES AND ASSOCIATED HEALTH OUTCOMES: A REVIEW OF INFORMATION PUBLISHED SINCE 1995 (2011).

[63] 65 Fed. Reg. 79,920 (Dec. 20, 2000).

By the mid-2000s, the DCMWC, OALJ, and BRB were processing most cases within a year and therefore meeting their component-specific goals for timeliness. Rates of appeals and remands between levels remained high, however, prolonging the overall disposition of cases. GAO found that because DOL did not track claims through all levels of its adjudication process, the agency could not "begin to accurately assess the scope of this problem or develop strategies to improve it." GAO found that difficulties associated with scheduling and conducting hearings in remote areas further delayed the disposition of cases at OALJ. Based on its examination, GAO made several recommendations to DOL, including:

- **Addressing Common Causes for Remand.** GAO recommended that DOL convene a group to study and develop solutions to reduce the rate at which BRB remanded cases to OALJ.

- **Collecting Better Data and Developing Performance Goals.** GAO recommended that DOL obtain information on how long it took to resolve claims through the entire adjudication system and develop systemwide performance measures.

- **Conducting Remote Hearings.** GAO recommended that DOL study the feasibility of using video hearings to expedite hearings for parties located in remote areas.

- **Improving the Quality of Evidence Received at DCMWC.** GAO recommended that DOL consider ways to improve how physicians documented their opinions and track complaints from stakeholders about testing practices that may contribute to inaccurate initial determinations.

GAO also concluded that certain structural issues, required by statute, might contribute to long processing times and high rates of appeal and remand. It recommended that DOL consider whether to propose legislative action that would improve claimants' access to representation, allow compensation for partial disability and settlement, and limit evidentiary development at OALJ and BRB.[64]

Increasing processing times, along with an October 2013 investigation by the Center for Public Integrity (CPI) and ABC News which uncovered that inaccurate x-ray readings by a physician may have resulted in a large number of wrongful denials, prompted renewed public and congressional attention to the black lung program.[65] Congress held a well-publicized hearing on the timeliness and accuracy of black lung adjudication in July 2014, at which senior DOL officials described several measures the agency had taken or planned to take to address the backlog at OALJ. They included: (1) hiring two additional ALJs for the Pittsburgh District Office and two additional ALJs for the National Office in Washington, D.C.; (2) reemploying a retired ALJ as a Senior ALJ in the Pittsburgh District Office; (3) piloting a program under which a senior attorney would be hired for each district office instead of relying solely on law clerks,

[64] U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS (2009).
[65] *See Coal Miners' Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck Against Black Lung Claimants: Hearing Before the Subcomm. on Emp. & Workplace Safety of the Sen. Comm. On Health, Education, Labor & Pensions*, 113th Cong. (2014).

who served two-year terms; (4) exploring the use of contract attorneys, typically former law clerks, to draft decisions for a fixed cost per case; (5) using rehired annuitants to manage OALJ's Permanent Labor Certification workload, which freed up ALJs to hear and decide more black lung cases; (6) monitoring ALJs' productivity and counseling ALJs who were less productive; (7) routinely advising represented parties that ALJs may make a decision on the record, without an oral hearing, with the agreement of all parties; (8) continuing to explore the use of video hearings (a pilot program was launched); and (9) working with NIOSH to develop training modules on recurring medical issues.[66] OALJ prepared additional backlog reduction plans in fiscal year (FY) 2015 and in 2016.[67]

Prompted by the 2013 CPI/ABC News investigation, the House of Representatives Committee on Education and the Workforce asked DOL's IG to examine the accuracy and timeliness of black lung adjudication. The IG made 23 recommendations to senior officials in OWCP, OALJ, and BRB, including:

- **Increase the Number of ALJs and Support Staff.** The IG recommended that OALJ request resources to replace outgoing ALJs and law clerks, extend law clerks' terms, reinstate the program under which contractors (often former law clerks) draft decisions for a fee, and obtain detailees from BRB.

- **Expand Electronic Case Management.** The IG recommended that OWCP, OALJ, and BRB work together to evaluate the feasibility and costs of implementing a system that would allow each component to management, track, and store cases electronically and exchange case file information electronically with other components.

- **Evaluate Reforms Requiring Legislative Action.** Concluding that the inability to award benefits for partial disability and settle cases resulted in high rates of appeal to OALJ and BRB, the IG reiterated GAO's earlier recommendation that DOL should evaluate the benefits and costs of statutory changes to introduce compensation for partial disability and settlement of claims.

- **Obtain Earnings Records Electronically.** Finding that it took an average of 58 days for OWCP to obtain miners' earning records from SSA through a paper-based process, the IG recommended that OWCP consider seeking authorization from Congress to access SSA earnings records online and, in the interim, renegotiate with SSA to allow OWCP to submit requests for earnings verification electronically.

- **Implement a Remote Hearings Program.** The IG recommended OALJ reduce the time and costs associated with ALJ travel by developing a program for conducting

[66] *See Coal Miners' Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck Against Black Lung Claimants: Hearing Before the Subcomm. on Emp. & Workplace Safety of the Sen. Comm. On Health, Education, Labor & Pensions*, 113th Cong. 13–14 (2014) (statement of Christopher P. Lu, Deputy Sec'y, Dep't of Labor & Patricia Smith, Solicitor, Dep't of Labor).
[67] U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 05-17-003-01-060, *supra* note 20, at 9.

hearings by video or telephone.

- **Improve Coordination Among DOL Adjudicative Components.** The IG recommended that OALJ and BRB leadership institutionalize a "system of regular communication" to coordinate their activities more effectively.

- **Establish Timelines and Performance Goals.** The IG recommended that OALJ establish timelines and performance goals for OALJ as a whole and individual district offices. The IG also recommended that OALJ implement a "time tracking system for judges and law clerks to record the amount of time spent on each case." The agency did not agree that this would be an effective mechanism for promoting timeliness.

- **Provide Training and Standardize Practices.** To improve efficiency and accuracy, the IG recommended that OALJ develop a formalized training program for incoming ALJs and staff and establish "centralized, written policies, procedures, or templates."

- **Review Case Assignment Practices in District Offices.** The IG found that different District Offices followed different practices for assigning cases to ALJs. The Cincinnati office assigned cases to judges as they "sufficiently" cleared their dockets, while the Pittsburgh office assigned each ALJ 25 cases every three months. Finding that the Pittsburgh office achieved higher productivity than the Cincinnati office, the IG recommended that OALJ consider transitioning the Cincinnati office to the Pittsburgh office's case assignment practice.[68]

A follow-up study in 2017 found that OALJ had "mostly addressed" the IG's recommendations and that OALJ's efforts had "resulted in an increased rate of black lung case dispositions and a reduction in the black lung backlog." The IG noted, however, that the limited capacity of attorneys who represented claimants before OALJ might impact the success of OALJ's efforts to improve timeliness.[69]

Congress has appropriated additional funding for OALJ. In addition, members have introduced bills since 2014 that would, among other things, require the Secretary of Labor to develop and submit to Congress a "comprehensive strategy to reduce the backlog of cases pending . . . before [OALJ]." Most bills would have required the Secretary to address the following in the comprehensive strategy:

- "[T]he current and targeted pendency for each category of cases before [OALJ]";

- "[T]he number of [ALJs], attorney advisors supporting such judges, support staff, and other resources necessary to achieve and maintain the targeted pendency for each category of such cases";

[68] U.S. DEP'T OF LABOR, OFF. OF INSP. GEN., 05-15-001-50-598, PROCEDURAL CHANGES COULD REDUCE THE TIME REQUIRED TO ADJUDICATE FEDERAL BLACK LUNG BENEFIT CLAIMS 28–30 (2015).
[69] U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 05-17-003-01-060, *supra* note 20, at 10–11.

- "[T]he necessary resources to improve efficiency and effectiveness, such as equipment for video conferences, training, use of reemployed annuitants, and administrative reforms";

- "[T]he necessary resources to reduce the average pendency of [black lung] cases to less than 12 months from the date of receipt of the case to the date of disposition of such case"; and

- "[T]he impact of sequestration, furloughs, and Federal Government shutdowns on increasing administrative burdens and the backlog of cases pending before [OALJ]."

Most bills would have required the Secretary to "consult with organizations that have ongoing interactions with [OALJ], including organizations that represent parties in cases under the [BLBA]" in developing the comprehensive strategy.[70]

DOL received a lower-than-expected volume of black lung claims during the COVID-19 pandemic,[71] but the number of claims appears to be increasing again. DOL continues to explore ways to promote timely adjudication. Budget and strategic planning documents in the last five years describe efforts including:

- **Reconsidering Performance Measures.** DCMWC has sought to reconsider its performance measures and establish goals that reflect "timeframes within the control of the of the claims staff, or touch times," rather than "overall aggregate timeframes." Such measures are intended to provide "clear guideposts to staff and managers." DCMWC introduced a new measure in FY 2022: "Percent of Black Lung claims pending at the start of the fiscal year that are resolved by the end of the fiscal year." For FY 2022 through FY 2026, DCMWC aims to meet this goal in between 86 and 90 percent of cases.[72] (DCMWC issued decisions on 91 percent of claims in FY 2022.) DCMWC continues to use other performance goals, such as completing claim development for cases in which there is a potentially liable operator within 34 days.[73]

- **Shifting to End-to-End Adjudication Model.** DCMWC reported in its FY 2020 annual performance report that it had "shifted away from specialized roles in claims work to an end-to-end claims adjudication model to enhance overall efficiency and

[70] Black Lung Benefits Improvement Act of 2023, S. 3304, 118th Cong. (2023); Black Lung Benefits Improvement Act of 2022, S. 4511, 117th Cong. (2022); Black Lung Benefits Improvement Act of 2022, H.R. 6102, 117th Cong. (2022); Black Lung Benefits Improvement Act of 2019, S. 2205, 116th Cong. (2019); Black Lung Benefits Improvement Act of 2017, S. 4511, 115th Cong. (2017); Black Lung Benefits Improvement Act of 2017, H.R. 6102, 115th Cong. (2017); Black Lung Benefits Improvement Act of 2015, S. 2096, 114th Cong. (2015); Black Lung Benefits Improvement Act of 2015, H.R. 3625 (2016); Black Lung Benefits Improvement Act of 2014, S. 2959, 113th Cong. (2014); Black Lung Benefits Improvement Act of 2014, H.R. 5751, 113th Cong. (2014).
[71] U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., 19-20-004-04-001, COVID-19: OWCP SHOULD CONTINUE TO CLOSELY MONITOR IMPACT ON CLAIMS PROCESSING 6–7 (2020).
[72] U.S. DEP'T OF LABOR, FY 2022 – 2026 STRATEGIC PLAN 45–46 (2021); U.S. DEP'T OF LABOR, FY 2021 ANNUAL PERFORMANCE REPORT 63–64 (2021).
[73] U.S. DEP'T OF LABOR, FY 2022 ANNUAL PERFORMANCE REPORT 66 (2021).

productivity."[74]

- **Centralizing Oversight of Field Operations.** OWCP subcomponents, including DCMWC, will rely on recent organizational changes to provide centralized oversight of its field operations to "leverage staffing efficiencies to improve claims processing times and program accuracy."[75]

- **Improving Data Analysis and Technology Use.** DCMWC uses a "data visualization dashboard to monitor its pending claims inventory."[76] DCMWC plans in FY 2023 to continue to "use informed analysis and information technology (IT) innovations to enhance performance and keep pace with the significant incoming claims volume, ensure accurate and timely adjudication of benefits, and modernize program operations."[77]

- **Improving and Expanding Use of Online, External-Facing Processes.** While not limited to the black lung program, OALJ and BRB have taken significant steps in recent years to improve and expand use of their online customer service portals.

- **Prioritizing Aged Cases.** DCMWC has prioritized the processing of claims that have been pending for more than a year. To accomplish this goal, the agency also used "prototype performance standards" for claims examiners intended to "promote a balanced approach to claims inventory management."[78]

[74] U.S. DEP'T OF LABOR, FY 2020 ANNUAL PERFORMANCE REPORT 38–39 (2021).
[75] U.S. DEP'T OF LABOR, FY 2022 – 2026 STRATEGIC PLAN *supra* note 72, at 45–46.
[76] U.S. DEP'T OF LABOR, FY 2022 ANNUAL PERFORMANCE REPORT 69 (2021).
[77] U.S. DEP'T OF LABOR, FY 2024 CONGRESSIONAL BUDGET JUSTIFICATION: BLACK LUNG DISABILITY TRUST FUND 14 (2023).
[78] U.S. DEP'T OF LABOR, FY 2018 ANNUAL PERFORMANCE REPORT 29 (2018); *see also* U.S. DEP'T OF LABOR, FY 2019 ANNUAL PERFORMANCE REPORT 41 (2019).

APPENDIX F:
DEPARTMENT OF VETERANS AFFAIRS

Veterans Disability Compensation Program

This case study provides an overview of efforts to improve or promote timeliness under the veterans disability compensation program. Established in 1917 and administered by the Department of Veterans Administration and its predecessors since 1921, the disability compensation program provides tax-free, monthly payments to veterans with disabilities resulting from an injury or disease incurred or aggravated during active military service.[1] Veterans may also become eligible for other types of benefits and services, such as job training, housing grants, and life insurance.[2]

Part I provides an overview of the veterans disability compensation program, its historical development, and VA's process for adjudicating cases under it. Part II describes timeliness as a value in disability compensation adjudication. Part III describes factors that have affected the timeliness of disability compensation adjudication. Part IV describes efforts undertaken by VA and Congress to promote or improve timeliness since 1988, when Congress first provided judicial review of VA decisions.

I. BACKGROUND

A. The Program

The federal government makes a wide range of benefits available to veterans and their survivors and dependents. Benefits and services include health care, compensation for service-connected disabilities, pensions for certain veterans with limited or no income, education and training benefits, vocational rehabilitation services, life insurance, home loans, burial and memorial services, and compensation and pensions for certain dependents and survivors.

The veterans' benefits program is among the oldest programs administered by the federal executive branch, dating to the late eighteenth century. Early programs were created to provide pensions to veterans of specific wars. The current system, under which veterans are compensated based on the severity of their service-connected disabilities, dates to October 1917, about six months after the United States entered World War I. Under that system, the executive branch was directed to adopt a

> schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries . . . based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case.[3]

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[1] 38 U.S.C. §§ 1110, 1131.
[2] SCOTT D. SZYMENDERA, BENJAMIN COLLINS & LIBBY PERL, CONG. RSCH. SERV., R44837, BENEFITS FOR SERVICE-DISABLED VETERANS (2022).
[3] War Risk Insurance Act of 1917, Pub. L. No. 65-90, 40 Stat. 398 (1917).

The new compensation system was intended to represent a "new paradigm" distinct from the earlier pension system, which many saw as a failed and highly politicized program.[4]

Like earlier programs, however, the compensation program was intended to provide benefits to veterans of a specific war. It was never intended to become permanent. Its longevity is largely the result of happenstance. As one account explains it:

> [T]he system established for World War I veterans was merely the dominant administrative program during the brief span of time when political pressure finally forced the unification of veterans' program into one agency and the New Deal created a permanent system of benefits for veterans.[5]

The system grew haphazardly through a series of congressional, presidential, and agency actions between 1917 and 1958, when Congress recodified veterans' law, the system stabilized into a permanent program, and an era of ongoing "reform efforts" came to an end.[6]

B. The Agency

The 1917 statute assigned responsibility for developing the ratings schedule and adjudicating benefits claims to a small office in the Treasury Department called the Bureau of War Risk Insurance. Congress had created the Bureau three years earlier to insure American vessels and their cargoes against the risks of war.[7] Over the next several years, Congress created additional benefits programs for veterans, including health care and vocational rehabilitation, but assigned them to other agencies outside the Treasury Department, namely the U.S. Public Health Service and the Federal Board for Vocational Education. The separate Bureau of Pensions, within the Interior Department, administered the pension system for veterans of previous wars.

Discontent with the confusing and fractured administration of the veterans' benefit system led Congress in 1921 to consolidate all programs for World War I veterans into a single, independent Veterans Bureau.[8] Nine years later, President Hoover combined the Veterans Bureau with the Bureau of Pensions and the National Home for Disabled Volunteer Soldiers to create the Veterans Administration, headed by a single Administrator.[9] The Veterans Administration became the cabinet-level Department of Veterans Affairs (VA), headed by a Secretary, in 1989.[10]

Today, two VA subcomponents are involved in the adjudication of claims for disability compensation: the Veterans Benefits Administration (VBA) and the Board of Veterans' Appeals (BVA). VBA is one of three major subagencies of the VA, along with the Veterans Health Administration (VHA) and the National Cemetery Administration. Organizationally, VBA consists of a central office headquartered in Washington, D.C., and a network of employees across 56 regional offices (ROs). VBA is headed by a Senate-confirmed official, the Under

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[4] James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L.J. 7 (2013).
[5] *Id*.
[6] *Id*.
[7] War Risk Insurance Act of 1914, Pub. L. No. 63-193, 38 Stat. 711 (1914).
[8] An Act Establishing the Veterans' Bureau of 1921, Pub. L. No. 67-47, 42 Stat. 147 (1921).
[9] Exec Order No. 5398 (1930).
[10] Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

Secretary for Benefits, who reports directly to the Secretary.[11] Veterans service representatives (VSRs) in the ROs adjudicate claims under the oversight of the centralized Office of Field Operations (OFO). OFO is responsible for ensuring that ROs provide services in a "timely, objective manner with respect to speed, accuracy and customer satisfaction" through performance, workload, and resource management.[12]

BVA was created by executive order in 1933 to provide a forum for administrative review of initial decisions and was later ratified by statute. Although BVA has jurisdiction to review many types of decisions issued by VA subcomponents, the vast majority of appeals involve claims for disability compensation. Organizationally, BVA consists of a Chairman, a Vice Chairman, and "such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner." The Chairman is appointed by the President, by and with the advice and consent of the Senate, for a six-year term and may be removed from office only for good cause after notice and opportunity for hearing. All other Board members, called veterans law judges (VLJs), are appointed by the Secretary upon the Chairman's recommendation and with the approval of the President. The Secretary designates one VLJ as Vice Chairman. The Chairman, subject to the Secretary's approval, establishes "objective and fair criteria" for evaluating VLJs' job performance. VLJs' performance is reviewed periodically by a panel consisting of the Chairman and two VLJs appointed by the Chairman on a rotating basis. If a performance review panel finds that a VLJ's job performance does not meet the performance standards, the Chairman may recommend that the Secretary remove them from office.[13]

C. The Adjudication Process

A veteran initiates a claim by submitting a standardized form, along with any evidence, to VA by mail, in person at a RO, or online. Each RO contains a veterans service center, which is the unit responsible for adjudicating disability compensation claims. The claim is assigned to a VSR, who helps the veteran obtain the evidence needed to evaluate the claim. VA has a statutory duty to make "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit."[14]

Evidence typically includes military service records, which are frequently obtained from the National Personnel Records Center (NPRC) of the National Archives and Records Administration (NARA), and medical treatment records, which may be obtained from VHA, the Department of Defense (DOD), private medical sources, and NPRC. The VSR may also refer the veteran for one or more medical examinations, which take place in person or virtually and are typically performed by a VA provider or a VA contract provider. Private physicians can also perform medical examinations under some circumstances.

Once the VSR has developed the record, the claim is referred to a rating VSR (RVSR) who assigns a percentage rating according to the schedule adopted by the Secretary. The RVSR

[11] 38 U.S.C. §§ 306, 7701.
[12] U.S. DEP'T OF VETERANS AFFS., 1 FUNCTIONAL ORGANIZATIONAL MANUAL: DESCRIPTION OF ORGANIZATION STRUCTURE, MISSIONS, FUNCTIONS, TASKS, AND AUTHORITIES 19 (2021).
[13] 38 U.S.C. § 7101A.
[14] *Id.* § 5103A.

may refer the claim back to the VSR for additional development. After the RVSR completes their work, the claim is referred to the VSR, who reviews the rating decision, generates the award, and prepares the decision notice. A senior VSR, reviews the award and decision notice for accuracy, authorizes the award, and releases the decision notice for mailing to the veteran.[15]

The process for appealing an initial decision has changed significantly in recent years as a result of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). For initial decisions issued before February 19, 2019, a veteran filed a Notice of Disagreement (NOD). A RVSR or a more experienced employee called a decision review officer (DRO) reviewed all evidence, including any new evidence, to reach a decision. Alternatively, the claimant could request a de novo hearing before a DRO. If the RVSR or DRO found insufficient evidence to fully grant the appeal, the adjudicator sent the veteran a Statement of the Case (SOC) documenting their findings. The veteran could submit new evidence at any time while the appeal was pending with VBA, which would trigger a rereview resulting in a Supplemental SOC. After finishing its review, VBA certified the case to BVA, where the veteran could request an optional, nonadversarial hearing before a VLJ. The VLJ would grant or deny benefits or remand the case to VBA for additional development.[16] VA is still processing some legacy appeals.

The new system created by the AMA was intended to speed up and simplify appeals. Under the system, a veteran who disagrees with an initial decision chooses among three "lanes":

- **Supplemental Claim.** The veteran may submit additional evidence or identify additional evidence that VA will help her obtain. Once the record is supplemented, a VBA adjudicator reviews the new record as a whole and makes a decision.

- **Higher-Level Review.** A more experienced adjudicator will review the claim de novo, but there is no opportunity to supplement the record. The veteran may request an informal telephone conference with the more experienced adjudicator. VA advises veterans that requesting a conference "may delay how fast a decision can be made."

- **Appeal to BVA.** If the veteran opts to appeal her claim to BVA, she must choose among three options: (1) direct review, (2) evidence submission, or (3) a hearing. Direct review is the quickest option, but a veteran who chooses this option may not submit additional evidence or have a hearing. Under the second option, the veteran has 90 days after filing the NOD to submit additional evidence. If a veteran requests a hearing before a VLJ, they may testify before a VLJ and may submit additional evidence at the hearing or within 90 days after the hearing. If a veteran appeals to BVA, VA will not help them develop additional evidence.[17]

Until 1988, there was no opportunity for judicial review of VA decisions. The Veterans' Judicial Review Act (VJRA) created a new Article I tribunal—originally called the U.S. Court of

[15] An overview of the VBA adjudication process is available in the agency's *Adjudication Procedures Manual*, available at https://www.knowva.ebenefits.va.gov.
[16] *Manage a Legacy VA Appeal*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/decision-reviews/legacy-appeals/ (last visited Sept. 4, 2023).
[17] *Appeals Modernization*, U.S. DEP'T OF VETERANS AFFS., https://benefits.va.gov/BENEFITS/factsheets/appeals/Appeals-Brochure.pdf (last visited Sept. 4, 2023).

Veterans Appeals and later renamed the U.S. Court of Appeals for Veterans Claims (CAVC)—with exclusive jurisdiction to review BVA decisions.[18] CAVC proceedings are adversarial and conducted according to formal rules of evidence and procedure. On appeal, CAVC may decide questions of law, compel action unlawfully withheld, and set aside decisions, findings and conclusions that are arbitrary, capricious, an abuse of discretion, or contrary to law. CAVC may only set aside findings of material fact that are clearly erroneous, however. CAVC may not receive additional evidence and must take due account of the rule of prejudicial error.[19] Appeal from CAVC decisions lies with the Court of Appeals for the Federal Circuit.

II. TIMELINESS AS A VALUE IN VETERANS BENEFITS ADJUDICATION

The veterans disability compensation program was established to provide income support to veterans who have become disabled as a result of military service, and so timeliness has always been an integral value animating administration, oversight, and public perception of the program. Media outlets report on a near-daily basis about the experience of veterans waiting months or years for a decision on their claims, and congressional caseworkers are kept busy with constituents' requests for assistance with applications pending at VA.

Congressional actors have continually exerted pressure on VA to decide cases more quickly through legislation, oversight hearings, appropriations, the confirmation of presidential appointees, constituent service activities, requests for audits by the Government Accountability Office (GAO) and VA's Office of Inspector General (OIG), and formal and informal communications with VA officials. The House and Senate Committees on Veterans' Affairs conduct essentially continuous oversight of VA's administration of the disability compensation program. External pressures to decide cases more quickly also come from veterans, advocates, and the media. Since the establishment of judicial review in 1988, VA is also responsive to pressure from CAVC and, to a lesser extent, the Federal Circuit and Supreme Court.

Veterans service organizations (VSOs) are especially important. VSOs are organizations approved by the Secretary to help veterans prepare, present, and prosecute their claims for benefits.[20] Prominent VSOs include the American Legion, Amvets, Disabled American Veterans, Veterans of Foreign Wars, and Vietnam Veterans of America. VSOs provide a number of services, including connecting veterans with accredited representatives who can assist them.[21] They play in important role not only in helping individual veterans but also, through well-developed relationships with VA leadership and members of Congress and their staffs, in advocating for systemic reform.[22]

Of course, pressures to improve timeliness have always coexisted beside other concerns, especially concerns about decisional quality (including accuracy and consistency), procedural fairness (including due process), and customer service. Efforts to promote all of these values

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[18] Pub. L. No. 100-687, § 301, 102 Stat 4105, 4113–21 (1988) (codified at 38 U.S.C. ch. 72).
[19] 38 U.S.C. § 7261.
[20] *Id*. § 5902.
[21] TAMAR B. BRESLAUER & CAROL D. DAVIS, CONG. RSCH. SERV. R46412, VETERANS SERVICE ORGANIZATIONS (VSOS): FREQUENTLY ASKED QUESTIONS (2022).
[22] *See, e.g.*, *Joint Hearing to Receive Legislative Presentation of Multiple Veteran Service Organizations (VSOs): Joint Hearing of the H. & Sen. Comms. on Veterans' Affs.*, 113th Cong. (Mar. 6, 2013).

simultaneously have shaped the operation, performance, and public perception of the disability compensation program in important ways.

There appears to be strong cyclicality in the ways that policymakers in both the executive and legislative branches have responded to these pressures. Concerns about timeliness frequently translate into actions by Congress and agency managers to speed up case processing. Improved timeliness—or pressure on individual employees to increase productivity—has repeatedly prompted concerns about quality, in particular, and allegations that agency managers are prioritizing quantity over quality.[23] As VA has introduced measures to improve timeliness over the years, it has frequently taken care to monitor any unintended effects on decisional quality. Measures that promise to promote timeliness and quality simultaneously are highly valued.[24]

III. FACTORS AFFECTING TIMELINESS

Many factors have affected VA's ability to adjudicate claims for disability compensation in a timely manner, and the causes of surges, backlogs, and delays typically are complicated and multifaceted. This Part describes six categories of factors that historically have had a substantial impact on the operation and performance of the disability compensation program.

A. Trends Affecting the Active-Duty Military

Trends affecting the active-duty military have affected VA adjudication in several ways. The size of the military has fluctuated over time, frequently growing during wartime and shrinking during peacetime. Although growth of the military has no immediate effect on claims for benefits administered by VA, it certainly increases the universe of future applicants. Because many servicemembers apply for disability immediately upon separation from the military, efforts to reduce the size of the active-duty military have had more immediate impacts on VA. The post-Cold War drawdown of the active-duty military and the number of veterans returning from the Gulf War and the wars in Afghanistan and Iraq have substantially impacted the operation and performance of VA's adjudication system, for example.[25] VA has introduced measures over the

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[23] *See, e.g.*, ERIC CHRISTENSEN ET AL., CNA CORP., FINAL REPORT FOR THE VETERANS' DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 142–43 (2007); Melissa Kong, *The Waiting Game: Mending the Disability Backlog*, 19 PUB. INT. L. REP. 18–19 (2013).

[24] *See, e.g.*, U.S. GOV'T. ACCOUNTABILITY OFF., GAO-23-106097, VA DISABILITY BENEFITS: ACTIONS NEEDED TO FURTHER EXAMINE RACIAL AND ETHNIC DISPARITIES IN COMPENSATION (2023); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-50, VETERANS' DISABILITY BENEFITS: IMPROVEMENTS COULD FURTHER ENHANCE QUALITY ASSURANCE EFFORTS (2014); U.S. GEN. ACCOUNTING OFF., GAO-02-806, VETERANS' BENEFITS: QUALITY ASSURANCE FOR DISABILITY CLAIMS AND APPEALS PROCESSING CAN BE FURTHER IMPROVED (2002); U.S. GEN. ACCOUNTING OFF., GAO-01-930R, VETERANS' BENEFITS: QUALITY ASSURANCE FOR DISABILITY CLAIMS PROCESSING (2001); U.S. GEN. ACCOUNTING OFF., GAO/HEHS-99-35, VETERANS' BENEFITS CLAIMS: FURTHER IMPROVEMENTS NEEDED IN CLAIMS-PROCESSING ACCURACY (1999); U.S. GEN. ACCOUNTING OFF., GAO/HRD-89-9, VETERANS' BENEFITS: IMPROVEMENTS NEEDED TO MEASURE THE EXTENT OF ERRORS IN VA CLAIMS PROCESSING (1989).

[25] *See, e.g.*, INST. OF MEDICINE, A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 36 (2007); *The Impact of Operation Iraqi Freedom/Operation Enduring Freedom on the U.S. Department of Veterans Affairs Claims Process: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs. of the H. Comm. on Veterans' Affs.*, 110th Cong. 61–62 (2007) (statement of Ronald R. Aument, Deputy Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.); *Adjudication of Claims and Appeals: Hearing Before the Subcomm. on Compensation, Pension & Insurance of the H. Comm. on Veterans' Affs.*, 103d Cong. 2–3 (1993) (statement of R. J. Vogel, Deputy Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

years to streamline adjudication of claims filed by recently separated servicemembers. VA has also undertaken extensive outreach efforts to active-duty personnel, which likely results in increased case receipts.[26]

Exposure to sources of injury and disease in the line of duty affects later application rates. Indeed, many legislative and administrative modifications to the program have addressed disabilities that significant numbers of veterans incurred as a result of specific conditions, such as exposure to burn pits in the Middle East, Afghanistan, and Kosovo; contaminated drinking water at Camp Lejeune; and Agent Orange in Korea and Vietnam.

B. Adoption of Presumptive Conditions

Congress and VA have adopted many presumptions that eliminate the burden on veterans to prove that certain conditions are service-connected if they meet certain service requirements, such as those noted in the previous section. Several justifications have been put forth for the "widespread use" of presumptions in VA adjudication, including that they "simplify and streamline the adjudication process by eliminating the need to obtain evidence and decide complex issues" and "relieve claimants and VA of the necessity of producing direct evidence when it is impractical or unduly burdensome to do so."[27]

The adoption of new presumptive conditions often results in a surge of claims.[28] Between August 2022 and September 2023, for example, VA received almost one million claims under the PACT Act.[29] Among other things, the statute eliminated the requirement that veterans prove that exposure to burn pits in the Middle East, Afghanistan, and Kosovo caused certain disabilities.[30]

C. Trends Affecting Veterans

VA noticed in the early 2000s that veterans were citing more disabilities in their claims than in previous periods. More complex claims require greater outlay of staff time and resources than less complex claims.[31]

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[26] *See, e.g.*, *The Challenges and Opportunities Facing Disability Claims Processing in 2006: Hearing Before the H. Comm. on Veterans' Affs.*, 109th Cong. 76–77 (2005) (statement of Ronald R. Aument, Deputy Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

[27] INST. OF MEDICINE, *supra* note 25, at 38–39.

[28] *See, e.g.*, Zolan Kanno-Youngs, *Biden Trumpets Legislation for Veterans Despite Backlog in Claims*, N.Y. TIMES (Aug. 10, 2023), https://www.nytimes.com/2023/08/10/us/politics/biden-utah-veterans-benefits.html; U.S. GEN. ACCOUNTING OFF., GAO-02-645T, VETERANS' BENEFITS: DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING (2002).

[29] Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (2022).

[30] *PACT Act Performance Dashboard*, U.S. DEP'T OF VETERANS AFFS., https://www.accesstocare.va.gov/PactAct (last visited Sept. 5, 2023).

[31] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 12–13 (2012); U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-283T, VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING CHALLENGES AND OPPORTUNITIES FOR IMPROVEMENT 7 (2005); *Challenges and Opportunities Facing Disability Claims Processing in 2006*, *supra* note 26, at 78–79; *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the Sen. Comm. on Veterans' Affs.*, 109th Cong. 10–11 (2005) (statement of Daniel L. Cooper, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

An aging veteran population may result in increased caseloads. In 2005, for example, GAO noted that more older veterans were filing claims for the first time and suggested that "[o]ne reason for this increase could be that older veterans have incentives to file disability claims because obtaining a service-connected disability rating is a gateway to VA health care."[32] In 2013, a VA official attributed its growing caseload in part to an "[a]ging population of previous era Veterans such as Vietnam and Korea, whose conditions are worsening."[33]

It has been suggested that the "[i]mpact of a difficult economy" might result in increased caseloads at VA.[34] As discussed in other case studies, many agencies that administer benefits programs have observed increased filing rates during economic downturns—presumably because there is greater need, especially among vulnerable populations, for income support or wage replacement during such periods.

Additionally, there have been extensive outreach efforts by VA, VSOs, and others to encourage veterans to apply for benefits to which they are eligible. Extensive outreach efforts have likely resulted in greater awareness of benefits programs among veterans and their families and increased application rates.[35]

D. Resource Constraints

Like any federal program, the operation and performance of the veterans' disability compensation program depends heavily on the resources allocated for its administration. Through budget requests and congressional oversight materials, it is clear that VA and legislative-branch officials have engaged in a continuing dialogue regarding the funding needed to administer the program. The budget environment—including funding cuts and continuing resolutions over the years—have impacted VA's ability to manage its pending caseload and implement improvements to expedite decision making in the future.[36]

Satisfactory administration also depends heavily on having staff in sufficient numbers. That is partially a factor of adequate funding. But like other high-volume adjudication agencies, VA also has struggled at times to attract and retain the personnel it needs to adjudicate claims in a timely manner. An aging workforce, for example, resulted in high rates of attrition due to retirement, particularly among the most experienced personnel, in the 2000s.[37] High staff

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[32] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-283T, VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING CHALLENGES AND OPPORTUNITIES FOR IMPROVEMENTS 7 (2005).

[33] *Focusing on People: A Review of VA's Plans for Employee Training, Accountability, and Workload Management to Improve Disability Claims Processing: Hearing Before the H. Comm. on Veterans' Affs.*, 113th Cong. 45 (2013) (statement of Allison A. Hickey, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

[34] *Id*.

[35] *Id*.

[36] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-368T, BUDGET ISSUES: CONTINUING RESOLUTIONS AND OTHER BUDGET UNCERTAINTIES PRESENT MANAGEMENT CHALLENGES (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-807T, BUDGET ISSUES: BUDGET UNCERTAINTY AND DISRUPTIONS AFFECT TIMING OF AGENCY SPENDING (2017); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-464T, BUDGET ISSUES: EFFECTS OF BUDGET UNCERTAINTY FROM CONTINUING RESOLUTIONS ON AGENCY OPERATIONS (2013); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-879, CONTINUING RESOLUTIONS: UNCERTAINTY LIMITED MANAGEMENT OPTIONS AND INCREASED WORKLOAD IN SELECTED AGENCIES (2009).

[37] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-491, VETERANS BENEFITS ADMINISTRATION: BETTER COLLECTION AND ANALYSIS OF ATTRITION DATA NEEDED TO ENHANCE WORKFORCE PLANNING (2003).

turnover for reasons other than retirement—including, perhaps, reduced competitiveness with the private sector and other agencies and low morale—has also been cited as a concern.[38]

E. Coordination with Other Agencies

Much of the evidence needed to substantiate claims comes from other federal agencies, including VHA, DOD, and NARA. Issues of timeliness at those agencies has had a significant impact on VBA's ability to develop claims and ready them for adjudication.[39] Public health measures implemented in response to the COVID-19 pandemic, for example, limited the number of in-person medical examinations that VA providers could perform and resulted in office closures at NARA, resulting in delays at VBA.[40] Many initiatives have been introduced over the years to streamline processing by these agencies, improve the transfer of information and records between agencies, or find alternative sources of evidence.

F. Structure of the Disability Compensation Program

The structure of the disability compensation program has also impacted the time it takes for VA to adjudicate cases. Perhaps given its haphazard development over the years, or perhaps given the amount of congressional attention it attracts, VA is subject to fairly rigid, statutory-defined requirements governing its structure. As a result, VA officials often must coordinate with Congress and key private-sector stakeholders, especially VSOs, to introduce reforms to improve timeliness. As described in Part IV, Congress has modified the program's structure many times.

By design, VA's adjudication system is intended to be nonadversarial and veteran-friendly. Although some have suggested introducing adversarial features,[41] most stakeholders seem to accept the program's nonadversarial structure. One unique aspect of VA's nonadversarial process is the statutory duty to assist, which requires VA to help veterans develop their claims. The contours of that duty have varied over time and have sometimes featured in debates over proper methods for improving timeliness.[42]

Another aspect of VA's nonadversarial process is its lack of finality. Veterans have considerable flexibility to claim additional disabilities, submit additional evidence, or request help obtaining additional evidence to prove their claims. Paired with the duty to assist, VA may

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[38] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-15, DEPARTMENT OF VETERANS AFFAIRS: IMPROVED SUCCESSION PLANNING WOULD HELP ADDRESS LONG-STANDING WORKFORCE PROBLEMS (2010); CHRISTENSEN ET AL., *supra* note 23, at 145.

[39] *See* U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., DEPARTMENT OF VETERANS AFFAIRS: AUDIT OF VA'S EFFORTS TO PROVIDE TIMELY COMPENSATION AND PENSION MEDICAL EXAMINATIONS (2010); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-98, VETERANS' DISABILITY BENEFITS: VA CAN IMPROVE ITS PROCEDURES FOR OBTAINING MILITARY SERVICE RECORDS (2006); U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-599, NATIONAL PERSONNEL RECORDS CENTER: PLAN NEEDED TO SHOW HOW TIMELINESS GOAL WILL BE ACHIEVED (2001).

[40] *See* Press Release, U.S. Dep't of Veterans Affs., VA Prepares to Get Ahead of Surge in Backlogged Claims (Oct. 13, 2021); MEGHAN M. STUESSY, CONG. RSCH. SERV., IF11950, COVID-19 IMPACT ON ACCESS TO MILITARY SERVICE RECORDS (2021).

[41] *See, e.g.*, Hugh B. McLean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277 (2019).

[42] *See Challenges and Opportunities Facing Disability Claims Processing in 2006*, *supra* note 26, at 79–80; U.S. GEN. ACCOUNTING OFF., GAO-02-412, VETERANS' BENEFITS: VBA'S EFFORTS TO IMPLEMENT THE VETERANS CLAIMS ASSISTANCE ACT NEEDS FURTHER MONITORING (2002); *Battling the Backlog*, *supra* note 31, at 10.

need to expend significant time and staff resources to obtain the evidence and, if necessary, rereview the case.[43] As discussed in Part IV, Congress and VA have implemented certain features to outsource development duties and incentivize submission of fully developed claims.

Additionally, veterans who have been denied can also repeatedly refile, and VA generally must use the same process to adjudicate their refiled claims. A congressionally chartered committee in 1990s found that repeat claims "outnumber[ed] original compensation claims by about three to one" and "dominate[d] the adjudication and appeals system."[44]

Finally, it is worth noting the effect of judicial review, which Congress established for veterans benefits claims in 1988. Exposure to the courts through judicial review, which Congress first made available in 1988, has reshaped VA's adjudication system. At a basic level, VA must dedicate staff resources to defending decisions before the court and processing remands. More fundamentally, exposure to CAVC's formal, judicial process has resulted in the formalization and judicialization of certain agency processes, especially at BVA.[45]

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

This Part examines chronologically how Congress and VA have responded to concerns about timeliness. Recognizing the impact judicial review has had on VA's adjudication system, this Part focuses on efforts since 1988, when the VJRA granted veterans the right to seek judicial review of VA decisions, and does not address earlier efforts undertaken to promote timeliness.

A few high-level trends emerge from this examination. First, VA has considered or introduced an enormous range of measures to promote or improve timely adjudication, including structural, organizational, procedural, personnel, informational, and technological strategies. VA has turned to informational and technological strategies, in particular, to collect and leverage management information about the performance of current and novel processes; automate routine tasks; and develop tools to support more timely case processing. GAO and OIG have repeatedly encouraged VA to collect reliable management information, develop metrics useful for measuring the effectiveness of different interventions to promote timeliness, and adopt best practices for IT modernization.

Second, the most successful interventions have garnered the support of diverse stakeholder groups, especially VSOs and the House and Senate Veterans' Affairs Committees. Numerous initiatives have been developed collaboratively by VA with key stakeholder groups, and many of them rely on partnerships between VA and private-sector groups, especially VSOs.

Third, many of the initiatives described in this case study required additional funding, staff, or other resources to be successful. VA has needed to continually develop and refine how it collects, analyzes, and uses management information to accurately calculate current resource

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[43] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 16 (2012).
[44] MELIDOSIAN ET AL., REPORT OF THE VETERANS' CLAIMS ADJUDICATION COMMISSION 9–11 (1996).
[45] *See generally* James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251 (2010).

levels and predict future resource needs. Effective budget planning and budget advocacy before Congress have always been foundational to achieving timeliness.

Finally, while this case study focuses on measures undertaken by Congress and VA, and studies undertaken at the request of Congress and VA, it bears noting that many others have studied and offered recommendations for promoting timeliness in VA adjudication, including the National Council on Disability, VSOs, practitioners, professional organizations, and scholars.[46]

A. Military Downsizing and Judicial Review (1988–1994)

During the late 1980s and early 1990s, VA was faced simultaneously with an increasing volume of claims due to the ongoing post-Cold War drawdown of active-duty military and increased caseload pressures resulting from the establishment of judicial review. Average processing times increased substantially, particularly at BVA.

Following a series of congressional hearings at which veterans and advocates testified about long wait times at BVA, the Chair and Ranking Member of the House Committee on Veterans' Affairs asked GAO to "evaluate the appeals process, with emphasis on timeliness." GAO examined factors affecting processing time for appeals in ROs and at BVA, finding delays at both levels. Although GAO attributed some delays to factors outside VA's control, such as the time veterans took to respond to information requests, GAO also recommended that VA manage appeals more effectively—particularly across its large, decentralized network of ROs.[47]

An underlying issue GAO identified was the lack of reliable data captured by the automated records management system that VA could use to identify and address systemic issues. GAO attributed the lack of reliable data to the fact that ROs had to dedicate significant staff time to maintaining the system, and RO personnel felt that "recording, updating, and monitoring data for this system [was] time-consuming, burdensome, and without benefits to their office." Consolidating the records management system with the system adjudicators used to process claims was one proposed solution.

GAO recommended that VA improve its data collection practices to detect and address sources of delay and other systemic problems more effectively, better understand differences in processing times between ROs, and identify "innovative or improved practices" that might warrant broader implementation.[48] GAO and VA's Office of Inspector General (OIG) have continued to emphasize the importance of collecting reliable data, not only to effectively measure and promote timeliness but also to understand resource availability, predict resource needs, and ensure efforts to improve timeliness do not adversely affect decisional accuracy.[49]

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[46] *See, e.g.*, NAT'L COUNCIL ON DISABILITY, CLEARING THE BACKLOG AND FACILITATING BENEFITS FOR VETERANS WITH DISABILITIES (2013), *available at* https://ncd.gov/publications/2013/11122013; McLean, *supra* note 41; Daniel L. Nagin, *Goals vs. Deadlines: Notes on the Disability Claims Backlog*, 10 U. MASS. L. REV. 50 (2015).
[47] U.S. GEN. ACCOUNTING OFF., GAO/HRD-90-62, VETERANS' BENEFITS: IMPROVED MANAGEMENT NEEDED TO REDUCE WAITING TIME FOR APPEALS DECISIONS (1990).
[48] *Id.*
[49] *See* U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 16-02103-265, VETERANS BENEFITS ADMINISTRATION: REVIEW OF ACCURACY OF REPORTING PENDING DISABILITY CLAIMS BACKLOG STATISTICS (2018);

Finding considerable variability in RO processing times, GAO also recommended that VA oversee ROs more effectively, by implementing realistic timeliness standards for different steps in the appeals process, disseminating guidance to standardize best practices for case processing, and ensuring that personnel adhered to such guidance. More broadly, GAO attributed concerns about timeliness to a lack of centralized leadership. It noted a lack of coordination between different VA subcomponents. ROs followed stricter criteria for awarding benefits due to hearing loss than BVA, for example, which GAO posited might result in increased appeals to BVA. GAO also noted that a lack of coordination between VBA and VHA resulted in delays in obtaining medical examination reports. GAO recommended that VA "designate a focal point to lead efforts to resolve problems and to obtain cooperation among the VA units involved in the appeals process so that needed changes can be made in a timely manner."[50] In subsequent reports, GAO continued to emphasize the need for centralized leadership within VA to ensure coordination among different components involved in adjudicating claims.[51]

VA undertook several initiatives in the early 1990s to meet its caseload challenges. First, it initiated a major effort to modernize its information technology (IT) infrastructure, focusing on electronic case management and automation of routine tasks. Second, VA encouraged ROs to "identify and implement innovative changes aimed at speeding up claims processing and reducing the growing backlog." Although some ROs undertook "major restructuring initiatives," others were reluctant to do so. Third, VA established a Departmental Task Force to analyze the Act's effect on the claims adjudication process. The Task Force made several recommendations, some requiring legislative change.[52] Fourth, VA conducted a customer satisfaction survey in 1992 to further develop additional short- and term-long term goals and establish priorities for future service improvements.[53]

U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-75, VETERANS' BENEFITS: IMPROVED OPERATIONAL CONTROLS AND MANAGEMENT DATA WOULD ENHANCE VBA'S DISABILITY REEVALUATION PROCESS (2007); U.S. GEN. ACCOUNTING OFF., *supra* note 37; U.S. GEN. ACCOUNTING OFF., GAO-03-1045, VETERANS' BENEFITS: IMPROVEMENTS NEEDED IN THE REPORTING AND USE OF DATA ON THE ACCURACY OF DISABILITY CLAIMS DECISIONS (2003); U.S. GEN. ACCOUNTING OFF., GAO/GGD-99-139, PERFORMANCE PLANS: SELECTED APPROACHES FOR VERIFICATION AND VALIDATION OF AGENCY PERFORMANCE INFORMATION (1999); U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 9R5-B01-005, ACCURACY OF DATA USED TO MEASURE CLAIMS PROCESSING TIMELINESS (1998); U.S. GEN. ACCOUNTING OFF., GAO/T-HEHS-98-125, VETERANS BENEFITS ADMINISTRATION: PROGRESS AND CHALLENGES IN IMPLEMENTING THE RESULTS ACT (1998); U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 8R5-B01-147, AUDIT OF DATA INTEGRITY FOR VETERANS CLAIMS PROCESSING PERFORMANCE MEASURES USED FOR REPORTS REQUIRED BY THE GOVERNMENT PERFORMANCE AND RESULTS ACT (1998); U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 7D2-B01-020, AUDIT OF VBA'S DATA RELIABILITY IN THE CLAIMS PROCESSING WORKLOAD REPORTING SYSTEM (1997); U.S. GEN. ACCOUNTING OFF., GAO/HEHS-95-25, VETERANS' BENEFITS: BETTER ASSESSMENTS NEEDED TO GUIDE CLAIMS PROCESSING IMPROVEMENTS (1995).

[50] U.S. GEN. ACCOUNTING OFF., *supra* note 47; *see also* U.S. GEN. ACCOUNTING OFF., GAO/HEHS-95-190, VETERANS' BENEFITS: EFFECTIVE INTERACTION NEEDED WITHIN VA TO ADDRESS APPEALS BACKLOGS (1995).

[51] *See, e.g.*, U.S. GEN. ACCOUNTING OFF., *supra* note 50; U.S. GEN. ACCOUNTING OFF., T-AIMD/HEHS-95-184, VETERANS BENEFITS MODERNIZATION: FURTHER SERVICE IMPROVEMENT DEPENDS ON COORDINATED APPROACH (1995).

[52] U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., SUMMARY REPORT ON VA CLAIMS PROCESSING ISSUES 13 (1997).

[53] U.S. GEN. ACCOUNTING OFF., GAO/HEHS-94-179, VETERANS' BENEFITS: LACK OF TIMELINESS, POOR COMMUNICATION CAUSE CUSTOMER DISSATISFACTION (1994); U.S. GEN. ACCOUNTING OFF., GAO/HEHS-95-25, VETERANS' BENEFITS: BETTER ASSESSMENTS NEEDED TO GUIDE CLAIMS PROCESSING IMPROVEMENTS 3 (1995); U.S. GEN. ACCOUNTING OFF., *supra* note 51.

Continuing concerns about the timeliness of VA adjudication prompted several congressional hearings in 1993. At the first, held in April, the Deputy Under Secretary for Benefits described several pilots and other efforts to improve timeliness at VBA, including:

- **Streamlining Evidentiary Development.** As the military downsized, many newly separated servicemembers filed claims for benefits. To streamline evidentiary development for such claims, the Army "agreed to test the transfer of veterans' service medical records directly to VA from the military installations where soldiers [were] separated." VA established a centralized records center to receive records "immediately upon a service member's discharge from active duty."

- **Adopting a Timeliness Standard for Medical Examinations.** VA adopted a standard requiring VA providers to complete medical examinations within 35 days.

- **Automating Routine Tasks.** A study found that about 30 percent of VBA's time was spent "moving records from one work station to the next." To streamline the transfer of information and records, VA developed an automated system for exchanging medical information between ROs and VA hospitals and tested an automated system to track the movement of records through ROs. VBA also began developing a new automated system for generating notices, correspondence, and other documents.

- **Streamlining Document Drafting.** In addition to the new automated document generation system, VBA conducted a limited test of the use of voice-to-text software by adjudicators to draft decisions and other documents.

- **Providing Information to Adjudicators.** VBA improved its training program for new hires and expanded it to include more experienced adjudicators, developed training resources centrally, and began testing systems to make VA regulations and manuals more accessible to adjudicators.

- **Piloting Redesigned Case Management Processes.** At least eight ROs participated in pilot programs to test alternative processes for managing and processing cases. One RO participated in a White House program to "redesign the claims process through a self-directed work team. Under this concept, a trained group shared responsibility for adjudicating claims. Another RO appointed technicians to help manage adjudicators' workflow. A third RO combined adjudication and customer service functions previously performed by different RO divisions.

- **Engaging With Adjudicators.** Adjudication officers, who managed ROs' adjudication divisions, convened advisory committees to consider and make recommendations to improve adjudication division operations. VA also held several conferences for adjudication officers for the purpose of discussing ways to expand capacity and streamline processes.

Other measures VA considered included consolidating ROs, communicating more frequently with claimants by telephone rather than by mail, and improving the quality of RO decisions to reduce subsequent remands.[54]

At the next hearing, held in May 1993, the BVA Chairman described efforts undertaken to improve timeliness on appeal. They included, in addition to hiring additional support staff:

- **Establishing a Team to Handle Judicial Review.** BVA established a special team to "process appeals to and remands from [CAVC], interpret and disseminate [CAVC] decisions for BVA use, and assist the Office of the General Counsel with litigation."

- **Implementing Single-Judge Hearings.** Before 1992, cases were heard and decided by three-member panels. Claiming statutory authority to do so, the Chairman decided most appeals would instead be heard and decided by a single VLJ.

- **Consolidating BVA Operations.** BVA consolidated all VLJs and most support staff in a single office location, to "help restore the proper collegial communication required to insure high decisional quality and consistency, as well as increase the efficiency and economy of the Board's internal operations."

- **Improving Technology Use.** BVA acquired computer workstations for all VLJs and support staff and explored opportunities to "integrate appropriate technologies into its automation structure," such as voice-to-text software for drafting decisions and an online archive of previously issued decisions.

- **Establishing a "Trailing Docket."** BVA implemented a more flexible method for scheduling travel hearings, permitting "more effective use of Board member time."

- **Establishing a Comprehensive Training Program.** BVA supplemented the "on-the-job" training traditionally provided to new staff attorneys with a "formal and comprehensive training program" of medical lectures, an RO visit, and coordination with BVA's training program.

- **Notifying Appellants When Claims Were Docketed.** To reduce the number of status inquiries received from veterans, their representatives, and congressional staff, BVA instituted a process to notify veterans immediately when their claims were docketed.

The Chairman emphasized, however, that "without a substantial commitment of additional resources, a change in the decisional process, or significant compromise in decisional quality, BVA productivity and response time will not return to past levels in the immediate future." The only viable alternative was legislative action, the Chairman suggested. He recommended that

[54] *Adjudication of Claims and Appeals*, *supra* note 25, at 37–43.

Congress eliminate the statutory provision limiting the number of VLJs to 65 (plus the Chairman and Vice Chairman) and clarify that cases could be heard and decided by a single VLJ.[55]

Several other initiatives from this period are worth noting. First, VBA recruited additional rating specialists (the precursor to RSVRS). Second, the agency authorized overtime for claims processing, focusing on aged cases. (Congress later earmarked $10 million for this purpose.) Third, VBA piloted a program under which a single specialist could decide most routine ratings. Previously, most such decisions had been made by a three-member "rating board." (One rating specialist prepared the decisions, which two other rating specialists reviewed and co-signed.) Finding no loss of quality, VBA authorized RO adjudication officers to authorize qualified rating specialists to decide noncomplex cases individually. Fourth, the agency hired support staff to assist with initial claims review and evidentiary developing, freeing up rating specialists to adjudicate claims and focus on more complex issues. Fifth, VBA provided rating specialists with word processing software containing a large database of standardized language. And sixth, the agency assigned ROs with available resources to assist ROs with critical ratings backlogs through "help teams" or case transfers.[56]

Despite VA's efforts, timeliness remained a "critical concern" among stakeholders. While the agency adopted timeliness standards for improved case processing, for example, GAO found that those standards did not "always meet customer expectations for reasonable processing time." GAO recommended that VA "set long-term goals to meet customer expectations for processing times," "prepare a plan describing the incremental steps necessary to meet them," and "provide applicants realistic estimates about how long it will take to complete their claims."[57]

B. Blue Ribbon Panel on Claims Processing (1993)

In June 1993, the Deputy Under Secretary for Benefits established the Blue Ribbon Panel on Claims Processing to "develop recommendations to shorten the time it takes to make decisions on disability claims and reduce the backlog of claims which has reached critical levels at many VBA regional offices." The Panel consisted of 28 representatives from VBA, BVA, VA's Office of General Counsel, and VSOs. Using Total Quality Management principles, the Panel members met three times between July and October and submitted its final report to the Secretary in November and the Senate and House Veterans' Affairs Committees a month later.[58]

At the first meeting, the Panel considered "the parts of the process that are causing the most significant timeliness problems" and decided to target three problems for improvement:

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[55] *Adjudication of Appeals by the Board of Veterans' Appeals: Hearing Before the Subcomm. on Compensation, Pension & Insurance of the H. Comm. on Veterans' Affs.*, 103d Cong. 32–35 (1993) (statement of Charles L. Cragin, Chairman, Bd. of Veterans Appeals, U.S. Dep't of Veterans Affs.).

[56] *Claims Processing at the Veterans Benefits Administration, Update on Processing of Persian Gulf War Claims, and Effect of Public Law 103-446, the Veterans' Benefits Improvements Act of 1994: Hearing Before the Subcomm. on Compensation, Pension & Mem. Affs. Of the H. Comm. on Veterans' Affs.*, 104th Cong. 72 (1995) (statement of R. J. Vogel, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

[57] U.S. GEN. ACCOUNTING OFF., GAO/HEHS-94-179, VETERANS' BENEFITS: LACK OF TIMELINESS, POOR COMMUNICATION CAUSE CUSTOMER DISSATISFACTION (1994).

[58] U.S. DEP'T OF VETERANS AFFS, BLUE RIBBON PANEL ON CLAIMS PROCESSING: PROPOSALS TO IMPROVE DISABILITY CLAIMS PROCESSING IN THE VETERANS BENEFITS ADMINISTRATION 3–4 (1993).

(1) Development of initial and reopened disability compensation claims is inadequate.

(2) Response time for requested evidence from all sources is excessive.

(3) The length of time cases remain in the rating boards is unacceptable.

The Panel divided into three teams, each assigned to analyze the root causes of one problem. The teams presented their analyses at the second meeting, and the Panel discussed and reached consensus on the root causes for each problem. Each team then analyzed potential solutions and presented them at the third meeting. The Panel reached consensus on the solutions for each problem at the third and final meeting.[59]

In its final report, the Panel recommended 42 organizational, procedural, technological, informational, educational, and other interventions. Among the Panel's recommendations: move from an assembly-line model—in which each claim was transferred through a succession of employees, each assigned to perform a discrete task—to a model in which a small, self-directed team was responsible for handling all aspects of the claim.[60] As noted above, at least one RO was already prototyping this model.[61] Based on this recommendation, VA developed several model claims processing structures, disseminated them to ROs in November 1994, and required ROs to submit a plan for implementing one of them by January 1995.[62]

Among the Panel's other recommendations: (1) centralize training programs, reducing the "significant" time more experienced employees spent training new employees; (2) accelerate automated data processing initiatives; (3) improve the quality and timeliness of medical examinations; (4) improve data- and record-sharing practices with other agencies; (5) standardize and simplify notice language to provide clearer instructions to veterans about information needed to process their claims; and (6) convene a working group of public- and private-sector representatives to conduct an "extensive and intensive review of all VA adjudication regulations, policies, and procedures."[63]

VA encouraged, but did not require, ROs to adopt several of the Panel's recommendations. GAO recommended that the agency develop a plan to require ROs to evaluate their major improvement initiatives and disseminate guidance for doing so, evaluate ROs' experiences, and disseminate information about other ROs' experiences and lessons learned in

[59] *Id*.
[60] *Id.* at 9–10.
[61] *See also* U.S. GEN. ACCOUNTING OFF., GAO/HEHS-94-183BR, VETERANS' BENEFITS: STATUS OF CLAIMS PROCESSING INITIATIVE IN VA'S NEW YORK REGIONAL OFFICE (1994).
[62] U.S. GEN. ACCOUNTING OFF., GAO/HEHS-95-25, VETERANS' BENEFITS: BETTER ASSESSMENTS NEEDED TO GUIDE CLAIMS PROCESSING IMPROVEMENTS 3 (1995).
[63] U.S. DEP'T OF VETERANS AFFS., *supra* note 58, at 5–7.

implementing such initiatives.[64] In later reports, GAO continued to urge VA to evaluate the performance of different ROs, identify best practices, and share them broadly.[65]

C. Select Panel on Productivity Improvement (1994)

At the BVA Chairman's suggestion, the Secretary established a similar body in March 1994 to "conduct a systemic review of [BVA] and to make recommendations regarding the mission, structure, and operations of the Board which will result in a more timely processing of appeals for claimants." The Select Panel on Productivity Improvement was made up of current and former VA officials and representatives from VSOs and SSA.

The Panel presented 12 recommendations to the Secretary in June 1994, all of which were approved. It affirmed the Blue Ribbon Panel's recommendations, emphasizing that VBA should prioritize improving the development of evidence by ROs to reduce remands from the BVA and expedite action on cases remanded to the ROs by BVA for additional development. The Panel also recommended that VA develop a timeliness measure to "address the claimants' real concern—the total time from the filing of a claim to the receipt of a final VA decision."[66]

The Panel also recommended regulatory and legislative changes that would permit BVA to prescreen appeals out of strict first-in-first-out (FIFO) order to identify and address problems early in the appeals process, use telephone and video hearings, and develop the record when additional evidence was needed instead of remanding to the RO.[67] As discussed in the next section, Congress ratified many of these recommendations a few months later.

D. BVA Administrative Procedures Improvement Act and Veterans' Benefits Improvement Act (1994)

Legislatively, 1994 was an important year for VA's adjudication system. In July, Congress passed the BVA Administrative Procedures Improvement Act. Drawing on proposals from VA, the statute eliminated the statutory cap on the number of VLJs, authorized the Chairman to designate VA employees to serve for up to 90 days as acting Board members, clarified that cases could be assigned to individual VLJs or panels of not less than three members, authorized BVA to decide cases out of FIFO order in cases of severe financial hardship or illness, and permitted BVA to conduct hearings by telephone or video with the appellant's consent.[68]

In November 1994, President Clinton signed the Veterans' Benefits Improvement Act into law. The statute made several important changes to VA's adjudication system, such as:

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[64] U.S. GEN. ACCOUNTING OFF., GAO/HEHS-95-25, VETERANS' BENEFITS: BETTER ASSESSMENTS NEEDED TO GUIDE CLAIMS PROCESSING IMPROVEMENTS 3 (1995).
[65] *See, e.g.*, U.S. GEN. ACCOUNTING OFF., GAO/HEHS-00-65, VETERANS' BENEFITS: PROMISING CLAIMS-PROCESSING PRACTICES NEED TO BE EVALUATED (2000).
[66] U.S. DEP'T OF VETERANS AFFS., BD. OF VETERANS APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1994 7–10 (1994).
[67] *Id.*
[68] Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, Pub. L. No. 103-271, 108 Stat. 740 (1994).

- **Reforming BVA.** The Act established the processes for appointing and removing VLJs and evaluating their performance described in Part I.

- **Permitting VA to Accept Private Physician Examinations.** The Act permitted VA to accept a medical examination report prepared by a private physician instead of a VA provider so long as the report was "sufficiently complete."

- **Working Cases Out of FIFO Order.** The Act directed BVA and ROs to expedite processing of claims remanded by CAVC and BVA, respectively. It also clarified that BVA could screen cases for purposes of "determining the adequacy of the record for decisional purposes" or "the development, or attempted development, of a record found to be inadequate for decisional purposes."[69]

The Act also required several studies to be conducted. First, it directed the Secretary to prepare a report "addressing the feasibility and impact of a reorganization of the adjudication divisions located within the [ROs] of the [VBA] to a number of such divisions that would result in improved efficiency in the processing of claims." More significantly, the Act established the Veterans' Claims Adjudication Commission described in the next section.[70]

E. Veterans' Claims Adjudication Commission (1994–1996)

The Veterans' Claims Adjudication Commission consisted of nine members appointed by the Secretary: one former VA official, one current VA official, two private-sector experts in the "adjudication of claims relating to insurance or similar benefits," two federal officials with expertise in non-VA benefits adjudication, two members recommended by VSOs, and one expert in administrative law recommended by the American Bar Association (ABA) or a similar private organization. Congress charged the Commission with conducting a comprehensive study of VA's adjudication system to determine its current efficiency and means to increase its efficiency, reduce the number of pending claims, and enhance VA's ability to decide claims in a "prompt and appropriate manner."[71]

The Commission's final report, issued after a series of public meetings and submitted to Congress in December 1996, identified four major concerns and made several recommendations:

- **"VA Disability Compensation Claims Do Not End."** Veterans whose claims are denied can repeatedly refile, and VA generally must use the same process to adjudicate their refiled claims. Finding that repeat claims "outnumber[ed] original compensation claims by about three to one" and "dominate[d] the adjudication and appeals system," the Commission concluded: "Congress has put VA in charge of a claims adjudication system that the Commission believes lacks real finality and as a consequence processes mostly repeat claims." One solution the Commission recommended was offering a one-time lump sum payment, instead of monthly benefits, to veterans with lower-rated disabilities.

[69] Pub. L. No. 103-446, §§ 201–203, 301–304, 108 Stat. 2645, 4655–59 (1994).
[70] Pub. L. No. 103-446, §§ 401–407, 301–304, 108 Stat. 2645, 4659–63 (1994).
[71] *Id.*

- **"The System of Claims Processing."** The Commission found that the system had become "cumbersome and outmoded." It acknowledged that VBA and BVA had made "some noteworthy attempts to rectify their problems" but concluded that "the problems of the adjudicative and appeals processes cannot be solved by fine tuning." The Commission made four recommendations for action by Congress and the Secretary: (1) expand the role of RO employees who conducted hearings as the first step in the appeals process (i.e., the DRO process described in Part I); (2) provide "greater policy direction" on matters such as burdens of proof and the duty to assist; (3) improve the "partnership" among VA, veterans, and VSOs; and (4) replace guidance and manuals with regulations that reflect the Secretary's interpretation of the law and "incorporat[e] and formaliz[e] VA's adjudication experience."

- **"The System for Administrative Appeals Processing."** The Commission endorsed restructuring BVA as a truly appellate body, without de novo review authority and responsible primarily for ensuring that the "prior decision is legally sufficient and can stand as the Secretary's final decision."

- **"Strategic Management."** The Commission recommended that VA expand and continuously develop its data collection to inform "discussions and decisions about the claims processing system" and "improved strategic management within VA," and to "predict workloads and plan resource requirements."[72]

The Commission's report describes many other more specific findings and recommendations—too many to describe in detail here. To respond to the report, VA's Deputy Secretary convened a Strategic Management Group made up of "senior executives and programmatic experts" from across the agency. The Group agreed with some of the Commission's recommendations, such as the proposal to promulgate comprehensive regulations, but disagreed with several others, such as the proposal that BVA's de novo review authority be eliminated.[73]

F. National Academy of Public Administration (1995–1997)

Pursuant to a 1995 request by the Senate Appropriations Committee, VBA contracted with the National Academy of Public Administration (NAPA) to "conduct a comprehensive assessment of [VBA] with particular emphasis on specific steps necessary to make claims processing more efficient and less time consuming." The NAPA report—prepared by a panel of experts, most of them former government officials, and released in August 1997—agreed with many of the Commission's recommendations and offered additional recommendations to, among other things, improve leadership and strategic management at VA, reengineer agency business processes based on "a more complete and detailed analysis of new workloads coming into the organization and their effects on appellate workloads," modernize IT, restructure ROs, establish performance measures and standards, develop a comprehensive reform plan for implementing these changes, and keep Congress apprised of its progress on implementing the plan. In offering these recommendations, NAPA recommended that VA treat the RO and BVA processes as "one

[72] MELIDOSIAN ET AL, *supra* note 44.
[73] *Hearing to Accept the Report of the Veterans' Claims Adjudication Commission: Hearing Before the H. Comm. on Veterans' Affs.*, 105th Cong. 43–47 (1997) (statement of Hershel Gober, Deputy Sec'y, U.S. Dep't of Veterans Affs.).

process with two highly interrelated components" and ensure that the Under Secretary for Benefits and Chairman "cooperatively develop the joint activities necessary to manage the process from the perspective of its customer—the veteran."[74]

G. Office of Inspector General (1997)

OIG undertook a comprehensive analysis of studies conducted in recent studies by "more than a half dozen separate groups," including those described in the previous sections. Its report, released in December, identified "over 200 recommendations, suggestions, and discussion points" for improving timeliness and decisional quality and categorizing them into 84 groups. Based on this analysis and its own assessment of the claims adjudication process, OIG identified three goals for VA to prioritize: (1) developing a "corporate database" to fully assess the effects of improvement initiatives, (2) reconciling concurrent efforts to reengineer VBA's business processes and restructure VBA's field operations, and (3) simplifying VBA's pension program to redirect scarce resources to the disability compensation program.

Other recommendations included: (1) improving the timeliness of medical examinations, which OIG found "offer[ed] the single most important opportunity for improving the overall timeliness of claims processing"; (2) eliminating the traditional assembly-line method for processing claims and "[c]onsolidating authority and responsibility so that a single individual is accountable for the timely and complete adjudication of any particular . . . claim"; (3) expanding the role of RO employees who conducted hearings as the first step in the appeals process; and (4) keeping veterans better informed about the status of their claims.[75]

H. Roadmap to Excellence (1998)

Facing continuing concerns about its performance, VBA held stakeholder meetings and formulated a new plan, *Roadmap to Excellence: Planning the Journey* in May 1998. Under this framework, the agency expanded electronic case management and automation and took additional steps to improve its performance.

A major aspect of the *Roadmap* was the "balanced scorecard" used to measure the performance of VBA organizational units. Under this system, units were scored on the basis of five factors: "claims-adjudication accuracy, timeliness, unit cost, customer satisfaction, and employee satisfaction and development." It was expected this approach would "drive organizational change; provide feedback to employees on measures they can influence; and link performance appraisal and reward systems to performance measures, thereby providing incentives to managers to work as teams in meeting performance measures." VBA also took steps to coordinate with VHA to improve the quality of medical examinations (inadequate

[74] NAT'L ACAD. OF PUB. ADMIN., MANAGEMENT OF COMPENSATION AND PENSION BENEFITS CLAIMS PROCESSES FOR VETERANS xxiv–xxvii (1997).
[75] U.S. DEP'T OF VETERANS AFFS., *supra* note 52, at 6–10.

medical examinations were a major reasons for remands from BVA), consolidate VBA field operations, improve training for adjudicators, and collect more reliable data.[76]

Several other initiatives are worth noting. First, recognizing that the speed and quality of medical examinations performed by VA providers contributed to case processing delays, Congress authorized VBA to conduct a pilot program under which contract physicians were also permitted to perform medical examinations.[77] Second, VA began piloting the DRO review process, described in Part I, in several ROs. VA issued a final rule in 2001 making the program permanent and expanding it nationwide.[78]

I. VA Claims Processing Task Force (2001)

The Veterans Claims Assistance Act became law in November 2000, clarifying by statute the nature of VA's duty to assist claimants in obtaining evidence necessary to substantiate their claims.[79] VA attributed increasing wait times to implementation and judicial interpretation of the Act. To face these challenges, Secretary Anthony Principi convened the VA Claims Processing Task Force and asked it to recommend strategies to address the growing backlog.[80]

The Task Force's report was delivered to the Secretary in October 2001 and Congress a month later. Drawing on previous studies and information gathered through four public meetings, information received from private-sector organizations, and site visits, the Task Force made 20 short-term and 14 medium-term recommendations for action. Recommendations included:

- **Prioritizing High-Priority Cases.** The Task Force recommended that the Secretary create one or more "tiger teams," made up of more experienced staff, to expedite claims with certain characteristics, including those pending for more than a year and cases where the veteran is older or terminally ill.

- **Reducing Timeframes for Evidentiary Development.** The Task Force recommended that VBA reduce the time provided for claimants to submit evidence from 60 to 30 days.

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[76] U.S. GEN. ACCOUNTING OFF., GAO/T-HEHS-99-77, VETERANS BENEFITS ADMINISTRATION: PROGRESS ENCOURAGING, BUT CHALLENGES STILL REMAIN 4–7 (1999); *see also* U.S. GEN. ACCOUNTING OFF., GAO/T-HEHS/AIMD-00-146, VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING (2000); *Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee: Hearing Before the Sen. Comm. on Veterans' Affs.,* 106th Cong. 48–84 (2000) (statement of Joseph Thompson, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).

[77] Pub. L. No. 104-275, § 504, 110 Stat. 3322, 3342 (1996).

[78] 66 Fed. Reg. 21,871 (May 2, 2001); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-812, VETERANS DISABILITY BENEFITS: CLEARER INFORMATION FOR VETERANS AND ADDITIONAL PERFORMANCE MEASURES COULD IMPROVE APPEAL PROCESS (2011).

[79] Pub. L. No. 106-475, 114 Stat. 2096 (2000).

[80] Principi had previously served as a member of the panel that produced the 1997 NAPA report and chaired the Commission on Servicemembers and Veterans Transition Assistance established by Congress in 1996. The Task Force was chaired by Daniel Cooper, whom Principi appointed Under Secretary for Benefits in April 2002.

- **Delaying Implementation of IT Initiatives.** The Task Force recommended that VBA delay implementation of IT initiatives until the claims workload was reduced to a manageable level.

- **Requiring BVA to Conduct Evidentiary Development.** The Task Force recommended that instead of routinely remanding cases to ROs for additional evidentiary development by ROs, BVA generally should develop evidence as needed.

- **Restructuring ROs.** Drawing on the experience of a high-performing RO, the Task Force recommended that VBA reorganize RO staff into specialized claims processing teams charged with performing discrete tasks such as record development, rating, appeals, and public contact. A triage team would prioritize new claims and direct them to the appropriate team for action.

- **Establishing Specialized ROs.** The Task Force recommended that cases involving complex, nonroutine issues be referred to specialized ROs for adjudication, reducing the time that generalist ROs spent researching and processing such issues.

- **Allocating Resources to High-Performing ROs.** The Task Force recommended that VBA "[p]referentially allocate new staffing resources to high-performance and high-quality [ROs]."

- **Managing Improvement Initiatives.** Timeliness was negatively affected by the fact that many different offices and managers were implementing many different initiatives simultaneously. The Task Force recommended that VBA implement formal processes to improve communication and coordination between offices and managers.

- **Refining Timeliness Measures Through Step-by-Step Time Goals.** The Task Force recommended that VBA develop measures that better reflect "the timeliness of processing steps that are within VBA's direct control."

- **Promoting Accountability for Managers.** The Task Force recommended that VBA hold managers to "individualized, measurable, and meaningful performance standards" and reward high-performing officials.

- **Utilizing VSOs More Effectively.** The Task Force recommended that VBA partner with VSOs to train VSO representatives on the claims development process, empower them to assist in developing evidence, and give them access to VA systems.

- **Improving the Medical Examination Process.** The Task Force recommended that VBA coordinate more effectively with VHA to improve the accuracy and timeliness of medical examinations by VA providers.

- **Improving NPRC Responsiveness.** The Task Force recommended that VBA coordinate with NARA to increase the speed at which NPRC provided veterans' service information to VBA.

- **Reorganizing VBA.** The Task Force recommended that VA reorganize VBA to improve communication between ROs and Central Office and improve Central Office oversight of ROs.

- **Centralizing Training.** The Task Force recommended that VA centralize employee development and training programs.

- **Outsourcing Claims Development.** To address a growing backlog of cases requiring claims development, the Task Force recommended that VBA contract with private vendors to conduct evidentiary development.

- **Establishing Call Centers.** To reduce demands on personnel involved in developing and deciding claims, the Task Force recommended that VBA establish call centers to handle status inquiries and other routine calls from veterans.[81]

VA implemented many of these interventions, including: (1) reorganizing RO staff into specialized claims processing teams charged with performing discrete tasks such as triage, record development, rating, appeals, award processing, and public contact (called the Claims Processing Improvement (CPI) model); (2) entering into an agreement with NARA to expedite record transfers to VBA; (3) creating a specialized tiger team, headquartered at the Cleveland RO, to focus on aged cases and claims filed by veterans over age 70; (4) amending VA regulations to permit BVA to develop evidence; (5) aligning managers' performance requirements with organizational goals; centralizing training for RO staff; (6) training VSO representatives on claim development and granting trained representatives increased access to VA electronic case management systems; and (7) coordinating with VHA to improve the timeliness and quality of medical examinations by VA providers.[82]

Building on the Task Force's recommendation to implement performance measures, VA convened teams to design national performance standards for claims examiners. The standards were intended to align individual expectations with organizational goals and thus focused on goals such as quality, productivity, and customer service. The standards were implemented following testing and agreement with the American Federation of Government Employees.[83]

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[81] VA CLAIMS PROCESSING TASK FORCE REPORT TO THE SECRETARY OF VETERANS AFFAIRS (2001), *in Hearing to Receive the Report of the VA Claims Processing Task Force (Cooper Report): Hearing Before the H. Comm. on Veterans' Affs.*, 107th Cong. (2001).

[82] *Challenges and Opportunities Facing Disability Claims Processing in 2006*, *supra* note 26, at 74–84; *The Status of the Department of Veterans Affairs' Implementation of the VA Claims Processing Task Force's Recommendations, and Exploring the Potential for a Greater VA/Veterans' Service Organization Partnership: Hearing Before the Subcomm. on Benefits of the H. Comm. on Veterans' Affs.*, 107th Cong. 63–68 (2002) (statement Daniel L. Cooper, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.); Press Release, U.S. Dep't of Veterans Affs., VA Reports Progress in Battling Claims Backlog (Nov. 26, 2002); *see also* U.S. GEN. ACCOUNTING OFF., GAO-03-282, VETERANS' BENEFITS: CLAIMS PROCESSING TIMELINESS PERFORMANCE MEASURES COULD BE IMPROVED (2002); INST. ON MEDICINE, *supra* note 25, at 140–46.

[83] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-561, VETERANS' BENEFITS: INCREASED FOCUS ON EVALUATION AND ACCOUNTABILITY WOULD ENHANCE TRAINING AND PERFORMANCE MANAGEMENT FOR CLAIMS PROCESSORS 22–30 (2008); *Oversight Hearing on the Training Provided to VBA Claims Adjudicators and the Standards Used to Measure Their Proficiency and Performance: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs.*

Additional interventions around this time include establishing resource centers at nine ROs staffed with claims examiners to supplement capacity at other offices and consolidating specific workloads—for example, non-rating work and claims filed by servicemembers prior to being discharged—at specific ROs to free up staff resources elsewhere. VBA also consolidated processing of BVA remands at a centralized Appeals Management Center (AMC) after CAVC held that BVA generally could not consider evidence it developed.[84]

At BVA, efforts included (1) coordinating with VBA (particularly AMC) to identify and address common processing errors and reduce "avoidable" remands; (2) directing VLJs to use "shorter and more concise decisions"; (3) implementing incentive and other programs to "increase employee motivation and satisfaction"; (4) authorizing overtime; (5) "aggressively" recruiting and training additional support staff; and (5) increasing the use of paralegals for "non-decisional support activities."[85]

J. Veterans' Disability Benefits Commission (2003–2007)

Responding to continuing concerns about the disability compensation program, Congress in 2003 established the Veterans' Disability Benefits Commission. The Commission consisted of five members appointed by the President and two members appointed by each of the following: the Speaker of the House, the House minority leader, the Senate majority leader, and the Senate minority leader. At least three of the presidential appointees and at least one member appointed by each of the congressional officials were required to be veterans awarded the Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, or Silver Star.[86]

The Commission was charged with studying and making recommendations regarding the "appropriateness" of available disability benefits, the level of such benefits, and the standards for determining whether a disability should be compensated. As part of its study, the Commission obtained reports from the Institute of Medicine of the National Academies and the Center for Naval Analyses (CNA). It also held a series of public hearings, conducted surveys, and made site visits.[87]

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of the H. Comm. on Veterans' Affs., 109th Cong. 29–30 (2006) (statement of Michael Walcoff, Assoc. Deputy Under Sec'y for Field Operations, Veterans Benefits Admin., U.S. Dep't of Veterans Affairs).

[84] U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-512T, VETERANS' DISABILITY BENEFITS: LONG-STANDING CLAIMS PROCESSING CHALLENGES PERSIST (2007); U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-149, VETERANS' BENEFITS: FURTHER CHANGES IN VBA'S FIELD OFFICE STRUCTURE COULD HELP IMPROVE DISABILITY CLAIMS PROCESSING (2005); *The Board of Veterans' Appeals and Appeals Management Center: Hearing Before the H. Comm. on Veterans' Affs.*, 109th Cong. 33–38 (statement Michael Walcoff, Assoc. Deputy Under Sec'y for Field Operations, Veterans Benefits Admin., U.S. Dep't of Veterans Affs.).

[85] *Battling the Backlog*, *supra* note 31, at 8–14; *see also Board of Veterans' Appeals and Appeals Management Center*, *supra* note 84, at 29–32, 57–58 (statement of Ron Garvin, Acting Chairman, Bd. of Veterans' Appeals, U.S. Dep't of Veterans Affs.); *Challenges and Opportunities Facing Disability Claims Processing in 2006*, *supra* note 26, at 86–90 (statement of James P. Terry, Chairman, Bd. of Veterans' Appeals, U.S. Dep't of Veterans Affs.); *VA Claims Adjudication and Appeals Process: Hearing Before the Sen. Comm. on Veterans' Affs.*, 110th Cong. 58–60 (2007) (statement of James P. Terry, Chairman, Bd. of Veterans Appeals, U.S. Dep't of Veterans Affs.).

[86] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 1501–1507, 117 Stat. 1392, 1676–79 (2003).

[87] VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 392–93 (2007).

Although not focused on timeliness alone, the Commission's October 2007 report made several recommendations directed toward improving timeliness, such as:

- **Expediting Claims with Complete Records.** The Commission recommended that VA establish a "simplified and expedited process for well-documented claims." It also recommended that VA permit veterans to "state that the claim is complete and waive the time period (60 days) allowed for further development."

- **Streamlining Evidentiary Development.** The Commission recommended that VA improve its policies, procedures, technologies, and communications associated with the process for assisting veterans to develop evidence to ensure they are "efficient and effective from the perspective of the veteran."

- **Reducing Appeals.** The Commission recommended that VA focus on reducing appeals by prioritizing the quality of initial decisions. The Commission emphasized the need for VA to adequately train RO staff and review their quality, as well the need for Congress to provide sufficient resources for VA to hire and train RO staff.

The Commission also recommended that Congress "mandate and provide the appropriate resources to reduce the VA claims backlog by 50 percent within the next 2 years."[88]

K. Technology Modernization and Business Process Engineering (2007–2008)

In September 2007, VBA contracted with IBM Global Business Services to analyze and recommend improvements to its existing business processes. Most of IBM's recommendations focused on IT improvements, including moving from a paper-based to a fully electronic process. VA embarked on its comprehensive Paperless Delivery of Veterans Benefits Initiative. As part of this initiative, VA began developing and piloting the Veterans Online Application, planning for a secure web portal where veterans and representatives could independently transact with VA and access information about their claims, developing an electronic folder for claim development and processing, working with VHA and DOD to improve the transfer of veterans' records, and integrating multiple IT systems used as part of case processing.[89]

The agency also developed "strategic partnerships" with MITRE Corp. and Booz Allen Hamilton. By mid-2009, MITRE was "actively providing strategic program management support, as well as support for the overall Paperless Initiative, addressing multiple areas of focus." The agency engaged Booz Allen Hamilton to assist in "business process re-engineering,

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[88] *Id*.

[89] *See Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs. of the H. Comm. on Veterans' Affs.*, 111th Cong. 70–71 (2009) (statement of Michael Walcoff, Deputy Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.); *Examining the Backlog and the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs. of the H. Comm. on Veterans' Affs.*, 110th Cong. 110 (2008) (statement of Michael Walcoff, Deputy Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.); *see also* Emily Woodward Deutsch & Terrence T. Griffin, *Parsing the Paperless Push: A Study of the Latest Efforts to Automate the Veterans' Claims Process*, 2 VETERANS L. REV. 117 (2010).

organizational change management, workforce planning and organizational learning strategies to ensure that VBA is well-positioned to take best advantage of the learning solutions being developed."[90] In its final report, Booz Allen Hamilton identified several potential strategies for improving claims processing and recommended that VBA pilot them to "test, validate, and refine as necessary."[91]

Related to these initiatives, VBA established a Business Transformation Lab at the Providence RO to "serve as the focal point for convergence of process re-engineering and technology, assuring that service delivery is optimized and best practices are developed and deployed throughout VBA."[92]

Several other initiatives are worth noting. First, with supplemental funding received from Congress, VBA embarked an "ambitious plan to increase its claims processing workforce by about 30 percent."[93] Second, VA began partnering with state agencies to augment its claims development capacity. As an initial pilot, the Waco RO entered into an intergovernmental agreement with the Texas Veterans Commission (TVC) under which TVC employees assisted with claims development by obtaining evidence from veterans, third-party sources, and electronic sources.[94] Third, VBA established several development centers to assist ROs with claims development as needed.[95]

L. Veterans' Benefits Improvement Act (2008)

In October 2008, Congress passed the Veterans' Benefits Improvement Act, which in addition to extending the pilot program under which contract providers could perform medical examinations, included several measures, described below, to "modernize" VA's disability compensation system. The Act also included several measures to promote decisional quality, including requirements that VA obtain an independent assessment of its quality assurance program and properly certify and train VSRs.[96]

First, the Secretary was directed to implement a one-year pilot program at ten ROs to "assess the feasibility and advisability of providing expeditious treatment of fully developed compensation or pension claims to ensure that such claims are adjudicated not later than 90 days after the date on which such claim is submitted as fully developed." Fully developed claims (FDCs) were defined as those in which the veteran and representative certified in writing that no

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[90] *Addressing the Backlog*, *supra* note 89, at 71.
[91] BOOZ ALLEN HAMILTON, VETERANS BENEFITS ADMINISTRATION COMPENSATION AND PENSION CLAIMS DEVELOPMENT CYCLE STUDY—FINAL REPORT (2009).
[92] *Addressing the Backlog*, *supra* note 89, at 71.
[93] U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 08-01559-193, AUDIT OF THE VETERANS BENEFITS ADMINISTRATION'S SPECIAL HIRING INITIATIVE i (2008).
[94] *Breaking Through the Backlog: Evaluating the Effectiveness of the New State Strike Force Team: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs of the H. Comm. on Veterans' Affs.*, 112th Cong. (2012); *Hearing on Review of Veterans' Disability Compensation: Undue Delay in Claims Processing: Hearing Before the Sen. Comm. on Veterans' Affs.*, 110th Cong. 8 (2008) (statement of Patrick W. Dunne, Acting Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).
[95] *Hearing on Review of Veterans' Disability Compensation*, *supra* note 94.
[96] Veterans' Benefits Improvement Act of 2008, Pub. L No. 110-389, 122 Stat. 4145 (2008).

additional development was necessary.[97] As required by the Act, VA contracted with a consultant to study the pilot program and make recommendations on the feasibility and advisability of continuing or expanding it with or without modifications.[98]

The FDC concept continued to develop over the next several years. To incentivize FDC, for example, Congress passed a law in 2012 temporarily authorizing VA to award up to a year of retroactive benefits to veterans who submitted FDCs.[99] The pilot also yielded a partnership with VSOs, including Disabled American Veterans and the American Legion, called the FDC Community of Practice.[100]

Second, the Secretary was directed to implement a temporary program at four ROs to "assess the feasibility and advisability of providing [veterans and their representatives] a checklist that includes information or evidence required to be submitted by the claimant to substantiate the claim."[101] As required by the Act, VA procured reports describing its findings regarding the pilot program and recommendations on the feasibility and advisability of continuing or expanding it with or without modifications.[102]

Third, the Act required VA to study the effectiveness of its employee work credit system and work management system, which were used to "measure and manage the work production of employees of [VBA] who handle claims for compensation and pension benefits" and "evaluate more effective means of improving performance." The agency was instructed to consider a range of topics, including (1) a "simplified process to adjudicate claims," (2) the "maximum use of [IT] applications," (3) "rules-based applications and tools for processing and adjudicating claims efficiently and effectively," (4) "methods of reducing the time required to obtain information from outside sources," (5) "guidelines and procedures for the identification and prompt processing of such claims that are ready to rate upon submittal," (6) "guidelines and procedures for the identification and prompt processing of such claims submitted by severely injured and very severely injured veterans," and (7) "requirements for assessments of claims processing at each [RO] for the purpose of producing lessons learned and best practices." The Act also directed VA to establish, based on the study's findings, an updated system for evaluating the performance and accountability of VBA employees involved in claims adjudication.[103]

VA engaged CNA to conduct the study. In its report, CNA found that "[s]takeholders' main concerns about the current employee work credit system are that it emphasizes quantity over quality and that the work credits don't accurately reflect the time required to perform each

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[97] Pub. L. No. 110-389, § 221(a), 122 Stat. 4145, 4154 (2008).
[98] *See* JOYCE MCMAHON ET AL., CNA ANALYSIS & SOLUTIONS, INTERIM EVALUATION OF FULLY DEVELOPED CLAIMS PILOT PROGRAM (2009).
[99] Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 506, 126 Stat. 1165, 1193–94 (2012); Press Release, U.S. Dep't of Veterans Affs., VA Grants Up to One Year Retroactive Benefits for Veterans Filing Fully Developed Claims to Help Reduce the Backlog (Aug. 1, 2013).
[100] Press Release, U.S. Dep't of Veterans Affs., VA and Veterans Service Organizations Announce Claims Initiative to Reduce Claims Backlog (May 21, 2013).
[101] Pub. L. No. 110-389, § 221(b), 122 Stat. 4145, 4155 (2008).
[102] *See* JOYCE MCMAHON ET AL., *supra* note 98.
[103] Pub. L. No. 110-389, § 226, 122 Stat. 4145, 4159–60 (2008); *see also Quality vs. Quantity: Examining the Veterans Benefits Administration's Employee Work Credit and Management Systems: Hearing Before the Subcomm. on Disability Assistance and Mem. Affs. of the H. Comm. on Veterans' Affs.*, 111th Cong. (2010).

action." CNA recommended several practices, including: (1) redetermining "the time required (i.e., the work credits) to perform each action at a certain average level of quality," taking into account varying levels of experience among VBA personnel; (2) being transparent with employees about the methodology used to develop the new work credits; and (3) conducing an ongoing analysis and revision of the work credit system. These practices were meant to ensure that the work credit was "both accurate and perceived by frontline employees to be accurate" and that employees were "not pressured to feel that they need to work at a rate that will reduce quality below the level that was selected as appropriate." CNA also expected that VA would use the new work credit standards to help determine its staffing needs.[104]

Fourth, the Act required VA to conduct a review of how it was using its IT resources for VBA adjudication and develop a "comprehensive plan for the use of such technology in processing such claims as to reduce subjectivity, avoidable remands, and [RO] variances in disability ratings for specific disabilities." VA was directed to include a number of technologies in its plan, including automated decision support software, electronic systems for accessing records stored in VHA and DOD databases, and online processes that veterans and representatives could use to access claim status and other information about their cases and transact with the agency.[105]

Fifth, the Act required VA to conduct a study of options for improving the medical examination process, such as improving communication between VBA and VHA and obtaining the services of additional medical professionals.[106]

M. People, Process, and Technology (2009–2017)

Under Secretary Eric Shinseki, VA adopted a three-pronged approach to addressing concerns about timeliness:

> (1) Culture: A culture change inside VA to one that is centered on accountability to and advocacy for our Veterans;
>
> (2) Reengineering business processes: Collaborating with internal and external stakeholders (VA employees, administrations and staff; Congress; VSOs; public and private entities) to constantly improve our claims process using best practices and ideas; and
>
> (3) Technology and infrastructure: Deploying leading edge, powerful 21st century IT solutions to create a smart, paperless claims system which simplifies and

[104] ELIZABETH SCHAEFER ET AL., CNA ANALYSIS & SOLUTIONS, RECOMMENDATIONS FOR THE VBA EMPLOYEE WORK CREDIT SYSTEM 3–4 (2009); *see also* ELIZABETH SCHAEFER ET AL., CNA ANALYSIS & SOLUTIONS, QUALITATIVE ANALYSIS OF VBA EMPLOYEE WORK CREDIT AND WORK MANAGEMENT SYSTEMS (2009).
[105] Pub. L. No. 110-389, § 227, 122 Stat. 4145, 4160–61 (2008).
[106] Pub. L. No. 110-389, § 228, 122 Stat. 4145, 4162 (2008).

> improves claims processing for timely and accurate completion the first time.[107]

These prongs were soon reduced to "People," "Process," and "Technology."[108]

The first prong—People—was an especially important aspect of VA's strategy during this period. The agency emphasized investment in its human capital through training, feedback, accountability, skills certification, career development, incentive, employee morale, and other initiatives. The agency also provided "change management training" and embedded "change management agents" within ROs to serve as "front-line proponents for transformation."[109]

Perhaps the most significant way in which VA sought to leverage its human capital was an effort to crowdsource ideas for improvement initiatives from frontline employees. In August 2009, President Obama directed White House officials to partner with Secretary Shinseki on a "new reform effort" to reduce wait times at VBA. As he described it:

> We're going to challenge each of our 57 regional VA offices to come up with the best ways of doing business, of harnessing the best information technologies, of cutting red tape and breaking through the bureaucracy. And then we're going to fund the best ideas and put them into action, all with a simple mission: cut those backlogs, slash those wait time, deliver your benefits sooner.[110]

VA launched the "innovation competition."[111] The result was a Transformation Plan, released by VBA in 2010, and the *Strategic Plan to Eliminate the Compensation Claims Backlog*, released in January 2013.[112]

Under these plans, VA launched many interrelated efforts to accomplish its twin goals of deciding all claims that had been pending for more than 125 days and simultaneously increasing the quality of VBA decision making. Initiatives undertaken during this period included:

- **Implementing the National Work Queue.** With an increasingly electronic business process, VBA began to manage its workload at the national rather than the local level by distributing claims across ROs as needed regardless of veterans' place of residence. In 2016, the agency implemented the National Work Queue, which automatically routed each claim to the RO that had the capacity and expertise to process it efficiently. The National Work Queue process also divided claims

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[107] *Review of Veterans' Claims Processing: Are Current Efforts Working?: Hearing Before the Sen. Comm. on Veterans' Affs.*, 111th Cong. 9–10 (2010) (statement of Michael Walcoff, Acting Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).
[108] U.S. DEP'T OF VETERANS AFFS., VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG 7–10 (2013).
[109] *Focusing on People*, *supra* note 33, at 46–49.
[110] President Barack Obama, Remarks by the President at the Veterans of Foreign Wars Convention (Aug. 17, 2009).
[111] Aneesh Chopra & Peter Levin, *A Presidential Challenge to the Employees of the VA*, WHITE HOUSE: BLOG (Sep. 21, 2009, 2:25 PM), https://obamawhitehouse.archives.gov/blog/2009/09/21/a-presidential-challenge-employees-va.
[112] U.S. DEP'T OF VETERANS AFFS., *supra* note 108.

processing into discrete phases, allowing VBA to assign responsibility for performing different phases of a single claim to different ROs.[113]

- **Reorganizing RO Personnel.** VA began piloting an alternative to the CPI model. Under the new model, RO employees were organized into cross-functional teams that were "collectively responsible for gathering the evidence for a claim, rating the claim, and processing the decision."[114]

- **Implementing Segmented Lanes for Claims Processing.** VBA assigned cross-functional teams to one of three "segmented lanes": (1) the Express Lane, for claims that "predictably can take less time" (estimated at 10 percent of all claims); (2) the Special Operational Lane, for claims "taking more time or requiring special handling" (estimated 10 percent of all claims); and (3) the Core Lane, for all other claims.[115]

- **Improving Communication With Veterans.** VBA explored ways to expedite communications between veterans and VBA, for example by instructing employees to "call Veterans more often during the claims process rather than to rely solely on written communication" and developing "on-line live chat capabilities."[116]
- **Focusing on Aged Cases and Other High-Priority Caseloads.** VA implemented an initiative to expedite claims pending for more than a year. To maximize productivity, VBA imposed mandatory overtime for VSRs, RVSRs, and DROs.[117]

- **Partnering with Private-Sector Organizations.** VA partnered with the ABA and Legal Services Corporation to connect self-represented veterans to pro bono attorneys who, in the course of providing representation, could help veterans develop their claims and thereby reduce the burden on agency employees.[118]

- **Introducing Electronic Tools to Support VBA Personnel.** VBA began developing interactive decision-support tools and automated decision-writing tools.[119]

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[113] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-15, VETERANS' DISABILITY BENEFITS: BETTER MEASURES NEEDED TO ASSESS REGIONAL OFFICE PERFORMANCE IN PROCESSING CLAIMS 6–7 (2018).
[114] U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-213, VETERANS' DISABILITY BENEFITS: FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING 23 (2010).
[115] U.S. DEP'T OF VETERANS AFFS., *supra* note 108.
[116] *The State of the Veterans Benefits Administration: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs. of the H. Comm. on Veterans' Affs.*, 111th Cong. 69 (2010) (statement of Michael Wolcoff, Acting Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).
[117] Press Release, U.S. Dep't of Veterans Affs., Backlog of Disability Claims Reduced by 34 Percent Since March (Nov. 7, 2013); Press Release, U.S. Dep't of Veterans Affs., VA to Expedite Claims Decisions for Veterans Who Have Waited a Year or More (Apr. 19, 2013); *VA Claims System: Review of VA's Transformation Progress: Hearing Before the Sen. Comm. on Veterans' Affs.*, 113th Cong. 19–20 (2013) (statement of Allison A. Hickey, Under Sec'y for Benefits, U.S. Dep't of Veterans Affs.).
[118] Press Release, U.S. Dep't of Veterans Affs., VA Partners With American Bar Association and Legal Services Corporation to Launch a Pilot Program to Help Veterans Receive Decisions Faster and Reduce Claims Backlog (Aug. 9, 2013).
[119] *Focusing on People*, *supra* note 33, at 51–52.

- **Increasing Reliance on Contract Providers for Medical Examinations.** The number of exams completed by VBA contractors "more than tripled" between FY 2012 and FY 2017. VA believed increased reliance on contract providers would "help avoid delays in the disability claim process related to completion of these exams."[120] That trend has continued through the present day.[121]

- **Making Workload Data Publicly Available.** Through its Monday Morning Workload Report initiative, VA began making key data and statistics about claims adjudication available at the start of each week.

Notably, many initiatives began as pilot programs implemented at a limited number of ROs.[122]

One significant initiative introduced at BVA during this period was the two-year Expedited Claims Adjudication Initiative, under which BVA hoped to expedite appeals by "obtaining claimants' waivers of certain statutory and regulatory response periods, and by utilizing [BVA's] statutory authority to pre-screen cases."[123]

N. VA Claims Backlog Working Group (2014) and National Academy of Public Administration (2014–2016)

Finding that "more must be done," Senators Robert Casey, Martin Heinrich, Dean Heller, Jerry Moran, Jon Tester, and David Vitter formed the VA Claims Backlog Working Group. In its March 2014 report, the Group proposed three areas for improvement:

- **Initiative #1—The Claims Submission.** Concluding that "if Veterans are better prepared to submit a claim, the wait time will decrease," the Working Group recommended initiatives such as better education for veterans on the process for filing a claim, improved access to VSOs, and monetary incentives for FDCs.

- **Initiative #2—Reform VA and RO Practices.** Finding that "structural changes" were needed "to ensure claims are being processed quickly," the Working Group recommended streamlining the medical examination and other processes, improving oversight and accountability for managers, and being transparent about caseload statistics and workload needs.

- **Initiative #3—Government Must Make VA Claim a Priority.** Finding that "files at other departments within the VA or at outside agencies are targeted as a reason for

[120] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-213T, VA DISABILITY EXAMS; IMPROVED OVERSIGHT OF CONTRACTORS NEEDED 1 (2018); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-715T, VA DISABILITY EXAMS: OPPORTUNITIES REMAIN TO IMPROVE OVERSIGHT OF CONTRACTED EXAMINERS (2019).
[121] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-444T, VA DISABILITY EXAMS: BETTER PLANNING NEEDED AS USE OF CONTRACTED EXAMINERS CONTINUES TO GROW (2021); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-543T, VA DISABILITY EXAMS: ACTIONS NEEDED TO IMPROVE PROGRAM MANAGEMENT (2021).
[122] *See The State of the Veterans Benefits Administration*, *supra* note 116, at 69–70.
[123] 73 Fed. Reg. 65,726 (Nov. 5, 2008); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114, at 21–22.

delays," the Working Group called on VA and other agencies to take steps to improve the interagency transfer of information and records.[124]

Two months later, the Senate Appropriations Committee—in its report for the bill that became the Consolidated and Further Continuing Appropriations Act for FY 2015—called for VBA to begin "laying the groundwork for enduring systemic and business process changes so that [VBA] does not face a similar backlog in future years" by engaging with NAPA to obtain an independent assessment of the agency's "management structure, training programs and workforce allocation strategy" and provide Congress with "recommendations for any structural changes to the current system."[125]

The NAPA panel, chaired by ACUS Senior Fellow John Kamensky, made several recommendations in its October 2016 report. As relevant here, they included:

- **Building and Expanding on Modernization Efforts.** The Panel recommended that VA use "advanced analytics" to evaluate, validate, and refine future process changes and explore ways to incentivize VSOs to submit FDCs.

- **Leveraging Electronic Case Management.** The Panel recommended that VA take steps to ensure effective adoption of the National Work Queue.

- **Improving Performance Oversight.** The Panel recommended that VA develop performance measures that were more reliable and realistic. It also recommended VA identify more detailed metrics and improve performance incentives (e.g., "rewarding creative thinking and managed risk to move claims more quickly through the process without sacrificing quality").

- **Using Algorithmic Tools to Support Adjudication of Express Lane Claims.** The Panel recommended that VA adopt "automated rules-based adjudication to assist in improving processing time and accuracy of disability claims, especially for those determined to be less complicated" and "propose legislative change to allow final disability determinations to be assisted by an electronic system." The Panel also recommended that VA maximize the use of big data and data analytics "in the application of statistical methods of claims adjudication."

- **Promoting Consistent Performance Across ROs.** The Panel recommended that VA continue to expand the role of the Change Management Agent to communicate modernization and transformation activities more effectively.

- **Proactively Leverage the Network of VSOs.** The Panel recommended that VA strategically leverage "the network of hundreds of official support organizations and thousands of volunteer organizations and individual volunteers as a workforce multiplier."

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[124] DEAN HELLER ET AL., THE VA CLAIMS BACKLOG WORKING GROUP: MARCH 2014 REPORT (2014).
[125] Sen. Rep. No. 113-174, at 32 (2014).

- **Assessing the Cumulative Impact of Existing Policies and Practices and Proposed Reforms.** The Panel recommended that VA "map out" all of the laws, rules, policies, and procedures applicable to the disability compensation program to identify possible reforms and understand and communicate the intended and unintended consequences of reform initiatives.

- **Using Lessons Learned at VBA to Reduce the Appeals Backlog.** The Panel recommended that VBA and BVA adopt best practices such as improving data transparency, defining step-by-step time goals, improving coordination between VBA and BVA, and engaging with stakeholders to identify solutions.[126]

O. Jeff Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act (2016)

Although VA made progress working down the backlog of claims awaiting an initial decision, the number of appeals continued to rise.[127] In December 2016, Congress passed the Jeff Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act, which included several measures to promote timely processing of RO and BVA appeals.[128]

First, the Act directed BVA to make an initial determination, for each appeal, of what hearing format—in-person or remote—would allow it to hold the hearing as soon as possible and notify the appellant of its determination. (Appellants retained the option to request an alternative hearing format.) Finding no statistical difference in the substantive outcomes of cases in which a video hearing was held versus an in-person hearing, Congress hoped that expanded use of remote hearings would decrease wait times, enhance agency efficiency, and preserve scarce resources that could be reallocated to other backlog-reduction efforts.[129]

Second, the Act required that VA publicly report on an ongoing basis the average length of time to adjudicate appeals with certain characteristics. Relatedly, the Act requested that VA include additional case processing statistics in the Monday Morning Workload Report, published each week by the Secretary.

Third, the Act required GAO to review RO practices to help VBA "achieve more consistent performance in the processing of claims for disability compensation." GAO was directed to review, among other subjects, "factors, including management practices, that distinguish higher performing [ROs] from other [ROs]" and "best practices employed by higher

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[126] NAT'L ACAD. OF PUB. ADMIN., VETERANS BENEFITS ADMINISTRATION: REVIEW OF THE DISABILITY CLAIMS AND APPEALS PROCESSES 9–12 (2016).
[127] *See, e.g.*, U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 16-01750-79, VETERANS BENEFITS ADMINISTRATION: REVIEW OF THE TIMELINESS OF THE APPEALS PROCESS (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-234, VA DISABILITY BENEFITS: ADDITIONAL PLANNING WOULD ENHANCE EFFORTS TO IMPROVE THE TIMELINESS OF APPEALS DECISIONS (2017).
[128] Pub. L. No. 114-315, 130 Stat. 1536 (2016).
[129] H.R. Rep. No. 114-405, at 30–31 (2016); H.R. Rep. No. 113-645, at 5–6 (2014).

performing [ROs] that distinguish the performance of such offices from other [ROs]." GAO issued its report in October 2018.[130]

Fourth, the Act directed VA to submit to Congress a report describing "the criteria and procedures that the Secretary will use to determine appropriate staffing levels at the [RO]s . . . under the National Work Queue for the distribution of the claims processing workload." Relatedly, the Act required the President to include in the budget submitted to Congress information on VBA's capacity to process claims. The President was instructed to describe: (1) an estimate of the average number of claims that a full-time equivalent employee should be able to process in a year based on a time-and-motion study conducted by VA and other relevant information, (2) actions VA would take to improve claims processing, and (3) an assessment of recent actions taken to improve claims processing.

The Act also required VA to submit an annual report on its progress in implementing VBA's electronic case management system, the Veterans Benefits Management System (VBMS).

P. Veterans Appeals Improvement and Modernization Act (2017)

As wait times for appeals continued to grow, VA invited VSO, congressional staff, and other stakeholders to an "Appeals Summit" in March 2016. Collaboration between VA and veterans advocates resulted in a legislative reform proposal to "streamline VA's appeals process while protecting veterans' due process rights." Their proposal led to enactment of the AMA in August 2017.[131]

The AMA radically overhauled VA's appellate process. Most significantly, it directed VA to implement the current appeals process, described in Part I. The Act also limited the duty to assist on appeal, required VBA to include additional rationale in notices of decisions, and authorized BVA to implement a process to expedite decision making for fully developed appeals.

The Act also included several measures to ensure successful implementation of the AMA. First, the Act required VA to submit a comprehensive plan for processing legacy appeals, implementing the new appeals system, and promoting timely processing under the new appeals system. Congress directed VA to describe, among other things, the resources and personnel required to address legacy appeals and administer the new appeals system, processes and time needed to onboard additional qualified personnel, projections for the productivity of individual VBA and BVA employees, and key goals and milestones for reducing the number of appeals pending at the time of AMA's enactment. The Act also required GAO to assess VA's comprehensive plan.[132]

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[130] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 113.

[131] Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017); H.R. Rep. No. 115-135, at 5 (2017); 83 Fed. Reg. 39,818, 39,819 (Aug. 10, 2018).

[132] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-352, VA DISABILITY BENEFITS: IMPROVED PLANNING PRACTICES WOULD BETTER ENSURE SUCCESSFUL APPEALS REFORM (2018); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-272T, VA DISABILITY BENEFITS: PLANNING GAPS COULD IMPEDE READINESS FOR SUCCESSFUL APPEALS IMPLEMENTATION (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-661T, VA DISABILITY BENEFITS:

Additionally, the AMA required VA to issue periodic reports on its progress in carrying out the comprehensive plan and addressing GAO's recommendations. VA was also authorized to use pilots to test its assumptions and various practices and directed to notify the House and Senate veterans' affairs committees whenever it determined that legislative changes to the new appeals system were necessary. The Act further required VA to publish claims processing metrics on its website.[133]

Q. AMA Implementation, the COVID-19 Pandemic, and Recent Initiatives (2017–Present)

Shortly after the AMA's enactment, VA met with stakeholders to answer questions and address concerns. It then developed rules to implement the AMA's "highly detailed statutory framework." The final rule went into effect on February 19, 2019.[134]

At the same time as it has worked to decide legacy appeals and operationalize the new appeals system, VA has faced several additional challenges. Office closures during the COVID-19 pandemic delayed many medical examinations and delayed record request processing at NPRC.[135] Caseloads have also grown as a result of legislative and regulatory changes that made it easier for veterans with certain conditions to prove entitlement for benefits. To meet these challenges, VA has hired and trained thousands of new employees and, with additional funding from Congress, authorized overtime to further expand its capacity.

Three other recent developments are worth emphasizing. First, policymakers continue to prioritize improving access to military personnel records that VA adjudicators need to process claims. VA and NARA have partnered on initiatives to reduce the time required to respond to record requests and proactively digitize paper records for all living veterans.[136] Congress directed NARA to submit a comprehensive plan for reducing the backlog of records requests from NPRC and improve the efficiency of NPRC operations.[137] In its plan, submitted to Congress in February 2023, NARA indicated it was on track to eliminate the remaining backlog by December.[138]

Separately, members of Congress have pushed NARA to eliminate the backlog of military personnel record requests. Eliminating the backlog was the focus of the Senate Homeland Security and Government Affairs Committee's hearing on the nomination of Colleen

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SOME PROGRESS, BUT FURTHER STEPS NEEDED TO IMPROVE APPEALS REFORM PLANNING (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-349T, VA DISABILITY BENEFITS: OPPORTUNITIES EXIST TO BETTER ENSURE SUCCESSFUL APPEALS REFORM (2018).

[133] Reports and metrics are available at https://www.benefits.va.gov/REPORTS/ama.

[134] 84 Fed. Reg. 138 (Feb. 18, 2019).

[135] Press Release, U.S. Dep't of Veterans Affs., VA Prepares to Get Ahead of Surge in Backlogged Claims (Oct. 13, 2021); *Please Leave Your Message at the Tone: Addressing Post-Pandemic Backlogs and Delays at Federal Agencies: Hearing Before the Subcomm. on Gov't Operations & the Fed. Workforce of the H. Comm. on Oversight & Accountability*, 118th Cong. (2023).

[136] Adam Patterson, *VA, NARA Partnership Streamlines Benefits Claims Processing*, GOVCIO (June 1, 2021, 12:07 PM), https://governmentciomedia.com/va-nara-partnership-streamlines-benefits-claims-processing.

[137] National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5301.

[138] NAT'L ARCHIVES & RECS. ADMIN., PLAN TO ELIMINATE RECORDS BACKLOG AT THE NATIONAL PERSONNEL RECORDS CENTER (Feb. 24, 2023), https://www.archives.gov/files/foia/nara-plan-to-eliminate-records-backlog-at-the-national-personnel-records-center.pdf.

Shogan to be Archivist in February 2023.[139] (Archivist Shogan has since described eliminating the backlog as her "top discrete priority."[140]) And NPRC's Director was one of three witnesses, along with officials from the Social Security Administration and State Department, at a recent hearing of the House Oversight and Accountability Committee focused on "addressing post-pandemic backlogs and delays at federal agencies."[141]

Second, VA has made several improvements to its electronic case management systems. VA has implemented the Production Optimization Continuous Improvement Model, for example, through which VBA and VA's Office of Information Technology use feedback and suggestions from VSRs to improve VBMS, address "defects," and eliminate "time-consuming workarounds." According to recent congressional testimony, VA implemented about 100 improvements between October 2022 and June 2023, many within 30 days of identification.[142]

Third, VA, like other agencies, continues to consider how it can expand and improve automation of administrative processes. For example, VA collaborated with industry partners on an "Automated Data Ingestion (ADI) functionality that automatically transcribes information received from medical exam vendors uploading Disability Benefits Questionnaires (DBQs) into the VBMS system used to calculate ratings."[143] VA also increasingly automates processing of much of its incoming claims-related mail. (Mail processing practices were historically a source of delays.[144]) Additionally, VBA is developing and prototyping Automated Decision Support tools that "support claims processors to make faster and more equitable claims decisions by indexing relevant medical evidence and automatically ordering exams in certain situations." Through its Automated Benefits Delivery System, launched in December 2021, the agency is also using artificial intelligence, natural language processing, and optical character recognition to extract information from electronic health records and military personnel records and automatically "expedit[e] claims that can be decided based on the evidence of record, order[] examinations when required," and index information in the record needed for adjudication.[145]

Congress continues to show substantial interest in VA's efforts to promote timeliness. The PACT Act, for example, required VA to submit a plan for modernizing VBA's IT systems. Congress instructed to VA to describe in its plan how it intends to incorporate automation to "increase the speed and accuracy of claims processing decisions."[146] In 2023, the House

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[139] *Nomination of Colleen J. Shogan to Be Archivist of the United States, National Archives and Records Administration: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 118th Cong.(2023).
[140] Victoria Macchi, *Improving Access, Reducing Barriers Top Priorities for New Archivist*, NAT'L ARCHIVES NEWS (June 30, 2023), https://www.archives.gov/news/articles/aotus-shogan-interview.
[141] *Please Leave Your Message at the Tone*, *supra* note 135 (statement of Scott Levins, Dir., Nat'l Personnel Records Ctr.).
[142] *From Months to Hours: The Future of VA Benefits Claims Processing: Hearing Before the Subcomm. on Disability Assistance & Mem. Affs. & the Subcomm. on Tech. Modernization of the H. Comm. on Veterans' Affs.*, 118th Cong. (2023) (statement of Raymond Tellez, Acting Assistant Under Sec'y for Automated Benefits Delivery, Veterans Benefits Admin.).
[143] *Id*.
[144] *See, e.g.*, U.S. DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., 08-01759-234, AUDIT OF VA REGIONAL OFFICE CLAIM-RELATED MAIL (2009).
[145] *From Months to Hours*, *supra* note 142; *see also* Adam Patterson, *VA Moves to Further Automate Benefits Claims*, GOVCIO (Feb. 18, 2022, 12:47 PM), https://governmentciomedia.com/va-moves-further-automate-benefits-claims.
[146] Pub. L. No. 117-168, § 701, 136 Stat. 1759, 1794–95 (2022).

Appropriations committee requested that OIG report on the status of the backlog, causes of the backlog, VA's efforts to address the backlog, and the effects of VA's partnership with NARA to improve access to military personnel records.[147]

Bills have also been introduced that would attempt to improve timeliness through other means. A bill introduced in the 117th Congress, for example, would have directed VA to set up a pilot program under which medical residency and fellowship programs could receive funding to establish programs for medical residents and fellows to perform medical examinations.[148] Another bill introduced earlier this year would establish legal internship and attorney honors programs at BVA.[149]

[147] *See* U.S. DEP'T OF VETERANS AFFAIRS, OFF. OF INSPECTOR GEN., 23-01362-130, VETERANS BENEFITS ADMINISTRATION: COMPENSATION AND PENSION BENEFITS CLAIMS BACKLOG (2023).
[148] Veterans Pro Bono Corps Act of 2021, H.R. 6231, 117th Cong. (2021).
[149] Veterans' Appeals Backlog Improvement Act, H.R. 1372, 118th Cong. (2023).

APPENDIX G:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case study provides an overview of efforts to improve or promote timeliness at the Equal Employment Opportunity Commission (EEOC). Congress established EEOC in 1964 to enforce Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, sex, color, religion, and national origin.[1] The agency's mission is to prevent and remedy unlawful employment discrimination and advance equal opportunity for all.[2]

Part I provides an overview of EEOC, its historical development, the types of cases it decides, and the process for adjudicating them. Part II describes timeliness as a value in EEOC adjudication. Part III describes factors that have affected the timeliness of EEOC adjudication. Part IV describes efforts by EEOC to promote or improve timeliness.

I. BACKGROUND

A. The Program

EEOC has the authority to investigate charges of discrimination in the workplace. The agency assesses allegations, makes findings, and works to settle grievances. EEOC also acts through litigation to enforce federal laws that make it illegal to discriminate against a job applicant or employee.

Additionally, EEOC assures federal agency compliance with employment laws, provides technical assistance and other guidance to federal agencies concerning equal employment opportunity (EEO) programs, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

Finally, the agency administers outreach, education, and technical assistance programs designed to prevent employment discrimination before it occurs.

B. The Agency

Federal efforts to address discrimination in the workplace began in 1941 when President Franklin D. Roosevelt signed an executive order prohibiting government contractors from engaging in employment discrimination based on race, color, or national origin.[3] That order also established a Committee on Fair Employment Practice to receive and investigate complaints of discrimination and to take appropriate steps to redress grievances the Committee found to be valid.

Over the next two decades, presidents continued to address employment discrimination through executive order. President Harry S. Truman required equality of treatment and fair employment policies in all federal agencies and in the armed services.[4] He also established a Fair

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[1] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
[2] *Overview*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last accessed Dec. 10, 2023).
[3] Exec. Order No. 8,802, (June 25, 1941).
[4] Exec. Order No. 9,980 (July 26, 1948); Exec. Order No. 9,981 (July 26, 1948).

Employment Board to coordinate fair employment policies and procedures in the executive branch and to review employment decisions made by federal agencies which were appealed to it.[5] President Dwight D. Eisenhower then replaced the Fair Employment Board, established a Committee on Government Employment Policy, and directed the head of each federal agency to designate an employment policy officer to receive and investigate complaints of alleged discrimination in the agency.[6]

In 1961, President John F. Kennedy established a Committee on Equal Employment Opportunity to study the employment practices of the federal government and to consider and recommend additional steps for agencies to realize more fully a national policy of nondiscrimination in both their own operations and by federal contractors.[7] The Committee had the authority to investigate the employment practices of any government contractor or subcontractor, or to direct the appropriate contracting agency or the Secretary of Labor to initiate such investigations. This authority included the ability to hold hearings and impose sanctions and penalties.

Congress enacted the first federal legislation dedicated to employment discrimination in 1963. The Equal Pay Act protected men and women who perform substantially equal work in the same establishment from sex based wage discrimination.[8] Congress then passed the landmark Civil Rights Act of 1964, prohibiting discrimination in a range of private conduct, including employment.[9] Title VII of that Act prohibited discrimination in recruitment, hiring, wages, assignment, promotions, benefits, discipline, and layoffs on the basis of race, sex, color, religion, and national origin. Title VII applied to private employers with 100 or more employees, with coverage phased over the next three years to include employers with 25 or more employees.[10]

Title VII also established EEOC as a commission composed of five members appointed by the president with the advice and consent of the Senate, not more than three of whom shall be members of the same political party.[11] The members served staggered five year terms and the president had the authority to designate a Chair and Vice Chair of the commission.

When EEOC opened, the agency began operations in offices borrowed from the Department of Commerce[12] and most of EEOC's 100 employees were detailed from other federal agencies.[13] The agency opened its first field office in 1966 in Dallas (relocated to Austin

[5] Exec. Order No. 9,980 (July 26, 1948).
[6] Exec. Order No. 10,590 (Jan. 18, 1955).
[7] Exec. Order No. 10,925 (Mar. 6, 1961).
[8] Pub. L. No. 88-38, 77 Stat. 56 (1963).
[9] Pub. L. No. 88-352, 78 Stat. 241 (1964).
[10] *EEOC History: 1964-1969*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last accessed Dec. 8, 2023).
[11] Pub. L. No. 88-352 § 705, 78 Stat. 241 (1964).
[12] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS ii (2000).
[13] *EEOC History: 1964-1969*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last accessed Dec. 8, 2023).

a few months later), followed shortly thereafter with three additional offices in Atlanta, Chicago, and Cleveland.[14]

The next decade brought a series of jurisdictional expansions for the agency. The Equal Employment Opportunity Act of 1972 altered Title VII to apply to private employers with 15 (as opposed to 25) or more employees, broadened EEOC authority to include coverage of educational institutions and state and local governments, and granted EEOC the power to sue nongovernment respondents for discriminatory practices if the agency could not secure acceptable conciliation agreements.[15] Additional laws expanded the agency's jurisdiction to include, *inter alia*, responsibility for coordinating all federal employment opportunity programs and enforcing anti-discrimination laws applicable to the civilian workforce.[16]

The 1970s also brought significant Supreme Court cases that supported EEOC's definition of employment discrimination and the agency's enforcement efforts.[17] Most notably, *McConnell Douglas Corp v. Green* established the basic analytical framework for proving an individual case of disparate treatment.[18] Other cases reinforced or expanded EEOC authority, elaborating upon definitions of discrimination, what constitutes disparate treatment, and who is covered under equal employment laws.[19]

To accommodate these changes, EEOC reorganized its structure and programs. The most significant modification was to place enforcement attorneys, who had previously worked in five litigation centers, in 22 district offices throughout the country so they could work more closely with the agency's investigators.[20] For the first time since it was established, each EEOC field office was able to perform interrelated functions related to administrative management, investigation, and litigation.

At that point in time, existing statutes, executive orders, and regulations granted important responsibilities relating to equal employment opportunity to 18 different governmental units. Recognizing this as a problem for implementation, President Jimmy Carter's Reorganization Plan No. 1 of 1978 made EEOC the principal federal agency in fair employment

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[14] *Id.*
[15] Pub. L. No. 92-261, 86 Stat. 103 (1972).
[16] *E.g.*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2077 (1978); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92. Stat. 2982 (1978); Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[17] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 27 (2000).
[18] 411 U.S. 792 (1973).
[19] *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973); McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Trans World Airlines, Inc v. Hardison, 432 U.S. 63 (1977).
[20] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 28 (2000); *EEOC History: 1970-1979*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1970-1979 (last accessed Dec. 10, 2023).

enforcement.[21] Among other things, the Plan shifted responsibility for enforcement of equal opportunity for federal employees from the Civil Service Commission to EEOC and the responsibility for enforcement of the Equal Pay Act and Age Discrimination in Employment Act from the Department of Labor to EEOC. As a direct result, EEOC's caseload more than doubled.[22]

Amendments to employment law throughout the 1980s and early 1990s continued to adjust EEOC's jurisdictional authority.[23] For example, the Civil Rights Act of 1991 expanded the agency's jurisdiction, most notably with respect to disability and age discrimination.[24]

Additionally, the Supreme Court upheld or increased the agency's ability to seek relief for individual and classes of victims[25] claiming age,[26] racial,[27] and wage[28] discrimination as well as sexual harassment.[29] The Court also affirmed EEOC's authority to initiate charges on its own through "Commissioner's Charges."[30]

Additional Supreme Court cases subsequently affirmed or expanded reach of EEOC, particularly with respect to sex[31] and age discrimination[32] and the definition of major life activity.[33] In 1997, a unanimous Supreme Court affirmed EEOC's position that protection against retaliation covers former as well as current employees[34] and the agency's method of counting employees to determine if an employer has the requisite number of employees to be subject to EEO laws.[35] The Court also clarified the agency's jurisdictional overlap with the Social Security

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[21] Reorganizational Plan No. 1 of 1978 (1978). *See also* Exec. Order No. 12,067 (June 30, 1978) (implementing Reorganization Plan Number 1).
[22] *EEOC History: 1980-1989*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1980-1989 (last accessed Dec. 10, 2023).
[23] *E.g.*, Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986); Age Discrimination Claims Assistance Act of 1988, Pub. L. No. 100-283, 102 Stat. 79 (1988).
[24] Age Discrimination Claims Assistance Amendments of 1990, Pub. L. No. 101-504, 104 Stat. 1298 (1990); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990); Civil Rights Act of 1991, Pub. L. No. 102-166, 102-166 (1991); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 State. 978 (1990).
[25] General Telephone Company of the Northwest v. Equal Emp. Opportunity Comm'n, 446 U.S. 318 (1980). The Court also clarified that disparate impact analysis could be applied to subjective or discretionary selection practices. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).
[26] Equal Emp. Opportunity Comm'n v. Wyoming, 460 U.S. 226 (1983).
[27] Connecticut v. Teal, 457 U.S. 440 (1982).
[28] County of Washington v. Gunther, 452 U.S. 161 (1981).
[29] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
[30] Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54 (1984).
[31] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Harris v. Forklift Systems, 510 U.S. 17 (1993); International Union, UAW v. Jonson Controls, 499 U.S. 187 (1991); Oncale v. Sundownder Offshore Services, 523 U.S. 75 (1998).
[32] O'Connor v. Consolidated Coin Caterers Corp, 517 U.S. 308 (1996).
[33] Bragdon v. Abbott, 524 U.S. 624 (1998).
[34] Robinson v. Shell Oil, 519 U.S. 337 (1997).
[35] Walters v. Metropolitan Educational Enterprises, 519 U.S. 202 (1997).

Administration (SSA) and held that a plaintiff can file a charge of discrimination under the Americans with Disabilities Act with the EEOC despite also filing action with SSA.[36]

In the 2000s, the Supreme Court issued a series of decisions affirming, adjusting, or clarifying EEOC authority.[37] The Court also elaborated upon the burden of proof in charges of age discrimination,[38] as well as the filing requirements for several different types of claims.[39] In part as a response to one of these decisions,[40] Congress enacted the Lilly Ledbettter Fair Pay Act changing the statute of limitations for filing a charge alleging pay discrimination. [41] As a result of these changes, EEOC had to reopen several hundred investigations and issue a multitude of new right to sue notices.

The last major statutory expansions of EEOC jurisdiction occurred in 2008 when Congress enacted the Genetic Information Nondiscrimination Act[42] and the ADA Amendments Act of 2008.[43]

Currently, EEOC's structure consists of five members appointed by the President and confirmed by the Senate.[44] The members serve staggered, five year terms.[45] The Chair of the commission, designated by the President, is responsible for the administrative operations of the commission.[46] The EEOC General Counsel, also appointed by the President and confirmed by the Senate, has the responsibility of conducting EEOC litigation and confers with the Chair on the appointment and supervision of regional EEOC attorneys.[47]

The EEOC carries out its work through the agency's headquarters offices in Washington, D.C., and maintains 52 field offices in 15 districts.[48]

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[36] Cleveland v. Policy Management Systems Corp, 526 U.S. 795 (1999).
[37] *E.g*., Arbaugh v. Y&H Corp., 540 U.S. 500 (2006); Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001); Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006); Chevron v. Echazabel, 536 U.S. 73 (2002); Edelman v. Lynchburg College, 535 U.S. 106 (2002); Equal Emp. Opportunity Comm'n, 534 U.S. 279 (2002); General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); National RR Passenger Corp v Morgan, 536 U.S. 101 (2002); Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184 (2002); US Airways, Inc. v. Barnett, 535 U.S. 391 (2002);
[38] Meacham v. Knolls Atomic Power Lab, 554 U.S. 84 (2008)
[39] Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008); Gross v. FBL Financial Services, Inc. 557 U.S. 167 (2009); Lewis v. City of Chicago, 560 U.S. 205 (2010); Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133 (2000).
[40] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).
[41] Pub. L. No. 111-2, 123 Stat. 5 (2009); *EEOC History: 2000-2009*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2000-2009 (last accessed Dec. 10, 2023).
[42] Pub. L. No. 110-233, 122 Stat. 881 (2008). However, EEOC had been operating under this authority since President Clinton directed the agency through executive order to enforce a prohibition of employers using individuals' genetic information when making hiring, firing, job placement, or promotion decisions. Exec. Order No. 13,145 (Feb. 8, 2000)
[43] Pub. L. No. 110-325, 122 Stat. 3553 (2008).
[44] 42 U.S.C. § 2000e-4(a).
[45] *Id*.
[46] *Id*.
[47] *Id*. at § 2000e-4(b).
[48] *Overview*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last accessed Dec. 10, 2023).

C. The Adjudication Process

EEOC proceedings originate when a job applicant or employee believes they have experienced discrimination in the workplace. This discrimination can occur in all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. The manner by which EEOC processes charges of discrimination depends on whether the charge involves a complaint against a federal agency.

1. Non-Federal Complaint Processing

If a person believes their employer, union, or labor union has engaged in employment discrimination, that person may file a Charge of Discrimination with the EEOC. To protect the identity of the aggrieved person, that person may have another individual, organization, or agency file a charge on their behalf. A Charge of Discrimination is a signed statement that a person has experienced discrimination at work because of race, color, religion, sex, national origin, age, disability, or genetic information. Generally, a person must file within 180 days from the day the discriminatory event took place.[49] The Charge of Discrimination requests EEOC to take remedial action and is required before a person may litigate in federal court.[50]

A person may file a Charge of Discrimination in multiple ways. The most common way is through EEOC's public portal. However, each EEOC office has scheduled and walk-in appointments so that a person who believes they have experienced discrimination at work has the opportunity to discuss their experience with an EEOC staff member and determine whether filing a Charge of Discrimination is appropriate. The EEOC staff member will then prepare the Charge using information provided and direct the person to review and sign the Charge through the public portal. Finally, a person may file a Charge of Discrimination through the mail by sending the EEOC a letter containing the information required for filing.

After the person has filed, the person must schedule an interview with an EEOC representative to proceed with the complaint. If the representative determines the complaint is covered by EEO laws, the person will receive a Charge of Discrimination, which becomes the legal document of record. If new events take place after filing, the complainant can add them to the charge.[51]

Upon receipt of the Charge, the person may sign it and use it to file an official complaint of discrimination with EEOC. Within 10 days of this filing, the organization named in the complaint will receive official notice of the Charge. At this point, EEOC may invite parties to participate in the agency's mediation program.

If mediation does not occur or is not successful, EEOC will investigate the charge and request a position statement from the respondent. Once the respondent submits a position

[49] This requirement is slightly different for complaints of age discrimination, complaints arising under the Equal Pay Act, or if a state or local agency enforces law that prohibits employment discrimination on same basis. In harassment cases, the time limit for filing a charge begins on last incident of harassment.
[50] Except for complaints arising under the Equal Pay Act.
[51] The time limits for amendments are the same as those for initial filing.

statement, the complainant has 30 days to submit a response. Additionally, EEOC may ask the respondent to answer questions about claims in the charge.

The length of the investigation process depends on many factors, including the amount of information the agency needs to gather and analyze. For example, some investigations will require EEOC investigators to visit the respondent on-site, hold witness interviews, and gather documents. Other investigations may simply involve requests for documents.

After the investigation has been completed, EEOC will let the parties know the result. If EEOC determines the law has been violated, the agency will try to reach a voluntary settlement agreement between the parties. If settlement cannot be reached, the case will be referred to EEOC's legal staff. The legal staff will decide whether EEOC wishes to litigate. The agency has discretion regarding which charges to litigate and considers such factors as strength of evidence, issues raised in the case, and the wider impact the case could have on EEOC's efforts to prevent and remedy unlawful employment discrimination. EEOC litigates only a small percentage of all charges filed.

If EEOC decides not to litigate, or if the agency has not been able to determine a violation of the law, EEOC will send the complainant a notice of right to sue. The complainant may also request a notice of a right to sue if the complainant wishes to file lawsuit in court before EEOC's investigation is complete. The complainant must file a lawsuit within 90 days of receipt of the notice of a right to sue.

2. Federal EEOC Complaint Processing

If a federal employee or job applicant believes they have experienced discrimination by a federal agency, that person generally must contact the agency's EEO counselor within 45 days of the action alleged to be discriminatory. The EEO counselor will provide information to the person concerning how the federal EEO complaint process works. In most cases, the counselor will give the person a choice of either participating in additional EEO counseling or in an alternative dispute resolution program such as mediation. The counselor also will advise the person in writing of their rights and responsibilities in the EEO process.

If the matter is not resolved within 30 days of the date the person contacted the agency's EEO office to request counseling, the counselor will inform the person in writing of the right to file a formal discrimination complaint against the agency. The person then has 15 days to file a complaint against the agency with the agency's EEO office. When the complaint is filed, the EEO counselor must submit a written report to the agency's EEO office detailing the issues discussed and actions taken during counseling.

Upon receipt of the formal complaint, the agency must acknowledge the receipt in writing. The agency then decides whether or not to dismiss the case for procedural issues such as failure to state a claim or comply with time limits or because the complainant already has elected to pursue the matter in another venue. If the agency does not dismiss the complaint, the agency conducts an investigation to develop an impartial and appropriate factual record upon which a reasonable fact finder could draw conclusions as to whether discrimination occurred.

This investigation must be completed within 180 days from the day the complaint was filed.[52] If more than 180 days pass since the complaint was filed, the complainant may request a hearing with the EEOC Hearing Unit Office. When the agency completes the investigation, the agency will provide a copy of the investigative file to the complainant along with notice that, within 30 days of receipt of the file, the complainant has the right to request the agency to issue an immediate final decision as to whether discrimination has occurred or to request a hearing and decision from an EEOC Administrative Judge (AJ).

If the complainant asks the agency to issue a decision, the agency will issue a final order. In the event the complainant disagrees with some part of the decision, the complainant may appeal that decision to the EEOC or challenge it in federal district court within no later than 30 days.

If the complainant requests a hearing conducted by an AJ, the EEOC will appoint one to the case. Prior to the hearing, the parties may conduct discovery. The AJ must conduct a hearing and issue a decision within 180 days. The hearing is closed to the public, recorded and transcribed, and considered part of the investigative process. The AJ will then send copies of the hearing record, the transcript, and the decision to the parties.

Once the agency receives the AJ's decision, the agency will issue a final order which tells the complainant whether the agency agrees with the AJ and if the agency will grant any relief the judge ordered. The agency has 40 days to do so. If the final order does not fully implement the decision of the AJ, the agency must simultaneously file an appeal with EEOC and attach a copy of the appeal to the final order. The complainant may appeal the final order within 30 days.

Appeals by either party must be filed with EEOC's Office of Federal Operations. EEOC appellate attorneys then review the entire file, including the agency's investigation, AJ's decision, transcript of the hearing, and any appeal statements. The decision on appeal is based on a de novo review, except that the review of factual findings in a decision by an AJ is based on a substantial evidence standard.

Any party may request that EEOC reconsider its decision on appeal within 30 days of receipt of the decision. The agency only grants requests for reconsideration if the moving party can demonstrate the decision was based on a mistake about the facts of the case or the law applied to the facts. Once EEOC makes a decision on request for reconsideration, the decision is final.

II. TIMELINESS AS A VALUE IN EEOC ADJUDICATION

When EEOC opened its doors, it did so with a backlog of nearly 1,000 complaints.[53] By the early 1970s, timeliness in EEOC decision-making was the primary problem in agency operations.[54] Throughout this initial period, the number of charges filed annually with EEOC

[52] Or if amended, 180 days from when amended.
[53] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 5 (2000).
[54] U.S. GEN. ACCT. OFF., B-175042, REVIEW OF SELECTED ACTIVITIES OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DISTRICT OFFICE IN MEMPHIS 1 (1973).

increased almost tenfold and the agency struggled to stay afloat.[55] In part, this is because Congress greatly underestimated the number of charges the agency would receive.[56]

Since that time, the agency's backlogs and delays have ebbed and flowed with agency priorities and strategies to address timeliness.[57] EEOC has experienced cyclical problems as it balances the competing demands of high quality investigation and efficiency.[58] As a result, historically, the EEOC has failed to meet even its own regulatory requirements for timeliness at any stage of its adjudicative process.[59]

Yet, over the course of the past decade, EEOC has made remarkable progress in promoting and improving timeliness in adjudication. For example, from 2011 to 2021, the agency reduced its pending charge inventory by about 47 percent and was able to close more charges than it received for nearly every year during the same period.[60]

In pursuing its mission to prevent and remedy unlawful employment discrimination and advance equal employment opportunity for all, EEOC pursues the strategic goal of exercising its enforcement authority fairly, efficiently and based on the circumstances of each charge or complaint.[61]

III. FACTORS AFFEFCTING TIMELINESS

As Parts I and II suggest, EEOC has gone through fluctuations with respect to the agency's timeliness in adjudicating both non-federal and federal complaints. This Part explores factors that have affected timeliness in EEOC adjudication, including (a) program startup and jurisdictional expansions, (b) agency resources, (c) agency leadership, (d) case management, and (e) policy environment.

A. Program Startup and Jurisdictional Expansions

Congress projected that the EEOC would receive approximately 2,000 complaints in the first year of its operations.[62] Instead, the agency received 8,852.[63] There were also miscalculations in the type of charges EEOC would process; it was generally assumed that the vast majority of complaints would allege race discrimination. However, approximately one third

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[55] Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 242 (1983)
[56] Nancy M. Modesitt, *Reinventing the EEOC*, 63 S.M.U. L. REV. 1237, 1241 (2010).
[57] *Id*. at 1242.
[58] Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 310-11 (2001).
[59] *Oversight of the Equal Employment Opportunity Commission: Hearing to Address in a Meaningful Way the Extraordinary Backlog that Exists Before the S. Comm. On Labor & Hum. Res.*, 104th Cong. 4 (1995) (statement of Linda G. Morra, Director, Education and Employment Issues, Health, Education, and Human Services Division, U.S. General Accounting Office); D. Aaron Lacy, *Alternative Dispute Resolution or Appropriate Dispute Resolution: Will ADR Help or Hurt the EEO Complaint Process*, 80 U. DET. MERCY L. REV. 31, 37 (2002).
[60] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 8 (2022).
[61] EQUAL EMP. OPPORTUNITY COMM'N, EEOC STRATEGIC PLAN 2022-2026 (2022).
[62] *EEOC History: 1964-1969*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last accessed Dec. 8, 2023).
[63] *Id*.

of the claims the agency received alleged discrimination on the basis of sex.[64] The agency immediately experienced a backlog of cases as it struggled to process charges filed. Simply, Congress underestimated both the number of charges EEOC would receive and the resources the agency would need to investigate those charges.[65]

A public information campaign only exacerbated the agency's timeliness problems. In 1967, EEOC began to hold hearings in selected cities to publicize EEO law, make employees aware of their rights, and focus attention on particularly acute and systemic discriminatory practices.[66] The campaign was more successful than anticipated and charges of workplace discrimination multiplied.

New jurisdictional expansions in the early 1970s only increased EEOC's caseload and strained agency resources. For example, as a result of the EEO Act of 1972, EEOC had to develop in-house litigation capacity and its increased jurisdiction over state and local governments resulted in a 50 percent increase in case filings.[67] By 1975, the agency's backlog expanded to more than 100,000 cases.[68] Because many of these cases were initiated in the agency's earliest years of operation, charges filed with EEOC became dated. An internal task force charged with studying EEOC's backlog reported that 15 percent of cases were no longer valid.[69] In part, this was because the lengthy delay in processing meant that EEOC investigators could not even locate the charging party or that the charging party no longer wished to pursue the alleged discriminatory behavior.[70]

Subsequent jurisdictional expansions further intensified the problem. For example, during the EEOC's first full year of implementing its statutory responsibility recognizing age discrimination in employment, charges filed with the agency increased by more than 300 percent.[71] From 1991 to 1995, the number of persons who filed charges with the EEOC increased by 49 percent.[72] Extending the time period three years, from 1991 to 1998, the agency's hearing inventory rose by 280 percent and the number of appeals pending before the commission increased by 648 percent.[73]

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[64] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 7 (2000).
[65] Nancy M. Modesitt, *Reinventing the EEOC*, 63 S.M.U. L. REV. 1237, 1241 (2010).
[66] *EEOC History: 1964-1969*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last accessed Dec. 8, 2023).
[67] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 677 (2005).
[68] *EEOC History: 1970-1979*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1970-1979 (last accessed Dec. 10, 2023).
[69] U.S. GEN. ACCT. OFF., B-175042, REVIEW OF SELECTED ACTIVITIES OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DISTRICT OFFICE IN MEMPHIS 1 (1973).
[70] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 8 (1976).
[71] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 33 (2000).
[72] U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NATIONAL ENFORCEMENT PLAN (1995).
[73] U.S. GEN. ACCT. OFF., GGD-99-128, EQUAL EMPLOYMENT OPPORTUNITY: COMPLAINT CASELOADS RISING, WITH EFFECTS OF NEW REGULATIONS ON FUTURE TRENDS UNCLEAR 1 (1999).

To add insult to injury, Congress failed to appropriate funds to match this increased caseload. Recessionary budget constraints limited the agency's ability to supplement its human and case processing resources to correspond with the number of charges filed with EEOC annually.[74] From 2000 to 2008, EEOC had a flat budget.[75] The agency's growing demands on its staff resulted in a loss of more than 33 percent of its investigative workforce[76] and the number of EEOC staff dropped to the lowest in 34 years.[77] Additionally, retirements and reassignments of EEOC employees made it difficult for the agency to fully staff all of its offices in headquarters and the field.[78]

B. Agency Resources

A lack of personnel or other resources was not a new problem for the agency. Indeed, during its first year of operations, EEOC failed to maintain its staff at authorized levels.[79] The relationship between cases filed and the number and capacity of EEOC staff to process them has been an ongoing problem.[80] For example, from 1989 to 1992, the number of charges filed with EEOC increased by about 25 percent but, during the same period, the agency's staff decreased by six percent.[81] Throughout the 1990s, this trend also occurred in agencies themselves, where EEO counselors, counselor/investigators, and investigators in EEO offices declined.[82]

Staff reductions and vacancies had multiple effects on EEOC's ability to adjudicate in a timely manner. Vacancies tends to lead to improperly kept records, confusion as to charge intake, and communication problems between claimants and the agency.[83] Vacancies also required EEOC to spend valuable time and resources on recruitment efforts.[84] Furthermore, when experienced employees left EEOC, they usually were replaced by new employees who lacked

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[74] Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 131-32 (2014); D. Aaron Lacy, *Alternative Dispute Resolution or Appropriate Dispute Resolution: Will ADR Help or Hurt the EEO Complaint Process*, 80 U. DET. MERCY L. REV. 31, 38 (2002).
[75] *EEOC History: 2000-2009*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2000-2009 (last accessed Dec. 10, 2023).
[76] *Id*.
[77] Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 140 (2014).
[78] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 11-13 (2009).
[79] Cornelius J. Peck, *Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831, 848 (1976).
[80] E.g., U.S. GEN. ACCT. OFF., HEHS-94-32, EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHARGES CALL FOR NEW APPROACH 8 (1994); U.S. GEN. ACCT. OFF., GGD-99-128, EQUAL EMPLOYMENT OPPORTUNITY: COMPLAINT CASELOADS RISING, WITH EFFECTS OF NEW REGULATIONS ON FUTURE TRENDS UNCLEAR 11 (1999).
[81] U.S. GEN. ACCT. OFF., HEHS-94-32, EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHARGES CALL FOR NEW APPROACH 9 (1994).
[82] U.S. GEN. ACCT. OFF., GGD-98-157BR, EQUAL EMPLOYMENT OPPORTUNITY: RISING TRENDS IN EEO COMPLAINT CASELOADS IN THE FEDERAL SECTOR 53 (1998).
[83] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable Edmund S. Muskie, United States Senate 3 (July 1, 1975).
[84] U.S. GEN. ACCT. OFF., GGD-81-57, IMPLEMENTATION: THE MISSING LINK IN PLANNING REORGANIZATIONS 8 (1981).

experience with the agency. A period of reduced productivity usually resulted as the new employees adjusted to the agency and its workload.[85]

These problems were particularly acute when it came to investigation and hearings.[86] EEOC AJs typically were hired at a grade lower than similar officials in other agencies,[87] and their case intake each year usually increased, sometimes by as much as 31 percent.[88] A lack of support staff to support the rising caseload meant that AJs spent time on clerical tasks such as copying files, filing documents, and preparing closed case files for mailing.[89] As a result, the agency regularly lost quality AJs to other agencies where the pay was greater and the workload was less.[90]

Not only has the sheer number of resources contributed to backlogs and delays, historically, EEOC has had problems with the strategic allocation of those resources.[91] When EEOC first began operations, the agency's investigators were not properly trained to investigate employment discrimination.[92] A lack of skill and training in investigations and EEOC decision-making, including among its AJs, has contributed to backlogs and delays.[93]

C. Agency Leadership

Not only did a lack of resources contribute to problems in timeliness at EEOC, but frequent turnover and vacancies in senior positions created disruption in agency operations.[94] For example, during its first five years of operation, EEOC had four different Chairs, six executive directors, seven directors of the Office of Compliance, and six general counsels.[95] With each change in these management positions, the agency's effectiveness was hampered. New agency leaders tended to bring in their own key staff personnel and had to get acquainted with agency

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[85] U.S. GEN. ACCT. OFF., B-175042, REVIEW OF SELECTED ACTIVITIES OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DISTRICT OFFICE IN MEMPHIS 11 (1973).
[86] David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 6 (2003).
[87] Michaelle E. Williams, *Getting the Fox out of the Chicken Coop: The Movement towards Final EEOC Administrative Judge Decisions*, 1999 ARMY LAW. 13, 24-25 (1999).
[88] U.S. GEN. ACCT. OFF., GGD-98-157BR, EQUAL EMPLOYMENT OPPORTUNITY: RISING TRENDS IN EEO COMPLAINT CASELOADS IN THE FEDERAL SECTOR 53 (1998).
[89] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 13 (2009).
[90] Michaelle E. Williams, *Getting the Fox out of the Chicken Coop: The Movement towards Final EEOC Administrative Judge Decisions*, 1999 ARMY LAW. 13, 24-25 (1999).
[91] *E.g.*, Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 261 (1983).
[92] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 673-74 (2005).
[93] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 15 (2009).
[94] Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 325 (2001).
[95] Cornelius J. Peck, *Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831, 847 (1976).

processes.[96] They also inevitably reorganized some of those processes, authorized new studies of EEOC's problems, and made major policy and/or program strategy changes.[97]

In the wake of such change, organizational problems resulted due to confusion and infighting over the roles and authority of key policymaking and management personnel.[98] Each new policy adopted by leadership reflected a change in the agency's strategic priorities, causing new workload and management challenges.[99]

D. Case Management

In part because of poor agency leadership, in its earliest years, EEOC did not have internal processes in place either to collect and analyze data on the charges it received[100] or to standardize procedures for investigators, conciliators, and litigators within the agency.[101] The lack of both contributed to problems in timeliness in adjudication.

A lack of quality data on its caseload meant that EEOC leadership did not have a good sense of its caseload or operating costs.[102] For example, in 1973, 22 out of 32 field offices produced data on their caseloads that had 20 percent or greater discrepancies in their counts of open charges.[103] Because of a lack of information about intake, the allocation of staff across most offices was skewed. Regional offices with large caseloads had the same staff resources, both in raw numbers and in balance between professional and clerical staff, as those with small caseloads.[104] Misallocation of resources resulted in varying levels of backlogs and delays across the agency.

The wide variation in backlogs and delays across offices at EEOC also resulted from a lack of procedural clarity and guidance. Early in the agency's existence, headquarters did not reinforce the importance of uniform decision-making across districts or provide feedback to management and personnel in field offices.[105] While the agency has taken steps to promote consistency across offices, variation in practice is still a problem and field offices report widely

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[96] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 60-61 (1976).
[97] *Id*.
[98] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 678 (2005).
[99] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 31 (2000).
[100] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (1976).
[101] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 679 (2005).
[102] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (1976).
[103] *Id*. at 11.
[104] *Id*. at 36-37.
[105] *Id*. at 33.

different processing times and procedures. For example, in 2021, the average case processing time for an office ranged from a low of 132 days to a high of 597 days.[106]

Both a lack of quality data and variation in practice affect how cases move through the system. For example, in the 1970s, the investigative process was the primary cause of EEOC's backlogs and delays.[107] Poor screening at intake resulted in many incomplete and unmeritorious claims being formally filed as charges.[108] There was also a problem with duplicate charges. Improperly trained intake personnel would sometimes establish separate files when EEOC received new material on cases for which files already had been established.[109] In 1982, it was estimated that as many as 10 percent of files awaiting attorney action were, in fact, duplicates.[110] These problems were made worse by the fact that EEOC had no system in place for ascertaining the viability of long-pending charges without investigation.[111]

The agency's problems were even greater when processing federal complaints. Like with its own personnel and processes, EEOC failed to provide procedural clarity and guidance to other federal agencies working in the EEO system who handled charges.[112] This led to inconsistencies in decision-making across the federal government.[113] Additional questions were raised regarding potential conflict of interests when agencies conducted their own investigations and when those responsible for carrying out those programs did not effectively communicate relevant information to parties in a timely manner.[114]

Not only did a lack of clear guidelines and procedures contribute to problems in case processing, but there was also a lack of accountability for poor performance among some who worked in the agency. Without an effective performance management system in place, there appeared to be no consequences for agency officials who failed to adhere to EEOC policies and procedures.[115] Additional problems arose among AJs, whose work was not systematically monitored or assessed.[116]

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[106] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 12 (2022).
[107] Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 243 (1983).
[108] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 18 (1976).
[109] U.S. GEN. ACCT. OFF., FPCD-82-68, INQUIRY INTO ALLEGED OPERATING AND MANAGEMENT PROBLEMS IN EEOC'S OFFICE OF REVIEW AND APPEALS 3 (1982).
[110] *Id*.
[111] U.S. GEN. ACCT. OFF., B-175042, REVIEW OF SELECTED ACTIVITIES OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DISTRICT OFFICE IN MEMPHIS 2 (1973)
[112] U.S. GEN. ACCT. OFF., HRD-76-147, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 54-57 (1976); U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 15 (2009).
[113] *Id*. at 15-16.
[114] *Id*. at 16.
[115] *Id*. at 11-13.
[116] *Id*. at 15.

E. Policy Environment

Throughout its history, EEOC has worked in a complex and politically charged policy environment. The agency's mission to advance equal opportunity for all was met with fierce opposition in some parts of the country. For example, in the 1960s, investigators in the South found derogatory remarks painted on their cars or were arrested for performing their jobs.[117] One investigator was even "gently urged" out of town by a pickup truck full of men with shotguns.[118] Not surprisingly, EEOC struggled to recruit personnel to work in these conditions.

Since that time, the concept of EEO has come to occupy an increasingly important place on the political agenda and in public discourse.[119] As EEO issues have received more attention, the agency has experienced a corresponding increase in workload.

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

EEOC consistently has worked to promote or improve timeliness. Measures that have helped the agency do so relate to (a) data and strategic planning, (b) public engagement, (c) case management, (d) task forces and pilot programs, and (e) information technology.

A. Data and Strategic Planning

Faced with an increasing workload over time, in recent decades, EEOC has emphasized the importance of collecting consistent and reliable data on both workplace discrimination and case processing.[120] For example, the agency collects records and reports on the employment status of protected groups in private employment.[121] These reports and studies, combined with other data on the labor market, have been an important tool for EEOC to identify patterns of discriminatory practices across the country and allocate resources accordingly.[122] Additionally, the agency now monitors office-level data to determine how long the intake process takes, identify trends across districts, and better determine whether EEOC is meeting its timeliness goals.[123]

Using this data, EEOC engages in more systematic strategic planning. In 1996, EEOC adopted a National Enforcement Plan which developed a three pronged approach to enforcement and required district offices to develop their own corresponding plans.[124] The goal was to enable

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[117] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 673-74 (2005).
[118] *Id*. at 674.
[119] Paul Burnstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC'Y REV. 355, 355 (1986).
[120] *EEO Data and Complaint Processing Problems: Hearing Before the Subcomm. On Civil Service, H. Comm. On Gov't Reform*, 106th Cong. 10-11 (2000) (statement of Michael Brostek, Associate Director, Federal Management and Workforce Issues, General Government Division).
[121] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 9 (2000).
[122] *Id*.
[123] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 22-23 (2022).
[124] *EEOC History: 1990-1999*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1990-1999 (last accessed Dec. 10, 2023).

agency investigators and litigators to focus their resources strategically and reduce backlogs and delays.[125] Three years later, the agency adopted a Comprehensive Enforcement Plan to maximize effective implementation of the National Enforcement Plan's policies.[126] Under the Comprehensive Enforcement Plan, EEOC integrated all facets of its work – from outreach, to development of charges, resolution, and litigation – so that investigators, attorneys, and other EEOC staff could more effectively communicate and assist each other with their work.[127] In 2012, EEOC issued its Strategic Enforcement Plan as a successor to these projects.[128]

EEOC continued its work toward data collection and strategic planning in 2015 when it adopted a research and data plan,[129] quality practices for effective investigations and conciliations,[130] and a communications and outreach plan.[131]

B. Public Engagement

Historically, when addressing timeliness concerns, EEOC has recognized the importance of education, outreach, and technical assistance to the public. EEOC receives many complaints that do not involve discriminatory practices, but instead reflect basic workplace communication problems.[132] By providing the public with information on EEOC's mission, processes, and jurisdiction, the agency can reduce the number of unmeritorious or incomplete charges filed. The need for information extends to employers. By providing employers with the knowledge about what constitutes discriminatory behavior, EEOC can help prevent discriminatory behavior and reduce the number of charges brought to the agency.

For example, in 1984, the agency began conducting seminars on EEO laws and responsibilities for employers and launched an "expanded presence" program shortly thereafter.[133] Under the latter program, EEOC field offices sent staff teams to targeted locations to provide employees with information, conduct counseling, and receive charges of discrimination.

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[125] U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 (2018).
[126] *EEOC History: 1990-1999*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1990-1999 (last accessed Dec. 10, 2023).
[127] *Id*.
[128] U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 (2018).
[129] EQUAL EMP. OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RESEARCH AND DATA PLAN (2015).
[130] EQUAL EMP. OPPORTUNITY COMM'N, QUALITY PRACTICES FOR EFFECTIVE INVESTIGATIONS AND CONCILIATIONS (2015).
[131] EQUAL EMP. OPPORTUNITY COMM'N, EEOC AGENCY-WIDE COMMUNICATIONS AND OUTREACH PLAN SEPTEMBER 2015 (2015).
[132] D. Aaron Lacy, *Alternative Dispute Resolution or Appropriate Dispute Resolution: Will ADR Help or Hurt the EEO Complaint Process*, 80 U. DET. MERCY L. REV. 31, 41 (2002).
[133] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 45 (2000).

C. Case Management

Throughout its existence, EEOC has experimented with different charge processing procedures to improve timeliness in its adjudicative process.

In 1970, EEOC implemented one of its first sets of agency-wide procedures designed to streamline internal reporting on investigation activities.[134] Then, in 1975, the agency experimented with an expedited charge processing procedure known as the "Thirty Day Turn-Around Project."[135] Recognizing that the investigation process largely contributed to EEOC's timeliness problems, the agency sought to reduce backlogs by streamlining the process, eliminating on-site investigations, and rendering determinations on minimal evidence. However, EEOC discontinued the project in the wake of criticism that the expedited procedures violated the rights of charging parties.[136]

EEOC then reallocated its resources to address backlogs in a more systematic manner without compromising quality. For example, the agency replaced the clerical staff originally in charge of case intake with professional staff who could more accurately screen complaints to eliminate those that were untimely and/or not within EEOC's jurisdiction.[137] The agency also reassigned personnel to backlogged cases and required supervisors to closely monitor the progress of those cases.[138] A major emphasis was placed on initial intake interviews and early fact-finding conferences with charging parties and respondents to identify meritorious complaints, promote settlement, and target systemic discrimination.[139]

Shortly thereafter, EEOC adopted its Rapid Charge Processing Program. Through the program, EEOC encouraged charging parties and respondents to negotiate quick, no-fault settlement agreements.[140] This program was largely successful in lowering the number of pending charges at the agency by increasing the number of cases that settled.[141] However, questions were raised over whether the program fostered a culture where cases with merit were settled too quickly and cheaply and cases without merit were settled for too much money.[142]

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[134] Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 244 (1983).
[135] U.S. GEN. ACCT. OFF., HRD-89-11, EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES 14 (1988).
[136] *Id*.
[137] U.S. GEN. ACCT. OFF., HRD-81-29, FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES 7 (1981).
[138] Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 246-47 (1983).
[139] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 28 (2000).
[140] *EEOC History: 1970-1979*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1970-1979 (last accessed Dec. 10, 2023).
[141] Anne Noel Occialino & Daniel Vail, *Why the EEOC (Still Matters)*, 22 HOFSTRA LAB. & EMP. L.J. 671, 681 (2005).
[142] Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 329 (2001).

In the 1980s, EEOC switched back to a policy that required full investigation and encouraged settlements only for the full amount of relief. [143] Additionally, in 1984, to ensure predictability in enforcement, every case in which a district director found that one or more EEO statutes had been violated was required to be submitted to the commission for litigation if settlement attempts failed.[144] To reinforce the importance of the new policy, EEOC adopted agency-wide performance standards that required each district to submit 24 cases to commissioners for litigation each fiscal year.[145] Not surprisingly, each of these changes required significant resources, slowed the agency's ability to process cases, and, as a result, EEOC's backlog grew.[146]

In 1995, EEOC adopted Priority Charge Handling Procedures to categorize and expedite its pending cases and allow the agency to focus its resources more strategically.[147] The new procedures revoked the policy of full investigation and categorized case handling based on the likelihood investigation would result in a determination of reasonable cause.[148] EEOC also issued a series of memos to senior field office managers stressing the importance of the program, and giving those managers more discretion and authority to dismiss cases.[149] The new policy helped reduce backlogs and delays in the agency's adjudication process, but some staff felt that the new categorization system prevented them from investigating charges as they would like.[150]

EEOC accomplished a further reduction in backlogs and delays in 1999 when it adopted a number of regulatory revisions to reduce caseloads and improve management of federal complaints.[151] These included allowing complainants to amend existing complaints and for the consolidation of two or more complaints by the same complainant. Within agencies, EEO staff were given the authority to dismiss cases in which there is an evidence of misuse of the complaint process. These changes led to an 18 percent reduction in charge inventory.[152]

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[143] Michel Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 14 (1996).
[144] U.S. GEN. ACCT. OFF., HRD-86-63FS, INFORMATION ON THE ATLANTA AND SEATTLE EEOC DISTRICT OFFICES 6 (1986).
[145] *Id.*
[146] U.S. GEN. ACCT. OFF., HRD-89-11, EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES 2 (1988); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 329 (2001).
[147] U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 (2018).
[148] GOV'T. ACCOUNTABILITY. OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 9-10 (2022); U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 (2018).
[149] GOV'T. ACCOUNTABILITY. OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 10 (2022).
[150] *Id*.
[151] *EEO Data and Complaint Processing Problems: Hearing Before the Subcomm. On Civil Service, H. Comm. On Gov't Reform*, 106th Cong. 8 (2000) (statement of Michael Brostek, Associate Director, Federal Management and Workforce Issues, General Government Division).
[152] *Id*.

A few years later, EEOC retained an independent contractor to review the Priority Charge Handling Procedures.[153] The resulting study concluded that implementation of the program was not consistent across the agency and that EEOC required more focused and extensive commitment to efficient and effective charge handling by management at headquarters and field offices. The agency then developed and communicated a series of best practices for internal agency management.

Finally, in 2013, EEOC designed and implemented a new case management system for federal complaints that go to hearing.[154] Like with the Priority Charge Handling Procedures, the new system for federal complaints involve early categorization of cases. The system also implemented a policy of conducting a conference with parties led by an AJ to set out how discovery will move a case to final resolution.

D. Task Forces and Pilot Programs

In adopting new case management procedures, EEOC consistently has used task forces and/or pilot programs to obtain information about how those procedures would affect agency operations. For example, in 1977, EEOC initially piloted its charge processing reforms in three field offices before implementing the reforms agency-wide.[155] When considering additional reforms in the early 1980s, EEOC established a task force to consider how those reforms would address the agency's backlogs and delays.[156] Similarly, the agency piloted its Alternative Dispute Resolution programs and online inquiry and appointment systems in field offices before expanding them to all offices.[157]

E. Information Technology

EEOC has recognized the importance of utilizing information technology to promote and improve timeliness in adjudication. In an early example, the agency established a toll-free number to enable callers anywhere in the country to contact the agency, connect with a field office, and receive information about the adjudicative process.[158]

EEOC's efforts to capitalize on advances in technology have been significant in the past decade. In 2012, the agency initiated two projects to use technology to streamline services and increase agency responsiveness to complainants.[159] The first project was an online tool for determining the status of a charge so complainants could determine where their charge was in the

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[153] *EEOC History: 2010-2019*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2010-2019 (last accessed Dec. 10, 2023).
[154] *EEOC History: 2010-2019*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2010-2019 (last accessed Dec. 10, 2023).
[155] Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 246 (1983).
[156] U.S. GEN. ACCT. OFF., FPCD-82-68, INQUIRY INTO ALLEGED OPERATING AND MANAGEMENT PROBLEMS IN EEOC'S OFFICE OF REVIEW AND APPEALS 3-4 (1982).
[157] *EEOC History: 1990-1999*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1990-1999 (last accessed Dec. 10, 2023); *EEOC History: 2010-2019*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2010-2019 (last accessed Dec. 10, 2023).
[158] EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 45 (2000).
[159] *EEOC History: 2010-2019*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-2010-2019 (last accessed Dec. 10, 2023).

administrative process. This reduced the number of inquiries to staff and freed up staff resources for investigation. The second project focused on providing employers with the ability to upload documents requested during the investigative process to the agency's online system. Both projects were operational by 2016. In 2019, EEOC expanded its public portal to federal complaints, again freeing EEOC staff resources and helping to address backlogs and delays in charge processing.[160]

The agency appointed its first Chief Data Officer in 2017 and established EEOC's first Data Governance Board in 2018.[161]

[160] *Id*.
[161] *Id*.

APPENDIX H:
FEDERAL ENERGY REGULATORY COMMISSION

This case study provides an overview of efforts to improve or promote timeliness at the Federal Energy Regulatory Commission (FERC). FERC is an independent agency established within the Department of Energy.[1] FERC regulates the transmission and wholesale sale of electricity and natural gas, as well as the transportation of oil by pipelines, in interstate commerce.[2] Additionally, the agency licenses non-federal hydropower projects and reviews proposals to build interstate natural gas pipelines, natural gas storage projects, and liquefied natural gas terminals.[3]

Part I provides an overview of FERC, its historical development, the types of cases it decides, and the process for adjudicating them. Part II describes timeliness as a value in FERC adjudication. Part III describes factors that have affected the timeliness of FERC adjudication. Part IV describes efforts by FERC to promote or improve timeliness.

I. BACKGROUND

A. The Program

FERC's mission is to assist consumers in obtaining reliable, safe, secure, and economically efficient energy services at a reasonable cost through appropriate regulatory and market means and collaborative efforts.[4] In pursuit of that mission, FERC engages in a variety of informal and formal adjudicative processes, including liquefied natural gas terminal permitting; natural gas pipeline and storage permitting; hydropower licensing; and enforcement of the Federal Power Act, Natural Gas Act, and Natural Gas Policy Act.[5]

B. The Agency

In 1920, Congress established the Federal Power Commission (FPC) to regulate the construction, operation, and maintenance of nonfederal hydroelectric power generation.[6] Shortly thereafter, the newly created FPC began providing licenses for hydropower facilities.

Initially, FPC was composed of the Secretaries of War, Interior, and Agriculture and the agency only was authorized to hire an executive secretary.[7] As a result, the agency's business was primarily performed by employees from the three executive departments headed by the FPC's leadership.[8] FPC's structure meant that leadership constantly changed and there was no

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[1] 42 U.S.C. § 7171(a).
[2] FED. ENERGY REGUL. COMM'N, FEDERAL ENERGY REGULATORY COMMISSION FY 2024 CONGRESSIONAL JUSTIFICATION 1 (2023).
[3] *Id*.
[4] Overview, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/what-ferc (last accessed Dec. 7, 2023).
[5] *FERC Processes*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/industries-data/resources/ferc-processes (last accessed Dec. 6, 2023).
[6] Federal Water Power Act § 4, 41 Stat. 1063 (1920).
[7] FED. POWER COMM'N, TWENTIETH ANNUAL REPORT OF THE FEDERAL POWER COMMISSION 3 (1941).
[8] *Id*.

core agency staff to provide continuity in agency operations.[9] Recognizing this problem, in 1928, Congress authorized FPC to hire an independent staff. As it did so, FPC also changed its hearing procedures to address the agency's burgeoning caseload.[10]

Congress adjusted the agency's structure and authority in 1930. The Federal Power Act established the FPC as an independent commission with five members appointed by the president and confirmed by the Senate.[11] FPC subsequently reorganized its commission staff and established regional offices in Atlanta, Chicago, Denver, New York City, and San Francisco.[12]

In 1935, Congress expanded FPC's jurisdiction to cover the electric power industry.[13] The Public Utility Holding Company Act gave the agency regulatory powers over interstate wholesale electric rates and over certain financial transactions of electric utilities engaged in interstate commerce. Three years later, Congress again expanded FPC's authority to include the planning of hydroelectric power at flood-control dams[14] and the regulation of the transportation and sale of natural gas in interstate commerce.[15]

The end of World War II brought changes to energy markets and an increase in pending cases before FPC. Some political discourse suggested that Congress would abolish the agency and that the Departments of Commerce and Interior would absorb its functions due to FPC's lack of expertise on energy production and its backlogged caseload.[16] Steadily declining appropriations to the agency perpetuated these rumors.

In 1954, FPC's caseload significantly increased due to a Supreme Court decision that expanded the agency's jurisdiction over natural gas pipelines and producers.[17] By 1960, FPC estimated it would take the agency *until 2043* to catch up on its adjudicative caseload, even if FPC staff tripled in size.[18] Simply explained in Senate hearings on the issue, "The Federal Power Commission without question represents the outstanding example in the federal government of the breakdown of the administrative process."[19]

FPC's problems further accumulated in 1965 and 1967, when over 30 million people experienced historic blackouts.[20] The blackouts highlighted the demand for additional power, leading to a large increase in new project applications filed with the agency.

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[9] Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission*, 1920-1977, 4 FED. HIST. 61, 73 (2012).
[10] *Id*. at 65.
[11] Pub. L. No. 71-412, 46 Stat. 797 (1930).
[12] *A Salute: 75 Years for the FPC and FERC*, 16 ENERGY L.J. 293, 294 (1995).
[13] Pub. L. No., 74-333 (1935).
[14] Pub. L. No. 75-761, 52 Stat. 1215 (1938).
[15] Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (1938).
[16] Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission*, 1920-1977, 4 FED. HIST. 61, 70 (2012).
[17] Phillip's Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954)
[18] Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission*, 1920-1977, 4 FED. HIST. 61, 64 (2012).
[19] JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, S. COMM. ON THE JUDICIARY 54 (Comm. Print 1960).
[20] *Id*. at 76.

Energy shortages and FPC backlogs continued into the 1970s. The U.S. House of Representatives complained that FPC had exhibited a "conscious disregard" of its responsibilities[21] and even FPC's Chairman acknowledged in a 1977 Senate hearing that the agency appeared to be "completely discredited."[22]

In response to calls for a more coherent and strategic national energy policy, Congress enacted the Department of Energy Organization Act in 1977.[23] The Act established the Department of Energy (DOE) and, within DOE, the Federal Energy Regulatory Commission. Most FPC functions and staff were transferred to FERC and FPC ceased to exist.[24] Like FPC, Congress designed FERC as an independent regulatory commission led by five commissioners appointed by the president and confirmed by the Senate. FERC commissioners served fixed terms and the president's ability to remove the commissioners was limited but for cause.

Congress adjusted FERC's authority in 1978 with the Natural Gas Policy Act[25] and the National Energy Act.[26] Notably, the latter Act included the Public Utility Regulatory Policies Act and created a market for power from non-utility power producers and encouraged the development of hydroelectric power. Not surprisingly, FERC's adjudicative caseload subsequently increased, reflecting these statutory changes in authority.

In its initial formulation of the agency, Congress specifically withheld from the agency jurisdiction over imports and exports of electricity or natural gas and reserved that authority for DOE. However, in 1984, DOE delegated jurisdiction over those matters to FERC.[27]

Two years later, Congress enacted the Electric Consumers Protection Act.[28] This Act required FERC to adopt new environmental conservation considerations in licensing and acknowledged the increased workload the new requirements imposed upon the agency. To compensate for this and other adjustments to the agency's jurisdiction, Congress authorized FERC to begin collecting annual fees and charges to equal its operating costs.[29]

The next few years of FERC's existence were marked by additional changes to the agency's jurisdiction.[30] The Energy Policy Act of 1992, *inter alia*, adjusted the agency's authority over natural gas imports and exports and electric markets.[31] Through a series of orders

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[21] *Federal Regulation and Regulatory Reform Before the Subcomm. on Oversight and Investigations of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong., 2nd Sess. 420 (1976).
[22] *Department of Energy Organization Act, Hearings on S.826 Before the S. Comm. on Gov't Affairs*, 95th Cong. 1st Sess. 167 (1977).
[23] Pub. L. No. 95-91, 91 Stat. 565 (1977).
[24] A small amount of FPC authority was transferred to the Interstate Commerce Commission. *Id*.
[25] Pub. L. No. 95-621, 92 Stat. 3352 (1978)
[26] Pub. L. No. 95-617, 92 Stat. 3117 (1978)
[27] Dep't of Energy, Delegation Order No. 0204-112, 49 Fed. Reg. 6684 (Feb. 22, 1984). This order was renewed in 2006. Dep't of Energy, Delegation Order No. 00-004.00a (May 16, 2006).
[28] Pub. L. No. 99-495, 100 Stat. 1250 (1986).
[29] Pub. L. No. 509, 100 Stat. 1890 (1986). The Electric Consumers Protection Act laid the foundation for this authority.
[30] *E.g.*, Pub. L. No. 101-60, 103 Stat. 157 (1989) (eliminating certain natural gas certification requirements). This act was, in large part, a response to the Supreme Court's 1954 Phillp's Petroleum decision regarding wellhead price regulation.
[31] Pub. L. No. 102-486, 106 Stat. 2782 (1992)

in the late 1990s, FERC then dramatically expanded its own authority to oversee electric utilities.[32]

In the early 2000s, power shortages occurred on both the east and west coasts, putting additional pressure on FERC operations. In 2000 and 2001, California experienced extraordinarily high wholesale electric prices and gas costs, driven by a combination of soaring demand, generation failures, flawed electric power market rules, and market manipulations.[33] The resulting power shortage was so severe that Secretary of Energy Bill Richardson issued a rare emergency order – subsequently extended by Bush Administration Secretary Spencer Abraham – requiring out-of-state power suppliers to generate, deliver, and transmit electric energy as needed to address the crisis.[34] Then, in 2003, approximately 50 million customers in the northeastern United States and southern Canada experienced the largest electrical blackout ever suffered in North America.[35] Bi-national investigations into the event found that the causes of the outage were similar to previous electric crises and that, without significant policy change, the United States could expect an increased number of large-scale events.[36]

In large part as a response to these crises, Congress passed the Energy Policy Act of 2005, which amended the Federal Power Act, Natural Gas Act, and Natural Gas Policy Act to give FERC new and exclusive licensing, regulatory, and enforcement authority across the energy market.[37] This expanded authority subjected a host of new transactions and actors to federal regulation and, predictably, increased FERC caseloads.[38]

Currently, FERC is composed of give members, not three of whom shall belong to the same political party, appointed by the president, by and with the advice and consent of the Senate.[39]

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[32] Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888 (1996); Open-Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889 (1996); Regional Transmissions Organizations, Order No. 2000 (2000). *See also* Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L.REV. 1783 (2016); Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1 (2005).

[33] Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-000.

[34] *See* Department of Energy, *Amended Order Pursuant to Section 202(c) of the Federal Power Act* (January 17, 2001) for specific description.

[35] Peter Fox-Penner, *A Year Later, Lessons from the Blackout*, N.Y. TIMES (Aug. 15, 2004).

[36] DEPARTMENT OF ENERGY, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS (2004), *available at* https://www.energy.gov/sites/default/files/oeprod/DocumentsandMedia/BlackoutFinal-Web.pdf; DEPARTMENT OF ENERGY, FINAL REPORT ON THE IMPLEMENTATION OF THE TASK FORCE RECOMMENDATIONS (2006), *available at* https://www.energy.gov/sites/default/files/oeprod/DocumentsandMedia/BlackoutFinalImplementationReport.pdf.

[37] Michael D. Hornstein & J.S. Gebhart Stoermer, *The Energy Policy Act of 2005: PURPA Reform, the Amendments and Their Implications*, 27 ENERGY L.J. 364 (2006); Todd Mullins & Chris McEachran, *Adjudication of FERC Enforcement Cases: See You in Court*, 36 ENERGY L.J. 261 (2015).

[38] Jacob Dweck, David Wochner & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation after the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY J.L. 473 (2006); Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in Energy Markets after the Energy Policy Act of 2005*, 27 ENERGY L.J. 364 (2006).

[39] 42 U.S.C. § 7171.

Members hold office for staggered terms of five years and may be removed by the president only for inefficiency, neglect of duty, and malfeasance in office.[40] The president designates one of these members as Chair.[41]

The agency maintains headquarters in Washington, DC and has regional offices in Atlanta, Chicago, New York, Portland, and San Francisco. Approximately 13 percent of FERC staff work in these regional offices and the rest work within 13 different offices at headquarters.[42]

C. The Adjudication Process

Due to the extent of its permitting, licensing, and enforcement operations, FERC does not have one, single adjudicative process. Each of its programs operate in different ways and have different procedures for pre-application, application, and post-filing activities within those programs.[43]

For example, FERC's adjudicative process for enforcing provisions of the Federal Power Act begins with a compliance order, includes notice of proposed penalty, involves a hearing before an administrative law judge (ALJ), provides for parties to filing with the Commission exceptions to the initial decision, allows for rehearing, and specifies procedures for payment of the penalty.[44] FERC's hydropower licensing processes contain procedures related to the pre-filing (including requests and approval to use traditional or alternative processes), require consultation with external stakeholders and other federal, state, and local agencies, provide for the issuance of a commission order, and involve post-order compliance inspections[45]

Additionally, FERC conducts administrative hearings for contested proceedings and rate cases and maintains four primary processes for doing so.[46] FERC administrative law judges (ALJs) resolve contested cases as directed by the commission, either by serving as a presiding judge, conducting a hearing, developing a record, rendering an initial decision, or by serving as a settlement judge and facilitating a negotiated resolution by settlement.[47]

This case study does not focus on any one program or process. Instead, it reflects on FERC's experiences pursuing timeliness in adjudication across all programs.

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[40] *Id*.
[41] *Id*.
[42] *Offices*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/offices (last accessed Dec. 6, 2023); *FedScope*, OFF. OF PERS. MGMt., https://www.fedscope.opm.gov (last accessed Dec. 6, 2023).
[43] *FERC Processes*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/industries-data/resources/ferc-processes (last accessed Dec. 6, 2023).
[44] *Federal Power Act (FPA) Part I Penalty Assessment*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/media/federal-power-act-fpa-part-i-penalty-assessment (last accessed Dec. 8, 2023).
[45] *Processes for Hydropower Licenses*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/media/applicants-pre-filing-process (last accessed Dec. 8, 2023).
[46] *Id*.
[47] *Office of Administrative Law Judges*, FED. ENERGY REGUL. COMM'N, https://cms.ferc.gov/office-administrative-law-judges-oalj (last accessed Dec. 6, 2023).

II. TIMELINESS AS A VALUE IN FERC ADJUDICATION

The pursuit of timeliness in adjudication is a guiding principle at FERC.[48] FERC pursues this principle alongside other values such as organizational excellence, due process and transparency, regulatory certainty, and stakeholder involvement.[49] In performing its core functions, the agency seeks to analyze and act on filings, applications, and inspections in a fair, clear, and timely manner.[50]

III. FACTORS AFFECTING TIMELINESS

Across its history, a variety of factors have made it difficult for FERC to conduct adjudication in a manner that is timely and predictable.[51] These factors include problems stemming from (a) program startup and jurisdictional expansions; (b) agency and program structure; (c) agency resources; and (d) hearings.

A. Program Startup and Jurisdictional Expansions

Upon its creation, FERC inherited a tremendous backlog from FPC. Towards the end of the life of FPC, the agency received a record number of electric, hydroelectric, and natural gas cases.[52] For example, in the last ten years of FPC's existence, its caseload in natural gas pipeline application rate filings alone increased over 100 fold.[53] Not only did the volume of cases across the agency's adjudicative processes increase, but the cases grew more complex and were more vigorously contested.[54] Furthermore, and in part due to this complexity, utilities, intervenors, and even FPC staff regularly filed for – and FPC regularly granted – time extensions before, during, and after hearings.[55]

In addition, FERC inherited many of the managerial and resource problems that had plagued FPC. The agency, including the technical bureaus responsible for investigating cases, was woefully understaffed and had difficulty addressing all cases within its jurisdiction.[56] In an attempt to save itself from being decommissioned in the 1970s, FPC rushed to implement changes to its organizational structure, records and case management, and general workflow.[57] However, this implementation came without the necessary planning, hamstrung the agency, and

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[48] FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN: FISCAL YEARS 2022-2026 4 (2022); FED. ENERGY REGUL. COMM'N, FY 2024 CONGRESSIONAL JUSTIFICATION 2 (2023).
[49] FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN: FISCAL YEARS 2022-2026 4 (2022).
[50] *Id*. at 7-8; 25-26.
[51] *See, e.g*., FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 48 (2021).
[52] U.S. GEN. ACCT. OFF., EMD-76-9, MANAGEMENT IMPROVEMENTS NEEDED IN THE FEDERAL POWER COMMISSION'S PROCESSING OF ELECTRIC RATE-INCREASE CASES iv-v (1976).
[53] Richard J. Pierce, Jr., *The Choice between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 2 (1979).
[54] *Id*.
[55] U.S. GEN. ACCT. OFF., EMD-76-9, MANAGEMENT IMPROVEMENTS NEEDED IN THE FEDERAL POWER COMMISSION'S PROCESSING OF ELECTRIC RATE-INCREASE CASES 18 (1976)
[56] *Id*. at 15.
[57] Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission*, 1920-1977, 4 FED. HIST. 61, 81-82 (2012).

contributed further to backlogs and delays in adjudication. As a result, after the first year of FERC's existence, some cases had been pending for over 17 years.[58]

At the time, FERC Chair Charles B. Curtis described the backlog of cases "unpenetrable."[59] Matters were complicated further by the fact that the volume of cases filed with FERC in the initial years of the agency's existence were much greater than projected.[60] Additionally, DOE's delegation of authority over natural gas or electricity imports and exports to FERC and FERC's own actions to close regulatory loopholes added to its caseload and led to an associated increase in its timeliness problems.[61]

B. Agency and Program Structure

FERC's structure as an independent agency within DOE initially presented a number of difficult issues regarding the two entities' jurisdiction and roles. During the first decade of FERC's existence, the President, Secretary of Energy, and Commission faced problems related to the agencies' overlapping (and at times conflicting) responsibilities, staffing, and FERC's position as an independent agency within an executive department.[62]

Issues over FERC's management of personnel exemplify these early struggles. As FERC worked to hire new employees who could help address the agency's existing backlogs and increasing caseload, disagreements arose between the DOE and FERC over the employees' appropriate job descriptions and grade levels, including the educational backgrounds required of new hires in various positions. Statutory law provided FERC with the authority to establish policies to achieve effective staff operations, and this included the authority to overrule DOE employee classifiers. However, FERC was reticent to create tensions through the use of this authority and delays in filling key staff positions resulted.[63]

While organizational issues such as these largely have resolved themselves over time, FERC still faces significant challenges related to coordination with other agencies. Many of its licensing and permitting programs overlap jurisdictional authority with other federal, state, and local agencies.[64] Not only do these programs require FERC to work extensively and

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[58] U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION i (1980)
[59] Richard J. Pierce, Jr., *The Choice between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 3 (1979).
[60] *E.g.*, U.S. GEN. ACCT. OFF., EMD-80-30, HYDROPOWER – AN ENERGY SOURCE WHOSE TIME HAS COME AGAIN 28 (1980).
[61] Dep't of Energy, Delegation Order No. 0204-112 (Feb. 22, 1984); U.S. GEN. ACCT. OFF., RCED-83-3, NEED TO REVISE ELIGIBILITY CRITERION FOR ONE NATURAL GAS PRICE CATEGORY AND ELIMINATE BACKLOG IN REFUND CONTROL WORK iii (1983).
[62] Edward J. Grenier Jr. & Robert W. Clark II, *The Relationship between DOE and FERC: Innovative Government or Inevitable Headache*, 1 ENERGY L.J. 325, 340-442 (1980).
[63] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 3-4 (Dec. 18, 1979)
[64] U.S. GEN. ACCT. OFF., EMD-80-30, HYDROPOWER – AN ENERGY SOURCE WHOSE TIME HAS COME AGAIN 24 (1980).

collaboratively with these agencies, but the agencies often are plagued by their own timeliness issues.

Simply, backlogs at other federal and state agencies play a role in the timeliness of adjudication at FERC.[65] For example, statutory mandates in FERC's hydropower program require state water quality certifications and federal agencies' biological opinions on fish and wildlife.[66] If there are delays in the submission of these certifications and studies, FERC's adjudicative process also suffers from delay. Similarly, poor interagency coordination and delays in the initiation and preparation of environmental impact statements across programs have significant effects on FERC's ability to process cases efficiently and effectively.[67]

Much of FERC's substantive jurisdiction involves licensing, permitting, and rate cases that depend on site-specific evaluations. This requires FERC to be sensitive to regional differences and can add to the time it takes for the agency to process cases, particularly in new and emerging policy areas.[68] Delays frequently occur in complex or controversial cases that involve overlapping federal, state, and local problems that may not be readily identifiable without extensive investigation.[69]

To that end, timeliness in FERC adjudication often depends on the parties themselves. Early in its existence, the agency received a large number of deficient or incomplete applications as a result of inexperienced applicants. FERC's failure to specify the data required to accompany an application or adhere to deadlines for applicant supplemental responses and staff review added to backlogs and delays.[70] At the same time, the agency was quite lenient in granting interventions and generally permitted any party with a reasonable concern in a case to intervene.[71] This policy added significantly to case processing time, as intervenors would introduce large amounts of evidence and raise new issues. There were also instances of parties intentionally filing incomplete applications so FERC's technical staff would begin review as soon as possible.[72]

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[65] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 56-57 (2021).
[66] FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN FY 2014-2018 57 (2014).
[67] U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION ii (1980)
[68] U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION 24 (1980).
[69] *E.g.*, FED. ENERGY REGUL. COMM'N, FISCAL YEAR 2017 CONGRESSIONAL PERFORMANCE BUDGET REQUEST AND FISCAL YEAR 2015 ANNUAL PERFORMANCE REPORT 27 (2016).
[70] U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION ii, 18 (1980)
[71] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 14-15 (February 13, 1979)
[72] U.S. GEN. ACCT. OFF., EMD-80-54, ADDITIONAL MANAGEMENT IMPROVEMENTS ARE NEEDED TO SPEED CASE PROCESSING AT THE FEDERAL ENERGY REGULATORY COMMISSION 19 (1980).

Strategic activity by parties who appear before FERC has continued through the present. Dilatory tactics related to the provision of information required to enable FERC investigations are well documented.[73]

C. Agency Resources

In part because of its complicated structural history and repeated jurisdictional expansions, FERC historically has suffered from a lack of human, financial, and technological resources. At different times and in different ways, this lack of resources has limited FERC's ability to process cases in an efficient and effective manner.

For example, in FERC's early years, the agency employed a priority hiring system that classified employee vacancies into three categories – those related to fulfilling new statutory requirements, those related to reducing existing backlogs, and "other" vacancies.[74] While laudable, the agency failed to account for its need for support staff in the first two categories. Support staff for ALJs and those working in the agency's Office of Opinions and Reviews constituted as "other" vacancies.[75] As a result, even when FERC hired new personnel to reduce existing backlogs, those employees were unable to process cases in a timely manner because of limited staff support.

Currently, despite relatively effective strategic planning, staff shortages continue to plague the agency. In part, this is due to practical realities of the labor market in the energy sector.[76] Organizations in both the public and private sector have had challenges in hiring qualified candidates, either because of the absence of applicants for open positions or because applicants lacked the relevant training and experience.

Like personnel constraints, FERC also suffers from limitations in its information technology resources. Some of the agency's legacy systems require expensive, resource-intensive solutions to maintain and update them so they can perform adequately. Without these updates, FERCs ability to make data-driven decisions to support its mission and to process cases in a timely manner is limited.[77]

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[73] *E.g.*, John S. Moot, *A New FERC Policy for Electric Utility Mergers*, 17 ENERGY L.J. 139, 155 (1996); Allison Murphy, Todd Hettenback & Thomas Olson, *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 302-03 (2014).
[74] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 5 (Dec. 18, 1979).
[75] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 3-4 (Dec. 18, 1979).
[76] Miranda Willson, *FERC Policy Chief Frets About Agency's Staff Openings*, E&E NEWS (Sept. 30, 2022), https://www.eenews.net/articles/ferc-policy-chief-frets-about-agencys-staff-openings/.
[77] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 5-6 (2021).

D. Hearings

Historically, even when FERC has taken action to improve case processing in other respects, a major source of delay in the agency's adjudicative processes results from those cases that require a full hearing.[78]

Like many agencies, FERC has struggled with timeliness resulting from variation in ALJs' efficiency and effectiveness in managing their caseloads.[79] While FERC has developed tools to monitor the progress of cases through the adjudicative process and evaluate the performance of most agency personnel, the agency's ability to correct the performance of individual ALJs is limited.

Contemporary evolutions in administrative jurisprudence also present challenges for FERC's employment of ALJs,[80] as well as for the agency's hearing and rehearing procedures more generally. For example, as a matter of practice, FERC acted on requests for rehearing by issuing delegated orders (called tolling orders) to extend the time allowed for the commission to consider the merits of a rehearing request and prepare orders addressing the issues raised in the case. However, in 2020, the D.C. Circuit Court of Appeals issued a decision questioning whether tolling orders satisfy certain requirements for action under the Natural Gas Act.[81] After this decision, FERC had to rework its procedures and practices to ensure the commission resolved requests for rehearing in a timely manner.[82]

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

Across time, FERC consistently has worked to balance the often competing demands of timeliness and due process.[83] The array of adjudicative activity in which FERC engages makes pursuit of timeliness at the agency a complex endeavor. While each FERC program strives for efficiency and effectiveness, the processes by which the programs encourage adjudication in a timely and thorough manner vary.[84] For example, FERC has established time targets for each programs' adjudicative processes. These targets differ, as they take into consideration the type of documents required for processing, the extent to which that processing is electronic, the degree

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[78] U.S. GEN. ACCT. OFF., RCED-83-51, FEDERAL ENERGY REGULATORY COMMISSION HAS EXPEDITED CASE PROCESSING; ADDITIONAL IMPROVEMENTS NEEDED 10; 29 (1983)

[79] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 1 (February 13, 1979).

[80] *E.g.*, Axon Enterprise v. Federal Trade Commission, 598 U.S. 175 (2023) (challenging the constitutionality of enforcement actions by the FTC involving ALJs). Similar challenges have been raised against FERC's enforcement activities.

[81] Allegheny Defense Project v. FERC, 964 F.3d 1 (D.C. Cir. 2020).

[82] FED. ENERGY REGUL. COMM'N, FY 2024 CONGRESSIONAL JUSTIFICATION 87 (2023).

[83] *E.g.*, FED. ENERGY REGUL. COMM'N, FISCAL YEAR 2019 CONGRESSIONAL PERFORMANCE BUDGET REQUEST AND FISCAL YEAR 2017 ANNUAL PERFORMANCE REPORT 40 (2016); FED. ENERGY REGUL. COMM'N, PERFORMANCE & ACCOUNTABILITY REPORT, FISCAL YEAR 2014 16 (2014); FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN FY 2014-2018 18 (2014).

[84] FED. ENERGY REGUL. COMM'N, FISCAL YEAR 2018 CONGRESSIONAL PERFORMANCE BUDGET REQUEST AND FISCAL YEAR 2016 ANNUAL PERFORMANCE REPORT 29 (2017).

of control FERC staff can exercise to encourage speedy action, and statutory or other deadlines for decision-making.[85]

Despite the variation in its adjudicative processes, FERC's experience in working to promote or improve timeliness in adjudication suggest several measures have been effective across time. These include (a) data and emphasis of the importance of timeliness; (b) the use of task forces and stakeholder engagement; (c) pre-filing assistance; (d) filing procedures and preliminary process; (e) hearing and settlement procedures.

A. Data and Emphasis of the Importance of Timeliness

Historically, two basic strategies have worked to improve timeliness in adjudication at FERC.[86] First, the agency has made concerted efforts to identify the actual size and types of backlogs and delays system-wide.[87] Since the transition from FPC to FERC, the agency has utilized management information systems and electronic databases for workload tracking, gathering and reporting timeliness data, and scheduling monthly workload review meetings.[88] Additionally, the agency has recognized the importance of regular review of its data collection procedures and revision of how cases are tracked through the system.[89]

Second, as a whole, the agency has stressed the importance of timeliness as a core value in all levels of management. This has required agency leadership to plan strategically and set timeliness goals, develop measures of performance that include timeliness as part of evaluation for both employees and FERC itself, and (where appropriate) hold managers accountable for backlogs and delays. Even in its nascent years as an agency, FERC used workload simulation models to forecast future caseloads in conjunction with various levels of resources in order to provide management with tools for long-term planning.[90]

Currently, FERC regularly collects and analyzes performance data and then applies logic modeling to develop measures of performance through strategic planning.[91] The agency's procedure manuals define the purpose of the performance measures, explain their interpretation, and identify external factors that may impact performance. The manuals also specify requirements for performance data collection and storage, data quality controls, and reporting.

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[85] *E.g.*, FED. ENERGY REGUL. COMM'N, FISCAL YEAR 2019 CONGRESSIONAL PERFORMANCE BUDGET REQUEST AND FISCAL YEAR 2017 ANNUAL PERFORMANCE REPORT 40 (2018); FED. ENERGY REGUL. COMM'N, PERFORMANCE & ACCOUNTABILITY REPORT, FISCAL YEAR 2014 16, 27 (2014); FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN FY 2014-2018 18 (2014).

[86] U.S. GEN. ACCT. OFF., AFMD-84-8, FERC CAN IMPROVE ITS OPERATIONAL PERFORMANCE BY BROADENING AND DEPENDING CURRENT MANAGEMENT EFFORTS 2-3 (1984).

[87] U.S. GEN. ACCT. OFF., RCED-83-3, NEED TO REVISE ELIGIBILITY CRITERION FOR ONE NATURAL GAS PRICE CATEGORY AND ELIMINATE BACKLOG IN REFUND CONTROL WORK 29 (1983).

[88] Mark L. Kerrigan, *Decision Making in the Management of Energy Regulation*, 39 PUB. ADMIN. REV. 553, 553 (1979).

[89] U.S. GEN. ACCT. OFF., RCED-93-168, ELECTRICITY REGULATION: FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS 8 (1993).

[90] Mark L. Kerrigan, *Decision Making in the Management of Energy Regulation*, 39 PUB. ADMIN. REV. 553, 554 (1979)

[91] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 113 (2021).

FERC's collection and analysis of performance data has occurred alongside the agency's efforts to automate and integrate a significant number of its manual processes. Even in areas that seemingly are unrelated to adjudication (e.g., financial management software), automation improves overall agency operations and can free up resources for FERC to use to improve timeliness.[92]

B. Task Forces and Stakeholder Engagement

In pursuit of timeliness in adjudication, FERC has used a variety of methods to engage with stakeholders both within and outside of the agency. Recognizing the importance of communication and information sharing, FERC has proactively engaged with Congress, government agencies at both the federal and state level, regulators and regulated entities, the international community, and other interested persons.[93]

This engagement has had the dual purpose of helping facilitate timeliness in FERC's adjudicative processes and working to promote best practices. For example, the agency's outreach to facility owners and operators, as well as state commissions that have jurisdictional oversight of energy infrastructure, have provided FERC with key information on the effectiveness of its adjudicative processes.[94] Similar outreach to entities engaged with wholesale electricity markets has helped the agency work with those entities to ensure proper compliance with legal standards and provide guidance and training regarding how to navigate FERC processes.[95]

Additionally, FERC has a long history of utilizing task forces and technical conferences to recommend and develop strategies for improving timeliness in adjudication. In the last years of FPC's existence before the transition to FERC, FPC created a task force to develop and recommend new procedures to streamline processing of electric rate cases, eliminate backlogs, and prevent further issues of delay.[96] After the agency instituted the procedures recommended by the task force, each member of the task force was assigned a group of legal and technical staff with whom to work closely in implementing the new procedures. This strategy continued as FPC operations were transferred to FERC, particularly with respect to agency actions designed to expedite settlement of existing caseloads.

FERC regularly uses task forces and technical conferences in the contemporary era. For example, the Joint Federal-State Task Force on Electric Transmission has focused on how to navigate shared federal-state regulatory authority and processes.[97] Additionally, FERC routinely holds technical conferences on both substantive and procedural issues related to adjudication. In the past year, FERC's conference schedule has included a workshop on the fundamentals of

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[92] *See* FED. ENERGY REGUL. COMM'N, FY 2024 CONGRESSIONAL JUSTIFICATION 74 (2023); FED. ENERGY REGUL. COMM'N, FY 2024 CONGRESSIONAL JUSTIFICATION 72 (2022).
[93] FED. ENERGY REGUL. COMM'N, FY 2021 CONGRESSIONAL JUSTIFICATION 99-104 (2020).
[94] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 72-73 (2021).
[95] FED. ENERGY REGUL. COMM'N, FY 2024 CONGRESSIONAL JUSTIFICATION 20 (2023).
[96] U.S. GEN. ACCT. OFF., EMD-76-9, MANAGEMENT IMPROVEMENTS NEEDED IN THE FEDERAL POWER COMMISSION'S PROCESSING OF ELECTRIC RATE-INCREASE CASES iv; 21 (1976)
[97] Joint Fed.-State Task Force on Elec. Transmission, 175 FERC ¶ 61,224 (2021) (Establishing Order).

intervention in FERC matters and a roundtable on ensuring environmental justice and equity in the infrastructure permitting process.[98]

C. Pre-Filing Assistance

Consistent with its attention to stakeholder engagement, FERC has dedicated resources to encouraging and assisting applicants prior to filing formal applications with the agency.[99] The goal is to identify and resolve issues early in the process to reduce delays caused by incomplete filings. Efforts of FERC staff to engage applicants and stakeholders in pre-filing counseling has significantly increased the likelihood that applicants provide all required information to the agency, preventing staff from having to engage in time-consuming follow-up inquiries to ensure applications are complete.[100]

In some instances, FERC has established formal, mandatory pre-filing periods. For example, applicants for liquefied natural gas projects must undergo a 6 month mandatory period. In other instances, such as gas pipeline and storage projects, the pre-filing period is optional.[101]

D. Filing Procedures and Preliminary Process

In addition to providing pre-filing assistance, FERC has worked to maintain and improve filing procedures so that staff can review and respond to incoming applications and documents efficiently and effectively.[102]

Historically, transparent, streamlined filing procedures for handling applications have helped the agency decrease processing time without an increase in staff. [103] For example, Orders No. 11,[104] 54,[105] and 59,[106] each clarified instructions for completing licensing and permit applications, detailed the information and/or exhibit requirements for submission, and simplified general application procedures.

By providing clarity at this stage of adjudication, FERC not only has reduced the number of incomplete applications it receives, but also has improved the accuracy of the application

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[98] *Technical Conference Schedule – 2023*, FED. ENERGY REG. COMM'N, https://www.ferc.gov/technical-conference-schedule-2023 (last accessed Dec. 8, 2023).
[99] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 48 (2021).
[100] FED. ENERGY REGUL. COMM'N, FISCAL YEAR 2020 CONGRESSIONAL PERFORMANCE BUDGET REQUEST FISCAL YEAR 2018 ANNUAL PERFORMANCE REPORT 33 (2019).
[101] FED. ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 56 (2021).
[102] FEDERAL ENERGY REGUL. COMM'N, FY 2022 CONGRESSIONAL JUSTIFICATION 107 (2021).
[103] U.S. GEN. ACCT. OFF., EMD-80-30, HYDROPOWER – AN ENERGY SOURCE WHOSE TIME HAS COME AGAIN 27 (1980); Letter from J. Dexter Peach, Director, Energy and Minerals Division, United States General Accounting Office, to the Honorable John A. Durkin, Chairman, Subcommittee on Energy Conservation and Supply, Committee on Energy and Natural Resources, United States Senate 4-5 (October 24, 1980).
[104] Federal Energy Regulatory Commission Order No. 11, "Regulations Governing Applications for Short-Form Licenses (Minor)" (Docket No. RM78-9), issued Sept. 5, 1979, 43 Fed. Reg. 40215, Sept. 11, 1978
[105] Federal Energy Regulatory Commission, Order No. 54, "Regulations Prescribing General Provisions for Preliminary Permit and License Applications; and Regulations Governing Applications for Amendments to and Cancellation of Permits (Docket No. RM79-23), issued Oct. 22, 1979, 44 Fed. Reg. 61328, Oct. 25, 1979.
[106] Federal Energy Regulatory Commission, Order No. 59, "Regulations Governing Applications for License for Major Projects – Existing Dams" (Docket No. RM79-36), issued Dec. 16, 1979, 45 Fed. Reg. 75383, Dec. 20, 1979

process.[107] Continual monitoring of the number of and reasons for incomplete applications also can helps FERC further promote timeliness by identifying future problem areas that could be addressed through amendments to the filling process.

As noted in Part III, the investigation stage of FERC's adjudicative processes often requires collection of information from external actors, including other federal and state agencies. In recent years, FERC has developed innovative ways to reduce the time it takes to obtain such information. For example, consistent with Executive Order No. 13807, FERC executed a Memorandum of Understanding with other federal agencies in 2018 to establish one decision framework for environmental review and authorization of major infrastructure projects.[108] In another example, to compensate for inspectors' inability to physically travel to all jurisdictional projects during the pandemic, FERC requested that hydroelectric dam owners provide information to the agency from their own inspections of projects.[109]

E. Hearing and Settlement Procedures

Over the course of its existence, FERC has adopted a variety of measures to manage its caseload efficiently and effectively at the decisional stage. Importantly, the commission delegated decisional power to officers throughout the agency to take final action on a variety of cases, unless appealed to the commission.[110] By establishing and expanding the authority of FERC staff in this way, the commission has freed its own resources for nonroutine cases.[111]

The agency also has emphasized pre-hearing and settlement conferences to promote and improve timeliness in adjudication. Early in FERC's history, the agency adopted procedures for pre-hearing conferences. While these conferences noticeably helped the agency address backlogs and delays in decision-making, their success depended largely on participation by all interested parties.[112] Current FERC settlement procedures and efforts recognize this practical reality.

Across agency programs, settlement of disputes has proven an effective way for FERC to reduce backlogs and delays in its adjudicative processes.[113] As a result, the agency has encouraged parties and FERC staff to seek either full or partial settlement agreements.[114] FERC

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[107] *See* U.S. GEN. ACCT. OFF., RCED-93-168, ELECTRICITY REGULATION: FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS 8 (1993)
[108] Exec. Order No. 13,807; Office of Mgmt. & Budget, Exe. Off. Of the President, Memorandum for Heads of Federal Departments and Agencies, One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807, M-18-13 (2018).
[109] FEDERAL ENERGY REGULATORY COMMISSION, FY 2022 CONGRESSIONAL JUSTIFICATION 64 (2021).
[110] Charles Curtis, *Forty Years of FERC*, 38 ENERGY L.J. 413, 414 (2017)
[111] U.S. GEN. ACCT. OFF., RCED-93-168, ELECTRICITY REGULATION: FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS 7 (1993); FEDERAL ENERGY REGULATORY COMMISSION, FISCAL YEAR 2020 CONGRESSIONAL PERFORMANCE BUDGET REQUEST FISCAL YEAR 2018 ANNUAL PERFORMANCE REPORT 33 (DATE).
[112] Letter from Elmer B. Staats, Comptroller General of the United States, to the Honorable John D. Dingell, Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, United States House of Representatives 14 (February 13, 1979).
[113] FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN: FISCAL YEARS 2022-2026 25 (2022); FED. ENERGY REGUL. COMM'N, STRATEGIC PLAN FY 2014-2018 9 (2014); U.S. GEN. ACCT. OFF., RCED-93-168, ELECTRICITY REGULATION: FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS 8 (1993)
[114] Charles A. Moore, *The Report of the General Counsel: The New Trial Program at the Federal Energy Regulatory Commission*, 3 ENERGY L.J. 337, 340-341 (1982).

also prioritizes settlement at early stages of the adjudicative process, uses ALJs to facilitate settlements, and has adopted and revised settlement procedures to expedite consideration of voluntary settlements.[115]

Currently, FERC settles approximately 84 percent of proceedings originally set for hearing.[116] Factors that affect how quickly settlement occurs depend on a variety of factors including the type and complexity of issues presented and whether those issues have been addressed by FERC in the past. In the last fiscal year, settlement negotiations took an average of six to nine months to complete, included from two to over 250 parties, and primarily involved electric rate and market rules applications. [117]

[115] U.S. GEN. ACCT. OFF., RCED-93-168, ELECTRICITY REGULATION: FACTORS AFFECTING THE PROCESSING OF ELECTRIC POWER APPLICATIONS 8 (1993); Charles Curtis, *Forty Years of FERC*, 38 ENERGY L.J. 413, 414 (2017)
[116] FEDERAL ENERGY REGULATORY COMMISSION, FY 2024 CONGRESSIONAL JUSTIFICATION 29-30 (2023).
[117] *Id*. at 30.

APPENDIX I:
MERIT SYSTEMS PROTECTION BOARD

This case study provides an overview of efforts to improve or promote timeliness at the Merit Systems Protection Board (MSPB). Established in 1978, MSPB is an independent agency established primarily to adjudicate a range of disputes arising under the civil service laws, including appeals from adverse actions taken by other agencies affecting their employees.

Part I provides an overview of MSPB, its historical development, the types of cases it decides, and the process for adjudicating them. Part II describes timeliness as a value in MSPB adjudication. Part III describes factors that have affected the timeliness of MSPB adjudication. Part IV describes efforts by MSPB and Congress to promote or improve timeliness.

I. BACKGROUND

A. The Program

MSPB hears a wide range of civil service disputes. The majority of its caseload consists of federal employees' appeals from "adverse actions" (i.e., removals, suspensions for more than 14 days, reductions in grade, reductions in pay, furloughs of 30 days or less) and reductions in force (RIFs).[1] Other cases within MSPB's appellate jurisdiction include appeals from certain Office of Personnel Management (OPM) determinations (e.g., retirement matters, suitability determinations, employment practices).[2]

About two-thirds of the federal government's full-time civilian workforce have appeal rights to MSPB, including competitive-service employees who have completed a probationary period, excepted-service employees with at least two years continuous service, and career appointees in the Senior Executive Service (SES). Probationary employees and applicants for federal employment have very limited appeal rights, and political appointees have none.[3]

MSPB also has original jurisdiction over certain cases, including whistleblower retaliation claims, actions filed by the Office of Special Counsel (OSC) against federal employees alleged to have committed prohibited personnel practices or violated the Hatch Act, actions taken against administrative law judges (ALJs), and requests for an informal hearing by persons removed from the SES for performance deficiencies.[4]

B. The Agency

MSPB is one of several successor agencies to the Civil Service Commission (CSC). The CSC was established in 1871, but funding was intermittent until, spurred on by President Garfield's assassination by a dissatisfied office seeker, Congress passed the Pendleton Civil

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[1] 5 U.S.C. § 7501 *et seq*.
[2] 5 C.F.R. § 1201.3.
[3] *Jurisdiction*, MERIT SYS. PROT. BD., https://www.mspb.gov/appeals/jurisdiction.htm (visited June 24, 2023).
[4] 5 C.F.R. §§ 1201.2; 1213.

Service Reform Act in 1883. The Act established a three-member Commission to root out partisanship in federal recruitment and hiring.

Discipline and removal of federal employees remained largely unregulated until 1897, when President McKinley issued an executive order requiring that an agency have "just cause" for removing an employee from the classified service (the predecessor to today's competitive service). The order also required that the agency provide a written statement of reasons and an opportunity for the employee to respond.[5]

The Lloyd-LaFollette Act of 1912 provided statutory removal protections ("no person in the classified service . . . shall be removed [from office] except for such cause as will promote the efficiency of said service") and established a rudimentary process for adjudicating cause. The agency was required to provide the removed employee with a written notice of reasons and a reasonable time to reply in writing and submit supporting materials. The agency could, but was not required, to provide a hearing. Whether or not a hearing occurred, the CSC was required to maintain a record of the proceeding that was available to the CSC and employee.[6]

Calls for additional reform led to passage of the Veterans Preference Act of 1944. The Act provided that agencies could not take adverse actions against covered veterans except in limited circumstances and after providing notice and the right to respond and submit supporting materials. Veterans also had the right to appeal to and appear before the CSC.[7]

In January 1962, President Kennedy issued Executive Order 10987, which effectively extended the protections of the Veterans Preference Act to all competitive-service employees. Under the executive order, employees could appeal adverse actions to an appellate decision maker within their agencies or to the CSC. In 1973, the CSC proposed a new process in which all appeals of adverse action would flow to the CSC.[8]

The CSC came under sustained attack in the wake of Watergate, and civil service reform became a key priority for the Carter Administration.[9] Upon taking office, President Carter established the Personnel Management Project (PMP), tasking it with studying all aspects of the federal civil-service system and making recommendations for action. The PMP concluded that there was an inherent conflict of interest at the CSC, which served simultaneously as a "management agent for a President elected through a partisan process, "the protector of the merit system from partisan abuse," "the provider of services to agency management in implementing personnel programs," and a neutral body that adjudicated "disputes between agency managers and their employees.[10]

Based on the PMP's recommendations, President Carter transmitted to Congress a pair of reorganization plans that would dismantle the CSC. Reorganization Plan No. 1 of 1978 proposed

[5] Exec. Order No. 101 (July 27, 1897).
[6] 37 Stat. 555 (1912).
[7] 58 Stat. 387 (1944).
[8] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, 96th Cong. 39 (1979).
[9] *See* Robert Vaughn, *Civil Service Reform and the Rule of Law*, 8 FED. CIR. B.J. 1, 2 (1999).
[10] PERS. MGMT. PROJECT, PRESIDENT'S REORGANIZATION PROJECT: FINAL STAFF REPORT 231 (1977).

transferring enforcement of federal-sector equal employment opportunity to the EEOC.[11] Reorganization Plan No. 2 of 1978 proposed assigning the CSC's other responsibilities to four new entities: (1) OPM, to manage the federal civil service system; (2) MSPB, to adjudicate appeals by individual employees; (3) OSC, to investigate and prosecute Hatch Act and merit-system violations; and (4) FLRA, to adjudicate matters related to federal labor relations such as union representation and unfair labor practice allegations.[12] Following a short period of legislative debate, Congress passed the Civil Service Reform Act (CSRA).[13] The CSRA formally abolished the CSC, and MSPB became operational on January 1, 1979.

Today, MSPB is an independent agency responsible for adjudicating civil service disputes and conducting special studies of the federal merit systems. The agency is headed by a three-member Board. Board members are appointed by the President by and with the advice and consent of the Senate. Members must be individuals "who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board," and no more than two members may be from the same political party.[14] Members serve fixed, seven-year terms and are ineligible for reappointment. The President may remove members "only for inefficiency, neglect of duty, or malfeasance in office."[15]

The Board includes a Chair, designated by the President by and with the advice and consent of the Senate, and a Vice Chair, designated by the President. The Chair is the Board's chief executive and administrative officer. In the absence or disability of a Chair, the Vice Chair performs the functions of the Chair. In the absence or disability of a Chair and a Vice Chair, the remaining Board member performs the Chair's functions.[16] In the absence of any Board members, as was the case between 2019 and 2022, the agency's General Counsel serves as the agency's chief executive and administrative officer under a continuity of operations plan.[17]

Employees of the Board responsible for carrying out most of its day-to-day functions are organized into headquarters (HQ) and regional operations. Most HQ components report to the Executive Director. HQ components include the Office of General Counsel (OGC); the Office of Appeals Counsel (OAC), which supports the Board's adjudicative function by conducting legal research and drafting proposed decisions; the Office of the Clerk of the Board (OCB), which, among other functions, receives petitions for Board review, rules on certain procedural matters, and issues Board decisions and orders; and the Office of Policy and Evaluation, which conducts special studies of the federal merit systems and coordinates performance planning for the agency. The Office of the ALJ is also at HQ, though its functions are now performed by ALJs loaned from the Federal Trade Commission and the U.S. Coast Guard. Operational functions—including budget planning and administration, human resources, procurement, information technology (IT) management, and general services—are also managed centrally.[18]

[11] 43 Fed. Reg. 19,807 (May 9, 1978).
[12] 43 Fed. Reg. 36,037 (Aug. 15, 1978).
[13] Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[14] 5 U.S.C. § 1201.
[15] *Id*. § 1202.
[16] *Id*. § 1203.
[17] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2018 1 (2019) [hereinafter FY 2018 ANNUAL REPORT].
[18] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2022 5–6 (2023) [hereinafter FY 2022 ANNUAL REPORT].

The Office of Regional Operations (ORO), located at HQ, oversees a nationwide network of six regional offices (ROs)—located in Atlanta, Chicago, Dallas, Philadelphia, Oakland, and Washington—and two field offices (FOs) in Denver and New York. Initial-level adjudicators, called administrative judges (AJs), and the legal and paralegal staff who support them are located in the ROs and FOs. ORO is headed by the Director of Regional Operations. Each RO and FO is managed administratively by a Regional Director or Chief AJ and has jurisdiction over a specific geographical area.[19]

C. The Adjudication Process

A proceeding before MSPB typically involves two stages. First, a party requests a hearing before an AJ. (Certain types of cases, including disciplinary actions against ALJs, are heard by an ALJ instead.[20]) Hearings are adversarial proceedings conducted according to trial-like rules of practice, though alternative, less formal procedures exist.[21]

An AJ's initial decision generally becomes the final decision of the Board 35 days after it is issued.[22] Alternatively, a party may file a petition for review (PFR), requesting that the Board review the AJ's (or ALJ's) initial decision. The Board also may review the initial decision on its own motion. Review is discretionary with the Board. Board regulations provide examples of situations in which it may grant a petition.[23] When the Board grants a PFR, it may issue an "opinion and order," which is considered precedential and ordinarily binding on the Board and lower-level adjudicators in future cases, or a "nonprecedential order," which is not binding and "does not add significantly to the body of MSPB case law."[24]

A party may seek judicial review of a final decision. In most cases, a party may seek judicial review in the Court of Appeals for the Federal Circuit.[25]

II. TIMELINESS AS A VALUE IN MSPB ADJUDICATION

Although the primary impetus for establishing MSPB was to separate the CSC's adjudicative function from its management role, concerns about long delays in the CSC's adjudication process civil service processes featured prominently in Reorganization Plan No. 2 and in debates over the CSRA.[26] The CSRA evinces an expectation by Congress that MSPB

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[19] *See Contacts and Locations*, MERIT SYS. PROT. BD., https://www.mspb.gov/about/contact.htm (last visited Sep. 7, 2023).
[20] *See, e.g.*, 5 U.S.C. § 5721 (adverse actions against ALJs).
[21] 5 U.S.C. § 1204; 5 C.F.R. §§ 1201.11–1201.113, 1201.121–1201.148.
[22] 5 U.S.C. § 7701(e); 5 C.F.R. § 1201.113.
[23] 5 C.F.R. § 1201.115.
[24] *Id*. § 1201.117(c).
[25] 5 U.S.C. § 7703.
[26] *See, e.g.*, *General Oversight on Civil Service Agencies: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Off. & Civil Service*, 97th Cong. 182 (1981) (statement of Ersa H. Poston, Vice Chair, Merit Sys. Prot. Bd.); *see also* Admin. Conf. of the U.S., Statement #15, *Procedures for Resolving Federal Personnel Disputes*, 54 Fed. Reg. 53498 (Dec. 29, 1989).

would "expedite the processing of its cases."[27] Indeed, several aspects of MSPB's statutory framework were intended specifically to address sources of delays present in the earlier system.

Under Executive Order 10987, a federal employee could appeal an adverse actions to an appellate decision maker within their agency or to the CSC. An employee who went directly to the CSC forfeited the option of appealing within their agency. An employee who appealed within their agency, on the other hand, could later appeal to the CSC. At the CSC, cases were initially decided at ROs and then appealable to the Board of Appeals and Review (BAR).[28] This new structure was immediately criticized. As one history explains:

> It is ironic that after the long absence of any safeguards for employees faced with removal, these additional levels of appeal soon led to calls for reform, claims that the system had gone too far in providing unnecessary process for employees, so that now the system took so long, was so cumbersome, and led to needless reversals, that something had to be done.[29]

Responding to calls for reform, the CSC in 1973 proposed an alternative system in which all appeals of adverse action flowed to the CSC. To carry out this system, the CSC established the Federal Employee Appeals Authority (FEAA), staffed by appeals officers stationed in field offices around the country, and the BAR's successor body, the multi-member Appeals Review Board (ARB). Organizationally, both the FEAA and ARB reported directly to the Commission, which could also review ARB decisions in limited circumstances.

Like its predecessor, this new system was criticized as unduly slow.[30] There were several sources of delay. First, although FEAA required agencies to present all written arguments and evidence at the time appeals were filed, agencies were allowed a "reasonable time" to furnish supporting materials and adjudicators liberally granted agencies extensions of time. Agencies often took a long time—up to six months, in some cases—to submit records for appealed cases. The ARB was no better. In 1978, many cases had been sitting with the ARB for more than a year "without an assignment to a panel or without preliminary review by an appeals officer."[31]

Compounding these issues, CSC adjudicators lacked subpoena power, and there was no legal requirement that agency employees testify in proceedings before them. Stakeholders also criticized the CSC's practice of reviewing all appeals to determine whether agencies had

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[27] MERIT SYS. PROT. BD., SECOND ANNUAL REPORT 10 (1981); *see also Urgent Supplemental Appropriations Bill, 1982: Hearing Before a Subcomm. of the H. Comm. on Appropriations*, 97th Cong. 16 (1982); MERIT SYS. PROT. BD., TEN YEARS AFTER THE CSRA: ANNUAL REPORT FISCAL YEAR 1988 9 (1989) [hereinafter FY 1988 ANNUAL REPORT].

[28] Michael Bogdanow & Thomas Lanphear, *History of the Merit Systems Protection Board*, 4 J. FED. CIR. HIST. SOC'Y 109, 111 (2010).

[29] *Id*.

[30] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707 & S. 2830 Before the Sen. Comm. on Gov't Affs.*, 95th Cong. 1411 (1978) (statement of the Nat'l Fed'n of Pro. Orgs.); *Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civil Serv.*, 95th Cong. 214, 544, 823, 973 (1978).

[31] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707 & S. 2830 Before the Sen. Comm. on Gov't Affs.*, *supra* note 32, at 1411.

complied with their own procedures, even when there was no claim that the appellant had suffered any harm as result of procedural error.[32]

As discussed in Part IV, Congress included several provisions in the CSRA meant to address previous sources of delay and promote timeliness more generally, and timeliness has continued to be a core value of MSPB adjudication in the 45 years since. The agency's procedural rules, personnel policies, and publications all tout the importance of timely decision making, and former Chair Susan Tsui Grundmann once referred to the agency's "culture of timeliness."[33] Communications between Board members (and nominees) and members of Congress frequently emphasize the importance and prioritization of timeliness.

At the same time, it is widely acknowledged that the agency should not pursue timeliness at the expense of other core values such as substantive accuracy, procedural fairness, and transparency. Some policymakers have asserted that timeliness and other values need not be mutually exclusive. At other times, policymakers have acknowledged more frankly the need to balance conflicting values,[34] or even prioritize some values—especially accuracy and fairness—over speed.[35] As one account explains:

> The Board recognized early the relationship between fair adjudication and efficient adjudication. Long backlogs associated with many government programs involving the resolution of individual claims can sap those processes of their integrity. The Board has consistently done more with less. Given the challenges of budgetary reductions and the large case load that it has faced, its ability to timely adjudicate the cases before it is appropriately a source of pride. It is a striking record sustained, with few exceptions, over two decades. Over these twenty years, members of the Board have also recognized that an undue emphasis on processing time can impair the preparation of some cases and undermine the fairness of some proceedings. Few adjudicatory bodies have as strong a record for the efficient use of resources as the Board.[36]

The takeaway is that the mission of MSPB is to promote the goals and sound operation of the merit systems. Timely adjudication is an important part, but not the sum total, of that objective.

III. FACTORS AFFECTING TIMELINESS

Many factors have affected the timeliness of MSPB adjudication since 1979. This Part provides a brief overview of five factors that have impacted MSPB's ability to process claims in

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[32] ALAN K. CAMPBELL, OFF. OF PERS. MGMT., CIVIL SERVICE REFORM: A REPORT ON THE FIRST YEAR 5 (1980); U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, FIRST-YEAR ACTIVITIES OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF THE SPECIAL COUNSEL 31 (1980).

[33] *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, 112th Cong. 13 (2012).

[34] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A.A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs.*, 108th Cong. 174 (2003).

[35] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2012 (2013) 12 [hereinafter FY 2012 ANNUAL REPORT].

[36] Robert Vaughn, *Civil Service Reform and the Rule of Law*, 8 FED. CIR. B.J. 1, 4 (1999).

a timely manner: (1) startup challenges, (2) jurisdictional expansions, (3) trends and events affecting the federal workforce, (4) the lack of a full Board, and (5) resource constraints.

This list is not exhaustive. Judicial decisions that modify "long-held government policies" have led to increases in the agency's caseload, for example,[37] and incidents that affect the day-to-day operations of the agency have also impacted its ability to process cases in a timely manner. Examples include office closures due to September 11, Hurricane Sandy, and the COVID-19 pandemic; mail disruptions during the 2001 anthrax attacks; government shutdowns; and outages in MSPB IT systems.[38]

D. Agency Startup Challenges

Upon MSPB's creation, the Board needed to establish an effective organizational structure, establish an effective regulatory framework for adjudication, and obtain the funds, staff, space, and equipment needed to carry out its mission. The agency also inherited an initial caseload of about 5,000 pre-CSRA cases from the CSC and received over 3,600 more by the end of its first year in operation. Board members and members of Congress prioritized reducing this backlog. At the same time, there was pressure not to let backlog reduction efforts impede efforts to decide new-system cases in a timely manner. Concerns were repeatedly voiced that the new agency's credibility—and the credibility of the CSRA itself—would suffer if backlog-reduction measures prevented MSPB from deciding cases more expeditiously than its predecessor.[39]

Due to a short legislative process and inadequate advance planning,[40] the agency began operations "unorganized, understaffed, and underfinanced." It had difficulty securing basic facilities needed to fulfill its adjudicative functions, including a properly equipped hearing room, an adequate library, and secure records storage. (The field operation depended on OPM local offices for administrative support.[41]) Although the agency began operations with about 175 employees who had previously worked in the CSC's adjudicative components, it quickly became

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[37] *Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel: Hearing Before the Subcomm. on Fed. Workforce, Postal Serv., and D.C. of H. Comm. on Oversight and Gov't Reform,* 110th Cong. 174 (2007).

[38] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2002 (2003) 1 [hereinafter FY 2002 ANNUAL REPORT]; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2015 (2016) 2 [hereinafter FY 2015 ANNUAL REPORT]; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2020 (2021) 10 [hereinafter FY 2020 ANNUAL REPORT]; FY 2022 ANNUAL REPORT *supra* note 18, at 10.

[39] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707 & S. 2830 Before the Sen. Comm. on Gov't Affs.*, *supra* note 32, at 1411–12*; Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civil Serv.*, *supra* note 31, at 214, 544, 823, 973; *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, note 8, at 41; *Oversight of the Civil Service Reform Act of 1978: Hearing Before the Sen. Comm. on Gov't Affs.*, 96th Cong. 33 (1979).

[40] U.S. GEN. ACCOUNTING OFF., GAO/GGD-81-57, REPORT TO THE COMM. ON GOV'T AFFS., U.S. SEN., IMPLEMENTATION: THE MISSING LINK IN PLANNING REORGANIZATIONS i (1981); *The Merit Systems Protection Board and Office of Special Counsel: Hearings Before the Sen. Comm. on Gov't Affs.*, 96th Cong. 4-5 (1979) (statement of Clifford I. Gould, Deputy Dir. Fed. Personnel and Comp. Div.); U.S. GEN. ACCOUNTING OFF., FPCD-79-51, REPORT TO THE COMM. ON GOV'T. AFFS., U.S. SEN., STAFFING AND FUNDING PROBLEMS OF THE MERIT SYS. PROT. BD. AND OFF. OF PERS. MGMT. (1979).

[41] *Civil Service Agencies Authorization Bills: Hearings on H.R. 3751 & H.R. 3752 Before the Subcomm. on the Civil Serv. of the H. Comm. on Post Off. & Civil Serv.*, 96th Cong. 6–7 (1979); U.S. GEN. ACCOUNTING OFF., FPCD-80-46, *supra* note 33, at 7-9; U.S. GEN. ACCOUNTING OFF., GGD-81-57, *supra* note 41, at i.

apparent that "supplemental staff and large-scale training" were needed to process cases to conduct the hearings required by the CSRA.[42] Compounding these challenges, the agency lacked adequate funding to begin operations. Initial funding for the agency was based on the President's reorganization plan and did not reflect the "expanded and strengthened" functions and responsibilities added in the CSRA, including the hearing requirement and the duty to conduct special studies of the federal merit systems.[43] Reviewing MSPB's experience and the experience of other agencies created during this period, GAO recommended that Congress and the executive branch ensure better planning for new agencies in the future.[44]

E. Jurisdictional Expansions

The CSRA gave MSPB appellate jurisdiction over adverse actions affecting competitive-service employees and original jurisdiction over OSC prosecutions and actions against ALJs. While jurisdiction remained relatively stable in MSPB's first few years, Congress has since substantially expanded the agency's jurisdiction. These expansions have sometimes resulted in increased case receipts for MSPB,[45] and annual reports document the agency's attentiveness to the potential impacts of jurisdictional expansions on the agency's caseload.

Significant expansions include: (1) the Federal Employees' Retirement System Act of 1986, which provided an appeal from OPM decisions affecting individuals' rights and interests under the Federal Employees Retirement System;[46] (2) the Postal Employee Appeals Rights of Act of 1987, which extended MSPB appeal rights to tens of thousands of U.S. Postal Service employees;[47] (3) the Whistleblower Protection Act of 1989, which created an individual right of action for whistleblowers if the OSC declined to prosecute their cases;[48] (4) the Ethics Reform Act of 1989, which established a new appealable action for about 7,000 career members of the Senior Executive Service;[49] (5) the Civil Service Due Process Amendments of 1990, which extended MSPB appeal rights to about 100,000 excepted-service employees;[50] (6) the Uniformed Services Employment and Reemployment Act of 1994, which authorized MSPB to hear certain claims regarding the employment or reemployment by federal agencies of individuals who have completed military service[51]; and (7) the Veterans Employment Opportunities Act of 1998, which gave MSPB authority to hear claims involving veterans preference rights.[52]

F. Events and Trends Affecting the Federal Workforce

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[42] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1979 10 (1980) [hereinafter FY 1979 ANNUAL REPORT].
[43] *The Merit Systems Protection Board and Office of Special Counsel: Hearings Before the Sen. Comm. on Gov't Affs.*, *supra* note 41, at 2.; U.S. GEN. ACCOUNTING OFF., FPCD-79-51, *supra* note 41, at 1-3.
[44] U.S. GEN. ACCOUNTING OFF., GGD-81-57, *supra* note 41, at 3, 25.
[45] U.S. MERIT SYS. PROT. BD., BUILDING A FOUNDATION FOR MERIT IN THE TWENTY-FIRST CENTURY: A TWENTY YEAR RETROSPECTIVE OF THE U.S. MERIT SYSTEMS PROTECTION BOARD 1979–1999 10 (1999); U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1991 (1992) 15 [hereinafter FY 1991 ANNUAL REPORT].
[46] Pub. L. No. 99-335, 100 Stat. 514, 571 (1986).
[47] Pub. L. No. 100-90, 101 Stat. 673 (1987).
[48] Pub. L. No. 101-12, 103 Stat. 16, 16–18 (1989).
[49] Pub. L. No. 101-194, 103 Stat. 1716, 1758 (1989).
[50] Pub. L. No. 101-376, 104 Stat. 461, 462 (1990); FY 1991 ANNUAL REPORT, *supra* note 46, at 26.
[51] Pub. L. No. 103-353, 108 Stat. 3149, 3166–367 (1994).
[52] Pub. L. No. 105-339, 112 Stat. 3182, 3184 (1998).

Events and trends affecting the federal workforce have affected MSPB both as an agency that adjudicates civil service disputes and as a federal employer. The former has tended to increase or decrease the agency's caseload, while the latter has affected MSPB's internal capacity to process the cases it receives.

Historically, actions taken by the executive branch or individual agencies affecting large numbers of federal employees have been the primary impetus for surges in MSPB's caseload. The most significant such action came in 1981, after President Reagan fired more than 11,000 air traffic controllers involved in the Professional Air Traffic Controllers Organization strike and imposed a lifetime ban on rehiring them. Nearly all of the fired workers filed appeals with the MPSB, more than doubling the agency's initial workload of 8,000 cases for that year.[53]

Other actions affecting large numbers of federal employees that have yielded increased case receipts for MSPB include a major restructuring of the U.S. Postal Service in late 1992;[54] military base closures;[55] the abolition of thrift institution regulatory agencies under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989;[56] the furlough of ALJs in 1991;[57] furloughs due to budget sequestration in 2013;[58] and other agency actions.[59]

Fluctuations in the size and makeup of the federal workforce also have the potential to increase and decrease case receipts for MSPB, for example by increasing and decreasing the number of people with MSPB appeal rights; increasing the number of appeals of OPM retirement decisions; and increasing the number of younger people in the workforce, who have traditionally experienced more appealable actions.[60]

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[53] *See* U.S. MERIT SYS. PROT. BD., STUDY OF MSPB APPEALS DECISIONS FOR FY 1982 52 (1983) ; *General Oversight on Civil Service Agencies: Hearing Before the H. Subcomm. on Post Office and Civil Serv.*, *supra* note 26, at 183; *Treasury, Post Office and General Government Appropriations for Fiscal Year 1982: Hearings Before the H. Subcomm. on Appropriations*, 97th Cong. 326 (1981); *Urgent Supplemental Approporiation Bill for 1982: Hearings Before the H. Subcomm. on Appropriations*, *supra* note 27, at 2.

[54] U.S. MERIT SYS. PROT. BD., BUILDING A FOUNDATION FOR MERIT IN THE TWENTY-FIRST CENTURY: *supra* note 46, at 15–16; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997: Hearing Before the H. Subcomm. on Post Off. and Civil Serv.*, 104th Cong. 782–83 (1996).

[55] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1991: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, 101st Cong. 426 (1990).

[56] FY 1991 ANNUAL REPORT, *supra* note 46, at 36.

[57] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1990 (1991) 38 [hereinafter FY 1990 ANNUAL REPORT].

[58] *See* MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2013 (2014) 8 [hereinafter FY 2013 ANNUAL REPORT]; *Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform* 114 Cong. 3–4 (2015). ; *see also* Jeffrey Joseph Lorek, *Budget-Related Furloughs in Today's Federal Government: Making the Case for Reforming the Civil Service Reform Act of 1978*, 24 Fed. Cir. B.J. 537 (2015).

[59] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1983: Hearing Before the Subcomm. of the H. Comm. On Appropriations*, 97th Cong. 164 (1982); ; *Civil Service Oversight: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Off. and Civil Serv.*, 98th Cong. 352 (1983) ; FY 1990 ANNUAL REPORT, *supra* note 58, at 16.

[60] *Ensuring a Merit-Based Employment Systems: An Examination of the Merit Sys. Prot. Bd. and the Off. of Special Counsel: Hearing Before the Subcomm. on Fed. Workforce, Postal Serv., and the D.C. of the H. Comm. on Oversight and Gov't Reform, supra* note 38, at 21.; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2007 (2008) 2 [hereinafter FY 2007 ANNUAL REPORT]; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2008 (2009) 2 [hereinafter FY 2008 ANNUAL REPORT].

These same trends have also affected MSPB as a federal employer. Mirroring trends across the government, MSPB faced pressure to streamline and downsize operations in the 1990s. It also faced a wave of retirements beginning in the 2000s.[61] The agency's 2012 annual report noted, for example, that almost one-third of MSPB employees and fifty percent of ALJs would be eligible to retire in the next two years.[62]

Starting in the mid-1990s and accelerating in the 2000s, several agencies were given statutory authority to develop alternative personnel systems outside the traditional civil service system. Employees at one agency, the Federal Aviation Administration, lost MSPB appeal rights. The new Department of Homeland Security (DHS) was not required to include MSPB in its appeals process. Legislation authorizing an alternative personnel system for the Department of Defense (DOD) required only a limited appellate role for MSPB.[63] Both DHS and DOD promulgated regulations that included a role for MSPB.[64] The trend toward civil-service alternatives had the potential to increase or decrease the agency's workload. Alternative, agency-specific systems also increase the complexity of MSPB case processing.[65]

One other notable trend has been federal agencies' increased use of alternative dispute resolution (ADR) to resolve personnel disputes. If agencies' efforts at using early ADR to resolve personnel disputes are successful, we might expect to see fewer cases filed with MSPB. Indeed, as discussed below, some Board members have encouraged agencies to use ADR more widely to resolve personnel disputes. They recognized that doing so might reduce the need for MSPB intervention in many cases and thereby allow the agency to redirect scarce resources to cases that cannot be resolved so easily.[66]

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[61] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, *supra* note 55, at 593; *Safeguarding the Merit Systems Principles: A Review of the Merit Sys. Prot. Bd. and the Off. of Special Counsel: Hearing Before the Oversight of Gov't Mgmt., the Fed. Workforce, and the D.C. Subcomm. of the Sen. Comm. on Homeland Sec. and Gov't Affairs*, 110th Cong. 5 (2007); *Ensuring a Merit-Based Employment System.: An Examination of the Merit Sys. Prot. Bd. and the Office of Special Counsel: Hearing Before the Subcomm. on Fed. Workforce, Postal Service, and the D.C. of the Sen. Comm. on Oversight and Gov't Reform, supra* note 38 at 22; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1995 (1996) 16 [hereinafter FY 1995 ANNUAL REPORT]; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1996 (1997) 16 [hereinafter FY 1996 ANNUAL REPORT]; *Nominations of Susan Tsui Grundmann and Anne Marie Wagner: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affairs*, 111 Cong. 10 (2009).

[62] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2012 (2013) 12 [hereinafter FY 2012 ANNUAL REPORT]; *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Oversight of Gov't Mgmt., the Fed. Workforce, and the Dist. of Columbia Subcomm of the Sen. Comm. on Homeland Sec. and Gov't Affairs*, 112 Cong. 13 (2012).

[63] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2003 (2004) ii [hereinafter FY 2003 ANNUAL REPORT].

[64] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2004 (2005) v [hereinafter FY 2004 ANNUAL REPORT]; *Safeguarding the Merit Systems Principles*, *supra* note 62, at 57–58; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2009 (2010) 2 [hereinafter FY 2009 ANNUAL REPORT] (explaining that the earlier agency action was later subjected to political action and rescinded).

[65] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2005 (2006) iii–iv [hereinafter FY 2005 ANNUAL REPORT]; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2006 (2007) 1 [hereinafter FY 2006 ANNUAL REPORT].

[66] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 95; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 55, at 594; U.S. OFF. OF PERS. MGMT., ALTERNATIVE DISPUTE RESOLUTION: A RES. GUIDE 130 (1999); *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 62, at 762; *Treasury, Postal Service, and*

G. Lack of a Full Board

The most significant, recent management challenges resulted from the lack of a Board quorum between 2017 and 2022. Certain actions, including reviewing initial decisions and issuing substantive regulations, require a quorum of at least two members. The Board had fewer than two members for most of 2003 and 2004[67] and for five years between January 2017 and March 2022. Large numbers of PFRs can accumulate during periods when the Board lacks a quorum. (About 3,800 PFRs were pending at the Board in March 2022.[68]) Reducing the backlog was a key topic of discussion during the confirmation of Cathy Harris, Tristan Leavitt, and Raymond Limon in September 2021.[69]

Although a two-member Board constitutes a quorum, PFRs may take longer to process when there are only two members because "there is an increased likelihood that some cases will take an unusually long time to close because the two members cannot agree on the disposition." That, at least, was the explanation for anomalous processing times in fiscal year (FY) 2000,[70] though the Board later began issuing "split votes" in such cases to avoid undue delay.[71] It may also simply be quicker to decide cases if initial review is divided among three rather than two members.[72]

H. Resource Constraints

Available funding is easily the biggest determinant of MSPB's capacity to process cases in a timely manner and respond to surges and backlogs. As discussed below, the agency has benefitted from statutory authority to submit budget requests directly to Congress.

By way of example: MSPB's appropriation for FY 1982 was cut by 16 percent, at the same time as it was dealing with a massive influx of air traffic controller appeals. The Board implemented several cost-saving measures in an effort to avoid furloughs. Measures included freezing hiring, imposing a temporary moratorium on hearings, banning hearing-related travel (which resulted in hearing delays for more than 500 appellants who could not travel to ROs), and abandoning a policy of providing appellants transcripts free of charge. Despite these measures,

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General Government Appropriations for Fiscal Year 1998: Hearing Before the Subcomm. of the H. Comm. on Appropriations., 105th Cong. 633 (1997); U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1998 (1999) 21 [hereinafter FY 1998 ANNUAL REPORT]. ;

[67] *Nominations of Neil McPhie and Barbra Sapin: Hearing Before the Sen. Comm. on Gov't Affs.*, 108th Cong. 43 (2004); Jessie Bur, *How Merit Board Nominees Plan to Address the Ever-Growing Backlog*, FEDERAL TIMES (Sep. 22, 2021) https://www.federaltimes.com/management/leadership/2021/09/22/how-merit-board-nominees-plan-to-address-the-ever-growing-backlog/.

[68] U.S. MERIT SYS. PROT. BD.: MERIT SYS. PROT. BD. LACK OF QUORUM AND THE INHERITED INVENTORY: CHART OF CASES DECIDED AND CASES PENDING (2023); CONG. RESEARCH SERV., TE10032, EFFECTS OF VACANCIES AT THE MERIT SYS. PROT. BD. 4 (2019).

[69] *Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affs.*,117th Cong. 10-12 (2021).

[70] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 58.

[71] *Id*. at 101, 135; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2000 (2001) 1 [hereinafter FY 2000 ANNUAL REPORT];

[72] Drew Friedman, *MSPB Making "Good Headway" Through Case Backlog, Acting Chairwoman Harris Says*, FEDERAL NEWS NETWORK (Jun. 20, 2022) https://federalnewsnetwork.com/workforce/2022/06/mspb-making-good-headway-through-case-backlog-acting-chairwoman-harris-says/.

the agency ultimately furloughed most Board employees, placing them on half-time status for about two weeks until an emergency appropriation was signed into law. In a statement to Congress, Chair Herbert Ellingwood warned: "As the backlog continues to grow, we face the prospect of a return to multi-year delays for decisions as characterized the old [CSC] and which Congress pushed to eliminate in the [CSRA]."[73]

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

This Part describes historical concerns about timeliness and efforts undertaken by MSPB and Congress to promote or improve timeliness in response to such concerns. It presents such concerns and efforts chronologically, dividing MSPB's history into five parts: (1) the CSRA (1978), (2) agency startup (1979–1981), (3) the PATCO strike (1981–1984), (4) a long period of relative stability (1984–2017), and (5) the lack of a quorum and its aftermath (2017–present).

At least five trends are evident from this history. First, MSPB has consistently taken a holistic perspective of timeliness. Strategies for responding to actual or predicted caseload pressures have always been multifaceted, relying on a wide range of interventions to promote or improve timeliness, including procedural changes, organizational realignments, human capital investments, IT modernization, and legislative and budget advocacy. In its strategic plan for FYs 2022–2026, for example, the agency committed to determining "fair approaches (e.g., policies and processes, adjudication systems, case management, the order in which cases are voted, etc.) to reducing the backlog" of PFRs and using "all flexibilities (e.g., details, temporary hires) to ensure MSPB has sufficient adjudication staff to reduce the backlog at HQ, maintain high-quality and timely adjudication of new HQ cases, and continue to maintain high-quality and timely adjudication of initial appeals, including remands, on [PFRs]."[74]

Second, the agency has developed a keen awareness of the internal and external factors that impact its capacity to process cases in a timely manner. In response to its challenging early history, perhaps, MSPB has taken a proactive approach, monitoring trends that might affect the future timeliness of its decision making, preparing contingency plans to manage expected increases in case receipts, and continually reevaluating its internal processes and human capital needs to ensure operational readiness.[75] Reliable data collection, facilitated by electronic case management, has been central to this approach.

Third, MSPB has engaged with a wide range of internal and external stakeholders to better understand the causes of delays, identify viable options for addressing them, and gauge the effectiveness of reform efforts. Engagement has taken many forms, including customer surveys, listening sessions, public meetings, information requests, and site visits.[76] Recently, for example,

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[73] *See Urgent Supplemental Appropriations Bill, 1982, : Hearing Before a Subcomm. of the H. Comm. on Appropriations*, *supra* note 27, at 13; *see also* U.S. GEN. ACCOUNTING OFF., FPCD-83-20, EFFECTS OF FISCAL YEAR 1982 BUDGET CUTS ON THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF THE SPECIAL COUNSEL 12–17 (1983).

[74] U.S. MERIT SYS. PROT. BD., STRATEGIC PLAN FOR FY 2022-2026 7–14 (2022).

[75] FY 1990 ANNUAL REPORT, *supra* note 58, at 41.

[76] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 56; *Nominations of Neil McPhie and Barbra Sapin, supra* note 68, at 43; *Nominations of Colleen D. Kiko, Mary M. Rose, Juliet J. McKenna, and John R. Fisher: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affs.*, 109th Cong. 73–

current Board Member Raymond Limon suggested in his confirmation hearing that MSPB transparently engage with internal and external stakeholders to develop an effective plan to reduce the current backlog.[77]

Fourth, MSPB has shown a willingness to learn from experience. It has learned by auditing case management practices to identify best practices and areas for improvement,[78] and it has repeatedly developed pilot programs to test out procedural reforms and gauge their effectiveness before implementing them broadly. The agency has also internalized lessons and institutionalized best practices learned during past crises. For example, MSPB introduced many measures to address the surge in air traffic controller appeals in the early 1980s, including increased reliance on electronic case management, a requirement that parties "share facts and issues between themselves early in the appeal process," "delegating more authority to the regional directors in the establishment of local procedures," and establishing a "hearing management training program drawing from our experience of processing ATC cases which we hope will streamline our hearings."[79] Asked during a congressional hearing whether the agency was "ready in case the incident with the air traffic controllers should happen again," Chair Ellingwood listed several procedural mechanisms that, with adequate funding, the agency would be prepared to implement: consolidating appeals by "major issue or employment site," establishing "broad scope discovery procedures," requiring "early identification and adjudication of lead issues," and "increased reliance on our computerized case-tracking system."[80]

Fifth, MSPB has been an early adopter of many technologies and has, throughout its history, relied on technology to promote timely decision making and achieve other objectives. Many IT modernization innovations seem unsurprising today but were significant at the time of their adoption. One of the agency's first major initiatives was the procurement of a computerized case tracking system to replace "the previous haphazard manual method of docketing, filing, and tracking appeals which made it difficult, if not impossible, to identify the location and status of any appeals."[81] The electronic case management system, which connected ROs with HQ, enabled centralized oversight of the agency's caseload and statistical analysis of caseload trends, "early identification of processing problems in any field office," and "shifting of cases or resources to prevent redundant undue processing delays from occurring."[82] GAO encouraged the

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76 (2005); U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2011 (2012) 10 [hereinafter FY 2011 ANNUAL REPORT].

[77] *Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affs., supra* note 70, at 12.

[78] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 188; *Nominations of Neil McPhie and Barbra Sapin, supra* note 68, at 12, 45–47; *Nominations of Colleen D. Kiko, Mary M. Rose, Juliet J. McKenna, and John R. Fisher, supra* note 77, at 73; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1985 (1986) 10 [hereinafter FY 1985 ANNUAL REPORT].

[79] *Treasury, Postal Service, and Gen. Gov't Appropriations for Fiscal Year 1985: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, 98th Cong. 806 (1984).

[80] *Id*.

[81] U.S. MERIT SYS. PROT. BD., U.S. MERIT SYSTEMS PROTECTION BOARD: FIRST ANNUAL REPORT 17 (1979).

[82] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1979; *Treasury, Postal Service, and Gen. Gov't Appropriations for Fiscal Year 1982: Hearing Before the H. Subcomm. on Comm. on Appropriations.*, 97th Cong. 371 (1981).

Board continue to monitor "the effectiveness of field office staffing" and field office caseloads "to help insure the most efficient use of staff resources in handling appeals"[83]

IT initiatives since then have included early implementation of the internet to link ROs and HQ in the 1980s, installation of local area networks at HQ and RO in the 1990s, use of email to provide updates on Board decisions to employees around the country, provision of personal computers and adoption of word processing by adjudicators and support staff,[84] integration of agency computer systems, automated generation of case-related correspondence,[85] launch of an electronic filing system, digitization of case files, and use of video hearings beginning with a pilot in the mid-1990s. Electronic voting and digital case files have been central to the current Board's efforts to tackle its backlog.[86] Annual reports and congressional testimony over the years have touted the benefitted of these and other technologies for timely case processing,[87] and the agency's most recent performance plan states the agency "is committed to transitioning to 100% e-adjudication to process cases more efficiently and improve service to our customers."[88]

A. Civil Service Reform Act (1978)

Many mechanisms to promote or improve timeliness in MSPB adjudication are baked into its organic statute. Most obviously, the CSRA requires MSPB to decide cases involving claims of discrimination within 120 days and directed MSPB to establish and publicly announce timeframes for adjudicating nondiscrimination cases.[89] For cases in which MSPB failed to complete an action by the announced date and it expected the delay to exceed 30 days, the CSRA requires the agency to publicly announce the new date by which it intended to complete action on the appeal. The CSRA also requires MSPB to submit an annual report describing not only the

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[83] U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 37–38.
[84] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1986 (1987) 8 [hereinafter FY 1986 ANNUAL REPORT].
[85] FY 1990 ANNUAL REPORT, *supra* note 58, at 48.
[86] Eric Katz, *Federal Employee Appeals Board Still Has Years of Work Ahead to Cut Through its Record Backlog*, GOVERNMENT EXECUTIVE (Dec. 20, 2022) https://www.govexec.com/workforce/2022/12/federal-employee-appeals-board-still-has-years-work-ahead-cut-through-record-backlog/381103/.
[87] FY 1998 ANNUAL REPORT, *supra* note 67, at 30; *Safeguarding the Merit Systems Principles: A Review of the Merit Sys. Prot. Bd. and the Off. of Special Counsel, supra* note 62, at 3–4, 29; *See* MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2014 (2015) 13 [hereinafter FY 2014 ANNUAL REPORT]; *Nominations of Neil McPhie and Barbra Sapin: Hearing Before the Sen. Comm. on Gov't Affairs, supra* note 68, at 48; *Nominations of Colleen D. Kiko, Mary M. Rose, Juliet J. McKenna, and John R. Fisher, supra* note 77, at 76; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 55, at 774; FY 1995 ANNUAL REPORT, *supra* note 62, at 32; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1997 (1998) 27 [hereinafter FY 1997 ANNUAL REPORT]; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1999 (2000) xxviii [hereinafter FY 1999 ANNUAL REPORT]; MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2001 (2002) 3 [hereinafter FY 2001 ANNUAL REPORT]; *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, *supra* note 34, at 7.
[88] FY 2022 Annual Report, *supra* note 18, at 10.
[89] Other statutes and regulations occasionally have specified other timeframes for certain appeals. The Veterans Access, Choice, and Accountability Act of 2014, for example, required AJs to issue decisions within 21 days. *See Merit Systems Protections Board, Office of Government Ethics, and Office of Special Counsel Reauthorization: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform, supra* note 59, at 42.

number of appeals it receives and completes but also how often it does not complete proceedings within the established the timeframes and the reasons why it failed to do so.[90]

To address specific sources of delay in CSC adjudication that contributed to delays, the CSRA:

- replaced the CSC's three-tier appeals system (FEAA, ARB, CSC) with a two-tier system, consisting of an initial decision and Board review;
- granted Board members and ALJs authority to subpoena witnesses and documents;
- provided that MSPB could only reverse an agency's decision based on a procedural error if the appellant showed they had suffered harm as a result of the error;
- authorized the MSPB to "provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board" with parties' consent;
- authorized MPSB to consolidate appeals filed by multiple appellants and join multiple appeals filed by a single appellant if doing so would "result in the appeals' being processed more expeditiously and would not adversely affect any party."[91]

Several other features have also facilitated congressional oversight of the timeliness of MSPB adjudication. First, Congress gave the agency independent authority to submit legislative proposals. Board members have used this authority to propose aspects of the CSRA that impede timely adjudication, and Congress has sometimes enacted their proposals. Based on Board members' proposals, Congress authorized the Board to delegate its subpoena authority to "any employee of the Board designated by the Board." The ability for AJs to subpoena witnesses and documents reportedly improved case processing.[92] Other legislative proposals were rejected. Congress did not enact a proposal that the agency be given summary judgment authority, for example,[93] nor did it enact a proposed exemption from the requirements of the Sunshine Act to discuss pending cases without prior public notice.[94]

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[90] Pub. L. No. 95-454, 92 Stat. 1111, 1125 (1978).

[91] 5 U.S.C. § 7701(f)(2); *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 8, at 17–18; *Civil Service Agencies Authorizations Bills: Hearings Before the Subcomm. on the Civ. Serv. of the H. Comm. on Post Off. and Civ. Serv., supra* note 42, at 135. ALAN K. CAMPBELL, U.S. OFFICE OF PERS. MGM'T, CIV. SERV. REFORM: A REPORT FOR THE FIRST YEAR (1980); U.S. GEN. ACCOUNTING OFFICE., GAO/FPCD-80-46, *supra* note 33, at 29–31.

[92] FY 1990 ANNUAL REPORT, *supra* note 58, at 32.

[93] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 55, at 599; *Ensuring a Merit-Based Employment Systems, supra* note 38 at 88; *Safeguarding the Merit System Principles*, *supra* note 62, at 18, 31, 80, 92. The Federal Circuit has held that MSPB lacks summary judgment authority. *See* Hessami v. MSPB, 979 F.3d 1362 (2020); Crispin v. Dep't of Comm., 732 F.2d 919 (Fed. Cir. 1984); *see also* Kirkendall v. Dep't of the Army, 479 F.3d 830 (2007) (USERRA).

[94] *Safeguarding the Merit Systems Principles*, *supra* note 62, at 15. Other adjudicative agencies have proposed similar reforms over the years without success, arguing that improved coordination and concurrent rather than sequential action on cases might improve processing times. *Cf.* Admin. Conf. of the U.S., *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 Admin. L. Rev. 421 (1997); *see also Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon, supra* note 70, at 23.

Second, the CSRA granted MSPB authority to submit budget requests directly to Congress. As discussed below, the agency has repeatedly relied on this authority to secure funding necessary to respond to caseload surges and backlogs.

Third, in addition to requiring the Board to submit an annual report describing its performance,[95] the CSRA directed GAO to prepare and submit an annual report to the President and Congress on MSPB's activities.[96] In an early report, GAO examined MSPB's case processing timelines.[97] Although Congress later transferred the annual report requirement to the Board itself,[98] members of Congress still periodically ask GAO to examine the agency's performance, management, and operations.[99]

Fourth, Board members and nominees periodically appear before congressional committees. Congress subjected MSPB to periodic reauthorization as part of the Whistleblower Protection Act of 1989. The reauthorization process historically has provided members of Congress an opportunity to conduct oversight, including on Board efforts to promote timely decision making. Confirmation hearings for Board nominees have also provided senators an opportunity to ask nominees about their perspectives on current Board practices for promoting timeliness and their own plans for the future.

Although the CSRA provides for judicial review of MSPB decisions, the courts historically have not played a large role in overseeing the timeliness of MSPB adjudication. Since 1982, only a single court of appeals—the Federal Circuit—has had jurisdiction to review most MSPB orders, and that court upholds well over 90 percent of MSPB actions it reviews.[100] Parties facing delays at MSPB have had little success convincing the court to compel the agency to expedite adjudication of their cases.[101]

B. Agency Startup (1979–1981)

The first Board needed to create a structure for adjudicating pre-CSRA cases and cases filed under the new civil service system. Its first Chair, Ruth Prokop, identified three priorities: (1) creating an effective organizational structure, (2) obtaining the resources necessary to carry out its operations, and (3) developing an effective regulatory framework for adjudication.[102] Although organizational, resource, and regulatory practices have developed over time, many of the strategies introduced in the agency's first few years are still relevant today. Several other

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[95] 5 U.S.C. § 7701(i)(2).
[96] Pub. L. No. 95-454, § 2304(b), 92 Stat. 1111, 1118 (1978).
[97] U.S. GEN. ACCOUNTING OFF., GAO/GGD-87-97, MERIT SYSTEMS PROTECTION BOARD CASE PROCESSION TIMELINESS AND PARTICIPANTS' VIEWS ON BOARD ACTIVITIES (1987).
[98] 5 U.S.C. § 1206.
[99] U.S. GEN. ACCOUNTING OFF., GAO/GGD-95-213, MERIT SYSTEMS PROTECTION BOARD MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND THE WORKING ENVIRONMENT 1 (1995).
[100] JON O. SHIMABUKURO AND JENNIFER A. STAMAN, CONG. RESEARCH SERV., R45630, MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW 12–13 (2019).
[101] *See, e.g.*, Rodriguez v. VA, 8 F.4th 1290 (Fed. Cir. 2021); U.S. MERIT SYS. PROT. BD., U.S. MERIT SYS. PROT. BD.: FOURTH ANNUAL REPORT 25–26 (1983).
[102] U.S. MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT *supra* note 82, at 7.

strategies used to promote timeliness also took root during this initial period, including: (4) precedential decision making, (5) auditing, and (6) case processing alternatives.

1. Organizational Structure

Chair Prokop prioritized developing an organizational structure that would "enable the Board to process those cases filed before the enactment of the Act in a more expeditious fashion but which is also adaptable to the processing of new cases brought under the [CSRA]."[103] Reflecting the agency's primarily adjudicative function, the Board established a field organization, where most appeals cases would be decided initially, and several HQ components to support the Board directly.

MSPB established eleven ROs—ranging in size from five to 25 employees—in Philadelphia, Boston, New York, Atlanta, Denver, Dallas, Chicago, St. Louis, San Francisco, Seattle, and Washington. A Chief Appeals Officer (later retitled Chief AJ), who reported to the Chair through a Managing Director (later renamed the Executive Director), exercised "primary administrative and substantive authority over the operations" of each RO.[104] Staff attorneys (later retitled AJs) presided over hearings and issued initial decisions supported by administrative staff. Although the use of legal support staff was slower to develop, law clerks were eventually made available to help presiding officials conduct legal research and draft legal documents.[105]

MSPB HQ consisted of the Board and several components under the supervision of the Managing Director that supported the Board's management and adjudication functions. HQ components included: (1) OGC, "established to provide legal advice to the Board"; (2) the Office of Special Decisions, "established to undertake responsibility for drafting significant Board decisions"; (3) the Office of Appeals, "vested with the responsibility for preparing and presenting proposed opinions and orders to the Board when it undertook a review of a decision made in the field"; (4) the Office of the Secretary (later renamed OCB), "assigned custodianship over all Board records and empowered to oversee and track cases"; (5) an ALJ "assigned to hear cases of particular difficulty or sensitivity and to render a recommended decision which was subject to the review of the Board"; (6) the Office of Administration, responsible for procurement, personnel, travel, and other basic operational needs; (7) the Office of Information, responsible for conducting public education and outreach, and (8) the Office of Merit Systems Review & Studies, responsible for performing the special studies required by the CSRA.[106]

Congress intended that "the Board, unlike its predecessor, should be an active adjudicator." To review initial decisions within reasonable timeframes, the Board developed a system in which staff attorneys briefed Board members and received instructions for drafting opinions for Board approval. The functions and processes used by these attorneys has evolved over time. Staff attorneys now assist in prioritizing cases for Board review, for example, by identifying cases that can be expedited or may be amenable to settlement.

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[103] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 8, at 12.
[104] MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 82, at 7–8.
[105] FY 1996 ANNUAL REPORT, *supra* note 62, at 38–39.
[106] MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 106, at 7–8, 20.

2. Resources

Chair Prokop prioritized "obtaining adequate funds, staff, and space."[107] With respect to funds, MSPB relied on its statutory authority to submit budget requests directly to Congress to request additional funds.[108] After Congress denied the first request, Chair Prokop froze hiring and halted new equipment purchases, training, and travel. MSPB ultimately received supplemental funding. With additional funding, the agency recruited additional personnel, began investing in IT improvements, and worked to secure staff and space.

With respect to staff, the agency inherited about 175 employees from the CSC's adjudicative components. It quickly became apparent, however, that "supplemental staff and large-scale training" were needed to process post-CSRA cases, and hold hearings, in the new manner required by the CSRA.[109] To eliminate the backlog of pre-CSRA cases within 18 months, Chair Prokop considered options including "the use of part-time personnel to help eliminate the backlog on a one-time basis," recruiting rehired annuitants, short-term contract, and hiring new personnel. She also considered detailing personnel from other agencies but felt that approach would pose challenges, including the need to train detailed personnel, the demand for specialized personnel (i.e., hearing examiners) who were already in short supply elsewhere, and the fact that MSPB was created essentially to act as a watchdog over the agencies from which detailees would come.[110] The agency ultimately received congressional authorization, along with supplemental funding, to increase its staff by about 32 percent. It moved quickly to fill the positions—primarily with lawyers who served as adjudicators in the field and staffed the HQ components that advised the Board.[111]

3. Regulatory Framework

One of the Board's first tasks was to design and implement a process that would promote two goals—"fairness" and "speed"—in processing the "steady but increasingly heavy flow of cases" under the CSRA.[112] In a statement to Congress, Chair Prokop emphasized that it was the "Board's responsibility to process appeals from Federal agencies expeditiously" and that agencies and employees were "entitled to have the Board devise procedures that will ensure that hearings are conducted and decisions rendered expeditiously."[113]

At its first meeting, the Board adopted a goal of processing new-system cases within 120 days. That timeframe was intended to "streamline the arduous, lengthy adjudication of cases which ha[d] characterized the Board's predecessors."[114] Although Chair Prokop emphasized to Congress that there was "no cutting back on due process to reach the 120 days,"[115] some

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[107] *Id*. at 7.
[108] *Id.* at 10–11.
[109] *Id.* at 11–12.
[110] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 8, at 41; *Oversight of the Civil Service Reform Act of 1978: Hearing Before the S. Comm. on Gov't Affs., supra* note 40, at 34, 118–19.
[111] U.S. MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 82 at 11–12.
[112] *Id.* at 13.
[113] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 8, at 18.
[114] *Oversight of the Civil Service Reform Act of 1978: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 40, at 14.
[115] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 8, at 48.

questioned whether strict adherence to the standard would adversely impact substantive accuracy and procedural fairness. GAO investigated whether the 120-day timeframe was "realistic."[116] It found that stakeholders—including agency managers and employee representatives—were generally satisfied with MSPB's timeliness standard.[117]

Although the 120-day timeliness standard has remained MSPB policy since 1979,[118] some have questioned whether a single timeframe for all appeals strikes an appropriate balance between timeliness, on the one hand, and other values such as decisional quality, procedural fairness, and participant satisfaction. Various alternatives have been proposed. Former Chair Neil McPhie, for example, once proposed "establishing realistic time lines and targets based on the complexity of each case."[119]

To develop rules that would enable the agency to complete cases within 120 days, the Board identified and sought to eliminate sources of delay that had plagued the previous CSC-administered system, for example:

- To address concerns that agencies took too long to submit records, the Board required agencies to submit records within 15 days, with extensions granted only in limited cases. In cases where the agency did not submit the record in a timely fashion, the Board would decide the case on the basis of the employee's submissions.[120]

- To address concerns that adjudicators too often granted continuances and postponed hearings and document production, the Board directed adjudicators to deny most requests for postponements and continuances relating to hearings and document submissions. Except in "extraordinary circumstances," no more than one continuance would be granted.[121]

- The Board directed adjudicators to issue initial decisions expeditiously, usually within 25 days after the closing of the record. Consistent with the CSRA, when adjudicators exceeded the established timeframe for completing cases (120 days), they were expected to explain why and, unless they expected to decide the case within 30 days, set a new date for decision making.

Later publications included more granular step-by-step time goals for adjudicators and parties.[122]

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[116] *The Merit Systems Protection Board and Office of Special Counsel: Hearings Before the Sen. Comm. on Gov't Affs.*, *supra* note 41, at 7–8.
[117] U.S. GEN. ACCOUNTING OFF., GAO/GGD-87-97, *supra* note 99, at 17.
[118] U.S. MERIT SYS. PROT. BD., U.S. MERIT SYS. PROT. BD.: JUDGE'S HANDBOOK 1 (2019); FY 2022 ANNUAL REPORT, *supra* note 18, at 10.
[119] *Nominations of Neil McPhie and Barbra Sapin: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 68, at 94.
[120] *Nomination of Ruth T. Prokop: Hearing Before the Sen. Comm. on Gov't Affs.*, *supra* note 8, at 41; U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 30.
[121] U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 30.
[122] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1987 (1988) 11 [hereinafter FY 1987 ANNUAL REPORT].

The Board published interim rules in January 1979 and final rules on June 29.[123] The rules were similar to others used in on-the-record adjudications at other agencies, and the Board designed them specifically to "accommodate the statutory directive that the Board processes be more judicial in concept." Many stakeholders complained that the procedures were "overly formal and legalistic," especially compared with the less judicialized procedures previously used by the CSC.[124] One early study argued the agency "must reconcile the costs of formal adjudication with the need for expedition and economy."[125] Responding to such criticisms, the Board insisted its procedures were consistent with congressional intent.[126]

This Board's initial framework appears to have been successful. The agency received thousands of cases under the CSRA during 1979 and, by the end of the year, had processed more than 98 percent of them within the 120-day time limit. Over its first two years in operation, the agency processed about 94 percent of cases within 120 days. This is particularly impressive given a 72-percent increase in case receipts between 1979 and 1980.[127] An audit of cases not completed within 120 days showed that delays resulted from "[t]emporary staffing and workload problems of professional and support staff," circumstances outside the agency's control, or the unusual complexity or sensitivity of specific cases.[128] MSPB generally has met or come close to meeting its timeliness standards, averaging processing times of less than 120 days in most years.

4. Precedential Decision Making

MSPB was established as a quasi-judicial agency and has been informed throughout its history by the example of the federal courts. This includes the development of and reliance on a body of precedent. Precedential decision making can serve many purposes in administrative adjudication, including the deliberative evolution of law, consistency, and predictability.[129] MSPB has also relied on precedential decision making as a tool for improving timeliness.

Within its first months, the Board took steps to implement a robust system of precedential decision making. By clarifying substantive law and refining the agency's procedures for deciding cases, the Board recognized that precedential decisions could have a "far-reaching impact."[130] In congressional testimony, Chair Prokop acknowledged that, as in other large adjudication

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[123] 44 Fed. Reg. 38,342 (June 29, 1979).
[124] U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 27.
[125] Robert G. Vaughn, *The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication*, 34 ADMIN. L. REV. 25, 50, 53–54 (1982); *Civil Service Oversight: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Off. and Civil Serv., supra* note 60, at 370; *see also* Vaughn, *supra* note 8, at 5; *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 53–54.
[126] U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 15, 48; FY 1988 ANNUAL REPORT, *supra* note 27, at 18.
[127] *Treasury, Post Office and General Government Appropriations for Fiscal Year 1982: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, *supra* note 54, at 750.
[128] U.S. MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 82 at 17; U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 22–24; *Treasury, Postal Serv., and General Government Appropriations for Fiscal Year 1981, Hearings Before a Subcomm. of the H. Comm. on Appropriations,* 96th Cong. 492–498 (1980); MERIT SYS. PROT. BD., SECOND ANNUAL REPORT, *supra* note 27, at 16.
[129] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).
[130] U.S. MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 82 at 21–22; *see also* Vaughn, *supra* note 127, at 35.

systems, the development of a body of precedent might not only help process similar cases expeditiously, especially those already pending before the agency, but also provide clarity sufficient to prevent similar cases from arising in the future. To ensure that this body of decisions achieved this goal, the Board published hard-bound volumes of its decisions and designed a "comprehensive research system" to facilitate identification of relevant law.[131]

5. Auditing

The Office of Merit Systems Review & Studies was established primarily to carry out MSPB's statutory duty to conduct studies of the federal merit systems. Early in its history, for example, the Board tasked the Office of Merit Systems Review and Studies with studying about 1,200 initial decisions "to discern any useful trends or patterns." Although initial findings focused on the merits of cases and trends in agency personnel actions, the Board anticipated that this type of analysis "may be used as an internal management tool for identifying a particular problem in case processing within a given field office."[132] The agency periodically has audited its own operations to detect and address systemic issues and identify best practices.

6. Screening, Triage, and Prioritization

Although MSPB generally decides cases on a first-in-first-out (FIFO) basis, it has experimented with exceptions to this practice to manage caseload surges and backlogs since its first years in operation. In processing the backlog of pre-CSRA cases, for example, agency staff "carefully reviewed old cases for common issues and to otherwise identify those that can be processed promptly." Proceeding in this way enabled the agency to "eliminate those items in our backlog which create a burden of unnecessary correspondence relating to status of cases, etc." and allowed it to direct scarce staff resources to more complicated cases.[133]

C. PATCO Strike (1981–1984)

MSPB faced one of its most significant operational challenges two years after its creation, when it received appeals from more than 11,000 air traffic controllers (ATC) involved in the PATCO strike, more than doubling the agency's caseload. At the same time, the agency faced a "spiraling workload" of RIF appeals resulting from budget cuts at other agencies as well as a 16 percent budget cut of its own, resulting in a furlough of most MSPB staff.[134]

Using its authority to submit budget requests to Congress directly, the agency obtained a restoration of its funding and supplemental appropriations.[135] MSPB relied on several strategies

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[131] MERIT SYS. PROT. BD., SECOND ANNUAL REPORT, supra note 27, at 15; *see also* Vaughn, *supra* note 127, at 54–55.
[132] U.S. MERIT SYS. PROT. BD.: FIRST ANNUAL REPORT, *supra* note 82 at 20.
[133] *Civil Service Agencies Authorization Bills: Hearings on H.R. 3751 & H.R. 3752 Before the Subcomm. on the Civil Serv. Of the H. Comm. on Post Off. & Civil Serv., supra* note 42, at 133.
[134] U.S. MERIT SYS. PROT. BD., STUDY OF MSPB APPEALS DECISIONS FOR FY 1982, *supra* note 54, at 52; *General Oversight on Civil Servivce Agencies: Hearing Before the Subcomm. on Civil Serv. Of the H. Comm. on Post Off. & Civil Serv., supra* note 26, at 183*; Treasury, Postal Serv., and General Government Appropriations for Fiscal Year 1982: Hearings Before a Subcomm. of the H. Comm. on Appropriations, supra* note 54, at 750; *See Urgent Supplemental Appropriations Bill, 1982, supra* note 27*,* at 2.
[135] U.S. MERIT SYS. PROT. BD., FOURTH ANNUAL REPORT, *supra* note 103, at 9–10.

during this period, including continued IT modernization efforts and personnel flexibilities. The Board continued to use precedential decision making to resolve recurring issues efficiently and thereby "process related cases more quickly."[136] To manage the surge in ATC cases, for example, the Board issued important precedents to efficiently resolve common issues central to their resolution.[137] The Board also implemented a procedure in place to "expedite[] cases which can be decided with short opinions" and imposed "tight time constraints" on its own deliberations, adopting a goal of acting on PFRs within 110 days.[138]

Novel strategies introduced in the early 1980s, discussed below, included: (1) a concerted effort to streamline its operations and (2) use of ADR techniques.

1. Operational Streamlining

In early 1982, Chair Ellingwood convened a task force in early 1982 to identify opportunities to streamline agency operations.[139] This task force morphed into a new permanent position at HQ, the Assistant Managing Director for Management, tasked with "revising and streamlining Board management" and "formulating, planning, and coordinating improvements to the policies, procedures, administration and management of the agency."[140] To "be creative in alternatives," the Board reassigned its highest-ranking lawyer to that office.[141]

Discrete streamlining initiatives implemented during this period included:

- **Streamlining Service of Documents.** The agency simplified service requirements and introduced new voluntary discovery procedures under which parties could exchange filings directly without agency supervision.[142]

- **Establishing Fixed Hearing Sites and Grouping Hearings.** Instead of traveling to hearing sites convenient for individual parties, MSPB established a network of "fixed, neutral hearing sites," which made it easier for adjudicators to handle multiple hearings per trip and "thereby facilitate expeditious hearing procedures."[143]

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[136] *General Oversight on Civil Service Agencies: Hearing Before the Subcomm. on Civil Service of the H. Comm. on Post Off. & Civil Service, supra* note 26, at 183–84.
[137] *Supplemental Appropriations for 1983 Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 98th Cong. 22–23 (1983).
[138] *See General Oversight on Civil Service Agencies: Hearing Before the Subcomm. on Civil Service of the H. Comm. on Post Off. & Civil Service, supra* note 26, at 183–84; *Civil Service Oversight: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Office and Civil Serv., supra* note 60, at 368.
[139] U.S. GEN. ACCOUNTING OFF., FPCD-83-20, *supra* note 74, at 11.
[140] U.S. MERIT SYS. PROT. BD., FOURTH ANNUAL REPORT, *supra* note 103, at 13.
[141] *Treasury, Post Office and General Government Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 98th Cong. 1299, 1416 (1983).
[142] U.S. MERIT SYS. PROT. BD., FOURTH ANNUAL REPORT, *supra* note 103, at 9; U.S. MERIT SYS. PROT. BD., THIRD ANNUAL REPORT 7 (1982).
[143] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1985: Hearing Before the Subcomm. on H. Comm. on Appropriations.*, *supra* note 80, at 807; *Civil Service Oversight: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Office and Civil Serv., supra* note 60, at 373.

- **Realigning the Field Operation.** Finding that ROs carried uneven caseloads, the agency adjusted its field operation, altering geographical jurisdictions and reallocating staff resources as needed to balance resources and caseloads.[144]

The Board also asked Regional Directors to develop plans for handling backlogs in their offices, to include "the use of teams on backlogged cases and reassignments of other cases to allow attorneys to handle many of the backlogged hearings at one location in one or two trips."[145]

To institutionalize streamlining reforms, the Board issued "new internal guidelines for conducting more efficient hearings, improving the quality and conciseness of appeals decisions, and expanding and refining its case-tracking systems."[146] Board members and HQ staff traveled to ROs to provide guidance on matters such as docketing, tracking, and adjudication; explain how the Board's policies and procedures "are expected to contribute to achieving our goal of fair and efficient adjudications of appeals"; advise field personnel "of the Board's expectations with respect to the timely processing of cases and the quality of field decisions"; and review ROs' business processes.[147]

MSPB also centralized certain functions where it could achieve efficiencies or economies of scale by doing so. The Office of the Secretary expanded its staff and established a "case processing center" to handle the "enormous paperwork" associated with ATC cases, for example, and HQ ALJs coordinated a national discovery process for ATC cases and were responsible for "issuing subpoenas, ordering the taking of depositions and ordering responses to written interrogatories for all of the regional offices."[148]

2. Alternative Dispute Resolution

MSPB launched an ADR pilot program in selected ROs in 1983. Initially called the Appeals Arbitration Program and later renamed the Voluntary Expedited Appeals Procedure (VEAP), the program was intended to reduce case processing times to as low as 60 days.[149] The agency developed the procedure after consulting with labor unions and agency managers to "try

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[144] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1986: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, 99th Cong. 15 (1985).
[145] *Civil Service Oversight: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Post Off. and Civil Serv., supra* note 60, at 371–72.
[146] MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1983 (1984) 6 [hereinafter FY 1983 ANNUAL REPORT].
[147] U.S. GEN. ACCOUNTING OFF., GAO/FPCD-80-46, *supra* note 33, at 25; *Treasury, Post Office and General Government Appropriations for Fiscal Year 1982: Hearings Before the Subcomm. of the H Comm. on Appropriations*, *supra* note 54, at 792-95.
[148] U.S. MERIT SYS. PROT. BD., FOURTH ANNUAL REPORT, *supra* note 103, at 9.
[149] *Treasury, Post Office and General Government Appropriations for Fiscal Year 1983: Hearings Before the Subcomm.of the H. Comm. on Appropriations*, *supra* note 60, at 1299, 162; *Treasury, Post Office and General Government Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, *supra* note 143, at 1298; U.S. GEN. ACCOUNTING OFF., FPCD-83-20, *supra* note 74, at 12; FY 1983 ANNUAL REPORT, *supra* note 143, at 25; *Civil Service Oversight: Hearing Before the Subcomm. of the H. Comm. on Post Off. and Civil Serv., supra* note 60, at 360.

to find alternatives to the regular judicial process."[150] VEAP played a critical role in eliminating the backlog in 1983 and early 1984 and was extended nationwide in 1985[151]

The Administrative Conference of the United States found that VEAP achieved its objective of "providing Federal employees and agencies with a more expeditious, less costly means of resolving routine disputed personnel actions while also affording a fair, impartial forum for the hearing of these disputes."[152] Although it was never widely used, lessons learned from the program made their way into standard case processing, as discussed in the next section.[153]

D. 1985–2017

MSPB experienced few major crises from 1985 through 2017. ROs experienced caseload surges in the early 1990s as a result of RIFs, furloughs, and military base closures, and caseloads systemwide fluctuated due to the downsizing and restructuring of various agencies, especially the restructuring of the U.S. Postal Service in 1992. The agency also faced its own workload challenges, including resource constraints, downsizing, attrition, and the brief loss of a quorum in the early 2000s. Nevertheless, the agency generally met or exceeded its timeliness goals.

The agency was generally able to manage its caseload through ordinary personnel measures, for example by realigning and reorganizing its field operation to balance caseloads between ROs and reduce overhead,[154] collapsing layers of management to redirect scare resources to core adjudicative functions,[155] and hiring permanent and temporary AJs and staff.[156]

In this "less crisis-charged atmosphere," attention shifted to other priorities.[157] Board members emphasized values like quality assurance, customer service, and transparency and activities like special studies and merit systems education and outreach. Nevertheless, some efforts had the effect of promoting timeliness. Through quality assurance efforts, for example, the agency identified "common administrative matters such as scheduling, form orders, and review procedures which could be improved or shared with other offices."[158]

Continued IT modernization efforts—including automated document generation, digitization of case files, development of public-facing online processes, and use of video hearings—also continued to improve how managers, adjudicators, and support staff managed

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[150] *Supplemental Appropriations for 1983: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, *supra* note 139, at 30.
[151] FY 1983 ANNUAL REPORT, *supra* note 143, at 12; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1986: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, *supra* note 146, at 2.
[152] Avril V. Adams and Jose R. Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector 2–6 (January 1985) (report to Admin. Conf. of the U.S.).
[153] FY 1988 ANNUAL REPORT, *supra* note 27, at 19.
[154] *Nominations of Neil McPhie and Barbra Sapin, supra* note 68, at 74; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 55, at 785.
[155] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998: Hearing Before the Subcomm. of the H. Comm. on Appropriations, supra* note 67, at 633.
[156] *Id.*
[157] FY 1987 ANNUAL REPORT, *supra* note 124, at 15; FY 1988 ANNUAL REPORT, *supra* note 27, at 23.
[158] FY 1985 ANNUAL REPORT, *supra* note 79, at 11.

caseloads, processed cases, and collected information on case processing systemwide.[159] In annual reports and congressional testimony, the agency touted the benefits of these and other IT modernization efforts for timely case processing.[160]

Notable trends during this period, discussed below, include (1) organizational and individual performance management, (2) a continued emphasis on ADR, (3) experimentation with the form of initial and Board decisions, (4) case prioritization, (5) recruitment and institutional knowledge transfer, (6) training initiatives, (7) regulatory review, and (8) a streamlining of the processes by which staff attorneys support Board action on PFRs.

1. Organizational and Individual Performance Management

The Government Performance and Results Act (GPRA) became law in August 1993, and President Clinton issued Executive Order 12862, *Setting Customer Service Standards*, a month later. In performance and customer service plans adopted since then, the agency has consistently emphasized timeliness—in particular, the 120-day timeframe for initial decision making—as a key performance goal and strategic objective.[161] Timeliness—including timely decision making "in accordance with our performance goals and targets"—remains one of four organizational values in the agency's most recent performance plan, along with excellence, fairness, and transparency.[162]

Timeliness of case processing has also been considered—and continues to be considered—in appraising the performance of individual employees.[163] As in other program, concerns have been raised that undue emphasis on timeliness in appraising adjudicators' performance might adversely affect the quality of their decisions or the fairness of their case management practices, particularly during periods when the agency faces increased caseloads or reduced capacity. As former Chair Susanne Marshall explained:

> The advantage to linking the Board's quality and timeliness Performance Plan goals to the performance standards for [AJs] and [HQ] attorneys is to ensure that those employees share directly in the responsibility for achieving the agency's established goals. The disadvantage of such linkage results from a certain amount of tension between the two goals when the Board's caseload increases but the

[159] FY 1986 ANNUAL REPORT, *supra* note 85, at 8; FY 1987 ANNUAL REPORT, *supra* note 124, at 6; FY 1997 ANNUAL REPORT, *supra* note 88, at 27; FY 1998 ANNUAL REPORT, *supra* note 67, at 30.
[160] FY 1998 ANNUAL REPORT, *supra* note 67, at 30; *Safeguarding the Merit Systems Principles*, *supra* note 62, at 3–4, 29; FY 2014 ANNUAL REPORT, *supra* note 88, at 13; *Nominations of Neil McPhie and Barbra Sapin, supra* note 68, at 48; *Nominations of Colleen D. Kiko, Mary M. Rose, Ho. Juliet J. McKenna, and John R. Fisher, supra* note 77, at 76; *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, supra* note 55, at 774; FY 1995 ANNUAL REPORT, *supra* note 62, at 32; FY 1997 ANNUAL REPORT, *supra* note 88, at 27; ANNUAL REPORT FOR FY 1999, *supra* note 88, at xxviii; ANNUAL REPORT FOR FY 2001, *supra* note 88, at 8; *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, *supra* note 34, at 14–16.
[161] *See* U.S. MERIT SYS. PROT. BD., *Plans, Budget & Performance*, https://www.mspb.gov/about/annual.htm (last visited Sep. 8, 2023); FY 2022 ANNUAL REPORT, *supra* note 18, at 10.
[162] FY 2022 ANNUAL REPORT, *supra* note 18, at 4. The most recent performance plan notes that the agency will focus in FYs 2023 and 2024 on "measures related to reducing the inventor of cases at HQ rather than the average processing time." *Id*.
[163] *Id*. at 25.

> number of [AJs] and [HQ] attorneys remains the same. As more cases must be adjudicated within the same time requirements with the same number of attorneys, quality can suffer. Because these employees have no control over the size of the Board's caseload, there is an element of unfairness in placing some of the responsibility on them for simultaneously achieving both the goal of timeliness and the goal of quality in such a situation.[164]

There have been efforts made to strike an optimal balance between timeliness and other performance objectives such as substantive accuracy and procedural fairness. In response to concerns that overemphasis on timeliness led to unfairly rushed discovery, for example, the agency implemented a program allowing AJs to suspend processing of a case for up to 60 days at the joint request of the parties while they pursue discovery or settlement.[165]

2. Alternative Dispute Resolution

The agency continued to experiment—and encouraged its adjudicators to experiment—with ADR techniques. The agency promoted the use of ADR to achieve settlement in the years that followed and provided adjudicators with training on ADR techniques.[166] The agency began to "emphasize mandatory settlement attempts as an alternative means for resolving appeals," and adjudicators increasingly relied on prehearing conferences and settlements negotiations as case management tools.[167] RO and HQ components also began to screen case files to support early identification of cases in which settlement may be viable and appropriate.[168]

The rate of settlement increased significantly through the 1980s. In FY 1984, parties settled in only 6 percent of merits appeals. That number jumped to 18 percent in FY 1985, 26 percent in FY 1986, 36 percent in FY 1987, 48 percent in FY 1988, and 49 percent in FY 1989, settling at about 50 percent thereafter.[169] Congress considered MSPB's experience in the debates leading up to passage of the Administrative Dispute Resolution Act of 1990.[170]

Even in cases that were not appropriate for ADR, adjudicators leveraged their experience with VEAP to encourage parties "to stipulate facts not in dispute and to identify remaining issues for hearing."[171] Requiring "early identification and adjudication of lead issues" became a core

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[164] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 62.
[165] *Id*. at 61.
[166] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1986: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, *supra* note 146, at 4; FY 1987 ANNUAL REPORT, *supra* note 124, at 5; *Treasury, Postal Service and General Government Appropriations for Fiscal Year 1988: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 100th Cong. 133 (1987).
[167] FY 1986 Annual Report, *supra* note 84, at 7.
[168] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie, supra* note 35, at 141.
[169] FY 1988 ANNUAL REPORT, *supra* note 27, at 39.
[170] *See Administrative Dispute Resolution Act of 1989: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the Sen. Comm. on Gov't Affs.*, 101st Cong. (1989).
[171] FY 1986 ANNUAL REPORT, *supra* note 85, at 7.

feature of case management.[172] At prehearing conferences, for example, adjudicators encouraged parties to define and narrow the issues, stipulate to undisputed facts, and consider settlement.[173]

In the early 1990s, MSPB began to consider using settlement judges and non-adjudicator mediators.[174] It initiated a pilot settlement judge program in 1994.[175] In 2002, it launched the Mediation Appeals Project (MAP), under which parties could elect to have their cases submitted to an MSPB employee trained in transformative mediation techniques.[176] MAP began as a pilot project but became a permanent, nationwide program in FY 2004.[177]

The Board also considered whether ADR might be useful in resolving pending PFRs more quickly. In the mid-1990s, it initiated a pilot settlement program under which Board attorneys discussed settlement with parties in appropriate cases and then expanded the use of ADR at the Board level.[178]

Board members have also encouraged—and even invested in formal programs to encourage—more effective use of ADR by other agencies to resolve personnel disputes. If successful, the likely result would be fewer appeals to MSPB, freeing up scarce agency time and resources to adjudicate cases that cannot be resolved so easily through early ADR.[179]

Some have questioned whether the emphasis on ADR, coupled with high rates of settlement, might optimize timeliness and cost-effectiveness at the expense of other values such as procedural fairness, decisional accuracy, and transparency—especially for self-represented appellants.[180] Concerns have also been raised that too much settlement may actually "conflict with the mission of the adjudicatory agencies to support the merit principles and may set troublesome precedents or create ethical dilemmas for manager."[181]

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[172] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1985: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, *supra* note 80, at 806.
[173] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1993 (1994) 24 [hereinafter FY 1993 ANNUAL REPORT].
[174] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1985: Hearing Before the Subcomm. of the H. Comm. on Appropriations.*, 102nd Cong. 455–56 (1992).
[175] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1994 10-11 (1995) [hereinafter FY 1994 ANNUAL REPORT];32.
[176] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 21–22, 140; *Nominations of Neil McPhie and Barbra Sapin: Hearing Before the Sen. Comm. on Gov't Affairs, supra* note 68, at 52; FY 2002 ANNUAL REPORT, *supra* note 39, at 4.
[177] FY 2004 ANNUAL REPORT, *supra* note 65, at vii–viii.
[178] FY 1993 ANNUAL REPORT, *supra* note 176, at 29; U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 1992 (1993) 19 [hereinafter FY 1992 ANNUAL REPORT]; FY 1994 ANNUAL REPORT, *supra* note 178, at 10–11; FY 1997 ANNUAL REPORT, *supra* note 88, at 27.
[179] ANNUAL REPORT FOR FY 1999, *supra* note 88, at x, xxvii; ANNUAL REPORT FOR FY 2001, *supra* note 88, at 3.
[180] *See, e.g.*, Robert Vaughn, *Civil Service Reform and the Rule of Law*, 8 Fed. Cir. B.J. 1, 6 (1998–1999); *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 63–64; *Nominations of Colleen D. Kiko, Mary M. Rose, Juliet J. McKenna, and John R. Fisher, supra* note 77, at 79–80.
[181] *Civil Service Reform IV: Streamlining Appeals Procedures: Hearing Before Subcomm. on Civil Serv. of the H. Comm. on Gov't. Reform and Oversight,* 104th Cong. 27 (1995); Eric Katz, *Agencies are Facing New Restrictions for Firing Feds Injured on the Job*, GOVERNMENT EXECUTIVE (Feb. 27, 2023) https://www.govexec.com/management/2023/02/agencies-facing-new-restrictions-firing-feds-injured-job/383382/; Drew Friedman, *MSPB*

3. Form of Initial and Board Decisions

The agency piloted, and later made permanent, a program permitting AJs to issue bench decisions. Bench decisions were expected to "provide parties with a decision more quickly and generally speed the decision-making process of the Board."[182]

The Board itself increasingly focused on issuing precedential decisions in cases involving "major issues," so that "these decisions may be utilized in the adjudication of other cases involving similar issues."[183] "Major issues" cases were those that were "novel but will occur with some frequency in Board appeals. Their resolution in one or two appeals, therefore, allows for resolution in many other cases." As the Board explained: "These precedential decisions can then be relied on by administrative judges in subsequent appeals, eliminating the need for writing their own lengthy rationale for reaching the same conclusions."[184]

To direct scarce resources to those cases in which the Board expected to issue a decision that would contribute significantly to its body of law, the Board adopted a policy of issuing less time-consuming "short-form" decisions in less significant cases. These decisions simply denied a party's PFR without explanation.[185] Finding that some explanation could be valuable even in nonprecedential decisions, the Board later began providing "expanded explanations of its rationale" in unpublished opinions.[186] As discussed in the next section, however, the Board has since reinstituted short-form decisions as a way to address its backlog.

4. Case Prioritization

The boldest experimentation with case prioritization was at the Board level. In the early 2000s, the Board focused its efforts on completing aged cases that had been pending with the Board for more than 300 days—especially enforcement cases that cannot be closed until compliance is achieved.[187] Board members also relied on informal methods to identify cases that might require additional time for further development, for example "color-coding, putting them in green folders so that we can make notes as they come into our office that this case has a

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Releases Results of Federal Sexual Harassment, FEDERAL NEWS NETWORK (Jan. 16, 2023) https://federalnewsnetwork.com/workforce/2023/01/five-years-later-mspb-releases-results-of-federal-sexual-harassment-study/.

[182] FY 1998 ANNUAL REPORT, *supra* note 67, at 20; ANNUAL REPORT FOR FY 1999, *supra* note 88, at xxviii; ANNUAL REPORT FOR FY 2001, *supra* note 88, at 3.

[183] FY 1987 ANNUAL REPORT, *supra* note 124, at 5; FY 1988 ANNUAL REPORT, *supra* note 27, at 28.

[184] FY 1987 ANNUAL REPORT, *supra* note 124, at 19.

[185] FY 1988 ANNUAL REPORT, *supra* note 27, at 14.

[186] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2010 (2011) 7 [hereinafter FY 2010 ANNUAL REPORT]; *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, *supra* note 34, at 3.

[187] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 140; *Nominations of Neil McPhie and Barbra Sapin: Hearing Before the Sen. Comm. on Gov't Affairs, supra* note 68, at 9, 93; *To Authorize Appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for Other Purposes: Report of the Sen. Comm. on Gov't. Affs.,* 107th Cong. 9 (2003); FY 2000 ANNUAL REPORT, *supra* note 72, at 3.

particularly difficult issue and we need to give it expeditious review so that we can determine what direction it should take if it needs any more work."[188]

Perhaps the most routinized example of case prioritization is the expedited PFR program, which began as a pilot in 1999. The program's purpose was to "identify non-meritorious [PFRs] that can be disposed of quickly so that the 3-member Board can focus its resources on complex and precedential cases." Under that program, a senior staff attorney detailed to the OCB reviewed whether PFRs meet one of eight criteria established for expedited processing ("e.g., clearly not within the Board's purview, no attempt to meet the criteria for Board review"). In such cases, the attorney prepared a proposed decision and forwards it to the Board rather than transferring it to a team of staff attorneys in OAC for consideration and preparation of a decision.[189]

In the program's first six months, about eight percent of 724 PFRs were expedited. The average processing time for expedited cases was 60 days.[190] The program was moved to the OAC in 2002 to take advantage of additional staff available in that Office, resulting in a two-month reduction in the Board's average processing time.[191] An evaluation of the pilot in 2002 recommended that the program be made permanent.[192]

5. Recruitment and Institutional Knowledge Transfer

MSPB, like other federal agencies, has faced a wave of retirements. This has impacted the corps of AJs, in particular, many of whom were among the most senior employees at MSPB. As then-Chair Susan Tsui Grundmann noted in congressional testimony in 2012:

> In the next 2 years, over 30 percent of MSPB's workforce will be retirement-eligible, and 47 percent of that number is the [AJs] who are responsible for issuing initial decisions in thousands and thousands of individual cases every year. Because it takes approximately 2 years of training before an AJ can work independently, retirement, recruitment, and training are extremely pressing concerns, particularly if appeals increase in the areas of retirement, veterans' work, veterans' claims and as a result of agency restructuring due to tightening budgets.

The agency made it a priority to maintain an appropriately sized corps of AJs as rates of attrition increased—for example by identifying "the critical vacancies that we needed to plan for in the

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[188] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 12.
[189] FY 2000 ANNUAL REPORT, *supra* note 72, at 5.
[190] FY 2000 ANNUAL REPORT, *supra* note 72, at 5; *To Authorize Appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for Other Purposes: Report of the Sen. Comm. on Gov't. Affs., supra note 190, at 10–12;* ANNUAL REPORT FOR FY 1999, *supra* note 88, at xxviii.
[191] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 21, 58; FY 2002 ANNUAL REPORT, *supra* note 39, at 4.
[192] ANNUAL REPORT FOR FY 2001, *supra* note 88, at 3; *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 141.

future," hiring a few AJs each year, and pairing them with experienced AJs for a two-year period to facilitate "the transference of institutional knowledge."[193]

6. Training Initiatives

MSPB invested heavily in adjudicator and staff training and built a robust training program to foster timely, fair, and high-quality adjudication. In the 1990s, HQ attorneys traveled to ROs to "share current and developing trends in Board law and practice with AJ" (as well as to receive AJs' "input into how those practices and procedures work when applied in 'real-world' situations").[194] The Board also held regional training conferences, prepared manuals to assist adjudicators and even established an "in-house faculty" to train attorneys not only on substantive legal matters but also "prehearing conferences" and other "hearing management" techniques.[195]

7. Regulatory Review

In the early 2010s, the Board undertook a "comprehensive review" of its procedural rules to achieve several objectives, including "streamlining certain processes that may appear time-consuming or redundant." To identify such processes more effectively, the Board assembled an internal "reg review team" of AJs, RO staff attorneys, and representatives from OGC and OCB.[196] The team prepared a document which the agency initially shared with about 40 stakeholders—including private practitioners, representatives from agencies that practices before MSPB, and representatives from other civil service agencies—before undergoing public notice and comment and issuing a final rule.[197] The rule included several reforms to promote timeliness. For example, it eliminated a regulatory requirement that parties make certain disclosures at the start of an agency proceeding without a discovery request, finding that requirement was "unnecessary and led to unproductive motion practice."[198]

8. Staff Support

The Board experimented with processes to expedite its own decision making without sacrificing quality by permitting senior staff attorneys to send recommendations directly to the Board without review by a supervisory attorney, by implementing a peer review program, and by developing a "working glossary of repetitive case citations and simplified standard paragraphs" which can be used across multiple cases.[199] (Similar glossaries have been provided to staff attorneys in ROs to expedite the process for drafting initial decisions.[200]) Board members also

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[193] U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2016 (2017) 1–2 [hereinafter FY 2016 ANNUAL REPORT]; *see also Nominations of Susan Tsui Grundmann and Anne Marie Wagner: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affairs, supra* note 62, at 10.
[194] FY 1991 ANNUAL REPORT, *supra* note 46, at 43–44.
[195] FY 1990 ANNUAL REPORT, *supra* note 58, at 35.
[196] *A Review of the Office of Special Counsel and Merit Sys. Prot. Bd.: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, *supra* note 34, at 17.
[197] *Id.* at 18; FY 2012 ANNUAL REPORT, *supra* note 36, at 17.
[198] FY 2012 ANNUAL REPORT, *supra* note 36, at 17–18
[199] *Nominations of Terrence A. Duffy, Susanne T. Marshall, and Neil A. McPhie: Hearing Before the Sen. Comm. on Gov't Affs., supra* note 35, at 58.
[200] FY 1990 ANNUAL REPORT, *supra* note 58, at 35.

relied on improved IT to eliminate time-consuming processes by which staff attorneys incorporated members' edits and circulated revised drafts for members' review and signature.[201]

E. Lack of a Quorum and Aftermath (2017–Present)

The Board lacked a quorum beginning in January 2017 and had no members between March 2019 and March 2022. Several measures were implemented during this period, or already in place, that diminished the effects of the lack of a quorum or prepared it to address the backlog once a quorum was restored, including:

- **Delegating Adjudicative Authority.** The Board had previously delegated authority to the Clerk of the Board to take actions such as granting a withdrawal of a PFR when requested by a petitioner, dismissing PFRs that are moot, rule on the time for filing pleadings, respond to requests for reconsideration or reopening, issue show cause orders, rule on procedural motions, and execute subpoenas.[202]

- **Relying on Staff Attorney Support.** OAC continued to review case files, prioritize certain caseloads, recommend outcomes, and draft decisions. As described below, this function was central to the Board's eventual approach to addressing the backlog.[203]

When a quorum was restored in March 2022, about 3,800 PFRs were pending resolution. at the Board in March 2022. The current Board has relied on several strategies to address the backlog. A few days after Raymond Limon was confirmed as Vice Chair and Acting Chairman and Tristan Leavitt was confirmed as a Board member—and a quorum was restored—they received a memorandum from OAC, through the Acting Executive Director, describing a "Recommended Approach for the Petition for Review Backlog." Vice Chair Limon and Member Leavitt approved the proposed approach, which read in full:

> As of February 28, 2022, there were 3,643 [PFRs] pending at [HQ], and for 3,352 of those, career staff—primarily in OAC—have already drafted recommended decisions. It is up to the new Board to decide how to address the backlog, and there are many possibilities in that regard. The following is a proposed initial approach, subject to review and adjustment by the Board over time.
>
> During Vice Chair and Acting Chairman Mark Robbins's tenure, when the backlog was beginning to grow, the legal offices determined it would be advisable to create a recommended plan to present to the new Board on how to best approach the backlog. Accordingly, over the last several years, MSPB's legal offices, including that of Acting Chairman Robbins when he was still here,

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[201] 32.
[202] U.S. MERIT SYS. PROT. BD., ORGANIZATION FUNCTIONS & DELEGATIONS OF AUTHORITY 21 (April 2011).
[203] *Katz*, *supra* note 87; *Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affs, supra* note 70, at 11–13; RAYMOND A. LIMON, MERIT SYS. PROT. BD., RECOMMENDED APPROACH FOR THE PETITION FOR REVIEW BACKLOG (March 10, 2022); Jason Briefel, *Back in Action: A Conversion with the Newly Confirmed MSPB Members*, FED MANAGER (July 19, 2022) https://fedmanager.com/news/back-in-action-a-conversation-with-the-newly-confirmed-mspb-members.

> collaborated to determine which cases were priorities from all of our perspectives, such as critical precedential decisions, a number of which involve allegations of whistleblower reprisal. Additionally, recognizing that new Board members would need to acclimate to the process of voting, we noted case categories that are typically easier to vote, like settlements and withdrawals.
>
> Statutes, regulations, and court precedent have change since some of the recommended decisions were drafted early in the lack of quorum period. OAC has been working to review and update those decisions to ensure they include the most up to date legal authority and are ready for voting by the Board members.
>
> Further, OAC, [OGC], and [OCB] have prepared the structure and processes needed to supply the Board members with a steady stream of cases to vote. Once you have approved the recommended approach to the backlog contained therein, the Board members will soon receive your initial case dockets.[204]

In official documents and in interviews, current Board members have described several other strategies used to address the PFR backlog, including:

- **Prioritizing Precedential Decision Making.** Staff attorneys in OAC screen PFRs to identify "emerging issues" that might be amendable to precedential decision making. The Board prioritizes cases in which a precedential decision is likely, "because then non-precedential ones that would follow those cases would be able to be issued more efficiently." As Acting Chair Cathy Harris explained: "So if you do a big case, a case that has a big holding, then maybe 25 cases follow it and we can just boom, boom, boom get those out."[205]

- **Using Short-Form Decisions.** To direct scare resources to more complex cases and cases in which a precedential decision is likely, the Board has relied on "short orders," with apparent approval from key members of Congress.[206]

- **Encouraging Settlement.** In addition to its longstanding settlement program, MSPB partnered with the Federal Mediation and Conciliation Service (FMCS) on a new pilot program, called the PFR Rapid Assessment Mediation Program (PFR RAMP), which is "offered in cases in which changed case law

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[204] The memorandum is available at https://www.mspb.gov/foia/files/BacklogDecisionMemo.pdf.
[205] Katz, *supra* note 87; Friedman, *supra* note 184; MERIT SYS. PROT. BD., FREQUENTLY ASKED QUESTIONS ABOUT THE LACK OF QUORUM PERIOD AND RESTORATION OF THE FULL BOARD (UPDATED JULY 5, 2023); MERIT SYS. PROT. BD., FREQUENTLY ASKED QUESTIONS ABOUT THE LACK OF QUORUM PERIOD AND RESTORATION OF THE FULL BOARD (UPDATED JULY 12, 2023).
[206] Eric Katz, *Federal Employee Appeals Board Still Has Years of Work Ahead to Cut Through its Record Backlog*, GOVERNMENT EXECUTIVE (Dec. 20, 2022) https://www.govexec.com/workforce/2022/12/federal-employee-appeals-board-still-has-years-work-ahead-cut-through-record-backlog/381103/; Drew Friedman, *MSPB Making "Good Headway" Through Case Backlog, Acting Chairwoman Harris Says*, FEDERAL NEWS NETWORK (Jun. 20, 2022) https://federalnewsnetwork.com/workforce/2022/06/mspb-making-good-headway-through-case-backlog-acting-chairwoman-harris-says/https://federalnewsnetwork.com/workforce/2022/06/mspb-making-good-headway-through-case-backlog-acting-chairwoman-harris-says/; *Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affairs, supra* note 70, at 11-12.

or other factors suggest a likely path for mediated resolution." The program is "staffed by two full-time mediators, including an experienced mediator on detail to MSPB from [FMCS]."[207]

[207] MERIT SYS. PROT. BD., MSPB ANNOUNCES PFR MEDIATION PILOT PROGRAM WITH FMCS (Sep. 28, 2022); Eric Katz, *Federal Employee Appeals Board Still Has Years of Work Ahead to Cut Through its Record Backlog*, GOVERNMENT EXECUTIVE (Dec. 20, 2022) https://www.govexec.com/workforce/2022/12/federal-employee-appeals-board-still-has-years-work-ahead-cut-through-record-backlog/381103/; *Nominations of Cathy A. Harris, Tristian L. Leavitt, and Raymond A. Limon: Hearing Before the Sen. Comm. on Homeland Sec. and Gov't Affairs, supra* note 70, at 11–17.

APPENDIX J:
NATIONAL LABOR RELATIONS BOARD

This case study provides an overview of efforts to improve or promote timeliness at the National Labor Relations Board (NLRB). Congress established NLRB in 1935 as an federal independent agency empowered to administer and enforce the National Labor Relations Act, which provides employees at private-sector workplaces the right to seek better working conditions and to designate representation without fear of retaliation.[1] NLRB safeguards employees' rights to choose for themselves, without interference by employers or unions, whether to form, join, assist, or collectively bargain through a labor organization and to otherwise join together for their mutual aid or protection, or to refrain from all such activity.[2]

Part I provides an overview of NLRB, its historical development, the types of cases it decides, and the process for adjudicating them. Part II describes timeliness as a value in NLRB adjudication. Part III describes factors that have affected the timeliness of NLRB adjudication. Part IV describes efforts by NLRB to promote or improve timeliness.

I. BACKGROUND

A. The Program

NLRB has two primary functions: (1) to investigate and resolve allegations of statutorily defined unfair labor practices by employers and unions and (2) to investigate and resolve questions concerning representation among employees to determine whether employees wish to be represented by a union.[3] About 90 percent of the agency's contemporary workload involves the investigation and resolution of unfair labor practice allegations, and roughly 10 percent of the agency's workload involves representation cases.[4]

NLRB does not act on its own initiative in either function; the agency may only act upon those charges and petitions which are filed with NLRB. Similarly, NLRB has no statutory power to enforce its decision and orders. However, NLRB may seek enforcement in federal courts and parties may also seek judicial review of the Board's decisions.

B. The Agency

In 1933, President Franklin D. Roosevelt created the National Labor Board (NLB) to assist the President in handling labor disputes arising out of the National Industrial Recovery Act.[5] Composed of representatives of labor and industry, NLB claimed jurisdiction over labor

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[1] National Labor Relations Act, Pub. L. No. 74-198 § 10, 49 Stat. 449, 453 (1935) (also known as the Wagner Act).
[2] *National Labor Relations Act*, NAT'L LAB. REL. BD., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Dec. 5, 2023).
[3] NAT'L LAB. REL. BD., STRATEGIC PLAN: FY 2022-2026 5 (2022).
[4] U.S. GOV'T. ACCOUNTABILITY. OFF., GAO-21-242, NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 6 (2021).
[5] NAT'L LAB. REL. BD., FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 4 (1936). *See also* National Industrial Recovery Act of 1933, Pub. L. 73-67, 48 Stat. 195 (1933).

disputes and established 20 regional boards to hold hearings where controversies arose.[6] Through a series of executive orders, President Roosevelt subsequently affirmed NLB's authority to do so.[7] As NLB continued to settle labor disputes, hold hearings, and issue findings and recommendations in cases where no settlement had been achieved, the value of a statutorily-created, permanent Board became apparent.[8]

In 1934, Congress passed a joint resolution that authorized the President to establish one or more boards to investigate the facts in labor controversies and to conduct elections among employees to determine their representatives for collective bargaining.[9] Subsequently, through executive order, President Roosevelt dissolved NLB, established a National Labor Relations Board ("old Board"), and empowered that Board to make investigations, hold labor elections, and hear cases of discharge of employees.[10] President Roosevelt extended the life of the old Board through additional executive orders, but the active work of the old Board ceased after the Supreme Court held parts of the National Industrial Recovery Act unconstitutional.[11]

In 1935, Congress passed the National Labor Relations Act, also known as the Wagner Act, and established NLRB as a permanent independent federal agency composed of three members, appointed by the President, by and with the advice and consent of the Senate.[12] The original members served staggered, fixed terms and were removable by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.[13] Upon the appointment of these three members and designation of a chairman, the old Board ceased to exist and all employees of the old Board were transferred to and became employees of NLRB.[14]

The constitutionality of the Wagner Act was challenged almost immediately. In the first two years of NLRB's existence, federal courts issued nearly 100 injunctions against the enforcement of the Act and effectively paralyzed the agency.[15] In 1937, the Supreme Court upheld the constitutionality of the Wagner Act, as well as the constitutionality of NRLB's jurisdiction.[16]

After the Supreme Court's ruling, NLRB's caseload rose 1000 percent.[17] To handle this dramatic increase in cases, the agency switched from a mostly per diem staff to employ a roster of regular staff judges.[18] Congress subsequently expanded the NLRB's jurisdictional authority

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[6] NAT'L LAB. REL. BD., FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 4 (1936).
[7] *E.g.*, Exec. Order No. 6580 (Feb. 1, 1934); Exec. Order 6612-A – Amendment of Executive Order No. 6580 (Feb. 23, 1934).
[8] NAT'L LAB. REL. BD., FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 5-6 (1936).
[9] H.J. Res. 275, 73d Cong., 48 Stat. 1183 (1934).
[10] Exec. Order No. 6763 (June 30, 1923).
[11] NAT'L LAB. REL. BD., FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 7 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[12] National Labor Relations Act, Pub. L. No. 74-198 § 3(a), 49 Stat. 449, 451 (1935)
[13] *Id*.
[14] *Id*.
[15] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 26 (2015).
[16] Nat'l Lab. Rel. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-31 (1937).
[17] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 27 (2015).
[18] NAT'L LAB. REL. BD., HISTORY OF THE NLRB JUDGES DIVISION 1 (2004)

with the War Labor Disputes Act[19] and Telegraph Merger Act.[20] During NLRB's first 12 years of existence, more than 105,000 cases were filed with the agency.[21] About 57 percent of these cases involved representation and about 43 percent involved allegations of unfair labor practices.[22]

In response to a series of major labor strikes across the country, Congress substantially increased NLRB's authority in 1947.[23] The Labor Management Relations Act amended the NLRA to include unions and defined six additional unfair labor practices and four new types of elections.[24] The Act also changed the structure of NLRB by expanding the Board's size to five members, but authorized the Board to sit in panels of three members to discharge its responsibilities.[25] Additionally, the Act provided for a General Counsel to serve as prosecutor and supervise all NRLB attorneys except trial examiners and attorneys on the staffs of individual Board members.[26]

Under its new structure, the NLRB adopted a new set of rules and regulations and made numerous changes to its procedures for handling both unfair labor practice and representation cases.[27] A majority of Board decisions were rendered by three member panels and the full Board handled cases involving undecided questions of policy or law.[28] The Board also adopted a formal policy of attaching "great weight" to administrative law judges' (ALJs') credibility findings.[29]

Throughout the next decade, the labor movement came under increasing congressional scrutiny for corruption, racketeering, and other misconduct and Congress determined additional reforms to the NLRA were needed.[30] In 1959, Congress passed the Landrum-Griffin Act and again expanded the NLRB's authority.[31] The Act also authorized the Board to delegate significant authority to its regional directors (subject to discretionary review).[32]

Shortly thereafter, NLRB's General Counsel appointed a committee of career agency staff to develop a case management system to handle the agency's increasing responsibilities.[33] The committee developed a "time target" system which not only has been utilized by NLRB in a

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[19] Pub. L. No. 78-89, 57 Stat. 163 (1943) (also known as the Smith-Connally Act).
[20] 57 Stat. 5 (1943).
[21] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 23 (2015).
[22] *Id*.
[23] Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (also known as the Taft-Hartley Act).
[24] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 36, 38 (2015).
[25] Labor Management Relations Act of 1947, Pub. L. No. 80-101 § 101, 61 Stat. 136, 139 (1947) (also known as the Taft-Hartley Act).
[26] *Id*.
[27] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 40 (2015).
[28] *Id*.
[29] Standard Dry Wall Products, 91 NLRB 544, 545 (1950), efrd. 188 F.2d 362 (3d Cir. 1951). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (holding intermediate reports of trial examiners are part of the record for applying the substantial evidence test).
[30] *1959 Landrum-Griffin Act*, NAT'L LAB. REL. BD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Dec. 5, 2023).
[31] Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).
[32] *Id*.
[33] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 48 (2015).

modified and expanded form ever since, but has served as a model for other agencies as they established their own case management systems.[34]

Over the next several decades, NLRB's jurisdictional authority continued to expand through either congressional[35] or agency action.[36] While this expansion of authority initially led to an increased caseload, the Board's caseload has been comparatively stable since 2014 (high of 23,863 total cases in 2016 and a low of 16,719 cases in 2021).[37]

Currently, NLRB structure consists of five members appointed by the President and confirmed by the Senate.[38] Board members served five year, staggered terms and are protected from removal but for cause.[39] One of these members is designated by the President to serve as Chair.[40] The President also appoints, with the advice and consent of the Senate, a General Counsel, who serves a four year term.[41]

NLRB's authority is divided by law and delegation.[42] Approximately 70 percent of NLRB staff are employed in a network of field offices, where all unfair labor charges and representation petitions initially are processed.[43] This network contains 26 regional offices, nine sub-regional offices, and 13 resident offices.[44] Additionally, the Division of Judges (comprised of ALJs) maintains offices in Washington, DC, New York, and San Francisco.[45] The Board and General Counsel maintain NLRB headquarters in Washington, DC.

C. The Adjudication Process

All NLRB proceedings originate with employees, labor unions, employers, or other private parties filing charges or petitions with NLRB.[46] The manner by which NLRB processes these actions depends upon whether they related to unfair labor practices or representation.

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[34] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 48 (2015).; NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 45 (2023).
[35] *E.g.*, Congress granted the NLRB jurisdictional authority over the U.S. Postal Service and nonprofit hospitals and nursing homes. NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 53 (2015).
[36] *E.g.*, On its own discretion, the NLRB expanded its jurisdiction to include major league baseball; private, nonprofit colleges and universities; foreign government-owned corporations doing business in the United States; law firms, and professional soccer. NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 53 (2015).
[37] *Unfair Labor Practice and Representation Cases Filed per Fiscal Year*, NAT'L LAB. REL. BD., https://www.nlrb.gov/reports/nlrb-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation (last accessed Dec. 5, 2023).
[38] 29 U.S.C. § 153(a).
[39] *Id*.
[40] *Id*.
[41] *Id*. at § 153(d).
[42] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 11 (2015).
[43] NAT'L LAB. REL. BD., STRATEGIC PLAN: FY 2022-2026 5 (2022).
[44] *Id*.
[45] *Division of Judges*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/who-we-are/division-of-judges (last accessed Dec. 5, 2023).
[46] NAT'L LAB. REL. BD., STRATEGIC PLAN: FY 2022-2026 5 (2022).

1. Unfair Labor Practices

If an employee believes their employer or union has violated the NLRA, the employee may file a charge with NLRB. Attorneys and examiners, collectively referred to as board agents, in the appropriate regional office then assess whether a charging party's preliminary information suggests a meritorious case. If the preliminary information provided by the charging party suggests unfair labor practices, then a board agent requests evidence from the party being charged. The board agent then makes a recommendation to the agent's supervisor or regional director based on the preliminary merits of the case. The regional director evaluates the board agent's findings and, when the charge raises certain novel or significant issues, may consult with the Division of Advice.

During the period of investigation by the board agent and evaluation by the regional director, a vast majority of charges are withdrawn by the charging party, dismissed by the regional director, or settled by the parties themselves.[47] Importantly, when the board agent and regional director find sufficient evidence to support a charge, NLRB actively encourages settlement.

If the parties cannot reach a settlement, NLRB issues a formal complaint, schedules a hearing before an ALJ, and operates as a representative for the charging party. During the hearing, both parties prepare arguments and present evidence, witnesses, and experts. The ALJ then issues an initial decision, subject to review by the Board. Any or all parties may request the Board's review of this initial decision.

Usually, a panel of three Board Members will review the case record, including all documents produced during the regional office's investigation and evaluation process. However, the full Board considers novel cases or those with potential precedential impact. In these circumstances, the Board may gather additional viewpoints by inviting briefs from interested parties. Board decisions constitute final agency action and may be appealed to the appropriate Article III court.

2. Representation

Employees who wish to form a union, join a union, or decertify an existing union file a petition with the appropriate NLRB regional office. Upon receiving the petition, board agents investigate to confirm the agency has jurisdiction over the issue, the organization seeking to represent employees is a labor organization, and no existing labor contracts or recent elections that would bar an election.

If there are no bars to NLRB action, then board agents seek an election agreement between the employer, union, and other interested parties. This agreement authorizes the NLRB regional director to conduct the election and to set the date, time, and place for balloting and method to determine who is eligible to vote in the election. If all parties cannot reach an election

[47] *Investigate Charges*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Dec. 4, 2023).

agreement, then the regional director holds a hearing. After the hearing, the regional director may order an election.[48]

Within seven days of the vote count, any party may file with the appropriate regional director objections and an offer of proof in support of these objections. Except where parties have agreed otherwise, the parties may then appeal to the Board the regional director's ruling on objections.

The Office of Representation Appeals processes requests for review of election-related decisions and assigns an attorney and supervisor for review of the case. The case is then presented to the Board, and the Board may deny or grant review of the regional director's decision. If the Board grants review, the parties may file additional briefs.

II. TIMELINESS AS A VALUE IN NLRB ADJUDICATION

NLRB has gone through fluctuations with respect to the Board's timeliness in adjudicating both unfair labor practice and representation cases and corresponding public and political attention to the Board's performance.[49]

Not surprisingly, these ebbs and flows correlate with changes to NLRB statutory authority. For example, in the first decade of its existence, the Board accumulated a substantial backlog as a result of legal battles over the constitutionality of the NLRA. As put by Board Member Dr. William M. Leiserson in 1941 during congressional hearings investigating the administration and effects of the Wagner Act, "The greatest weakness in the work of the Board is the delay in handling cases."[50] Concerns over delay continued through the 1960s, where the "notorious" and "aggravating" problem of timeliness in NLRB decisions was the subject of additional congressional oversight.[51]

Perhaps as a result, historically, Congress has selected NLRB as an exemplar when trying to understand the complexities of timeliness, administrative procedure, and the implementation of delegated power.[52] Promoting timely decision-making while adhering to principles of fairness

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[48] Federal law provides employees with a path to voluntarily recognize a union outside of the NLRB process. For more information, *see Conduct Elections*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections (last visited Dec. 5, 2023).

[49] E.g., Fred Feinstein, *The Challenge of Being General Counsel*, 16 THE LAB. LAW. 19, 19 (2000); William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309, 309 (2005); Charles J. Morris, *NLRB in the Dog House – Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 9 (1987); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 THE LAB. LAW. 1, 1 (2000).

[50] H. COMM. INVESTIGATING LAB. BD. & WAGNER ACT, VERBATIM RECORD OF THE PROCEEDINGS 6 (Bureau of Nat'l Aff. 1940) (statement of William Morris Leiserson).

[51] SUBCOMM. ON NAT'L LAB. REL. BD. OF THE H. COMM. ON EDUC. & LAB., ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB 17 (Comm. Print. 1961).

[52] *E.g.*, SUBCOMM. ON SEPARATION OF POWERS, S. COMM. JUD., HEARINGS ON CONGRESSIONAL OVERSIGHT OF INDEPENDENT ADMINISTRATIVE AGENCIES, 90th Cong. (1968). *See also* Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 254 (1968).

and quality continues to be one of the main challenges the NLRB faces.[53] That said, the agency has exhibited remarkable ingenuity in navigating these challenges.

Currently, NLRB's primary strategic goals are to ensure effective enforcement of the NLRA through timely, quality consideration and resolution of unfair labor practices and to protect employee free choice with timely, effective mechanisms to resolve representation cases.[54] As the agency endeavors to navigate its core functions, timeliness remains an essential consideration.

III. FACTORS AFFECTING TIMELINESS

As Part II suggests, the political and legal controversy that accompanied initial implementation of the FLRA caused backlogs and delays in NLRB's caseload almost immediately upon the agency's establishment. Subsequent expansions of the agency's statutory authority without proportionate increases in appropriations added to NLRB's workload and further delayed its adjudicative processes.

Since the 1980s, case processing times at the NLRB have increased.[55] Agency resource levels undoubtedly have affected the agency's ability to process cases efficiently and effectively. For example, budget cuts and staff reductions frequently have been cited as primary contributors to backlogs in the agency.[56] Taking inadequate resources as a given, this Part explores additional factors that have affected timeliness in NLRB adjudication. These factors include (a) agency structure; (b) case characteristics, procedures, and strategy; and (c) policy environment.

A. Agency Structure

NLRB describes itself as a bifurcated agency governed on one side by the Board and on the other side by the General Counsel.[57] Historically, most of the agency's timeliness problems have stemmed from backlogs and delays in the portions of the agency that fall outside of the General Counsel's direct authority: the Division of Judges and the Board itself.[58]

1. Division of Judges

The processing time for cases scheduled for ALJ hearings steadily increased in the late 1970s and throughout most of the 1980s.[59] This increase occurred both in the time from when a

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[53] *Oversight of the National Labor Relations Board Before the Subcomm. On Human Resources of the H. Comm. on Gov't Reform and Oversight, 105th Cong*. 156 (1997) (statement of Carlotta C. Joyner, Director, Education and Employment Issues, Health, Education, and Human Services Division, U.S. General Accounting Office).
[54] NAT'L LAB. REL. BD., STRATEGIC PLAN: FY 2022-2026 4 (2022).
[55] Nat'l Lab. Rel. Bd., Memorandum GC 19-02 from Peter B. Robb, General Counsel on Reducing Case Processing Time (Dec. 7, 2018).
[56] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-26-00-02, Review of Board Casehandling Timeliness 1 (2000); Fred Feinstein, *The Challenge of Being General Counsel*, 16 THE LAB. LAW. 19, 37 (2000); John H.D. Wigger, *Delay in Proceedings Under the National Labor Relations Act*, 28 GEO. L. J. 1102, 1123 (1940).
[57] *Who We Are*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/who-we-are (last accessed Dec. 7, 2023).
[58] Samuel Estreicher & Matthew T. Bodie, *Administrative Delay at the NLRB: Some Modest Proposals*, 23 J. LAB. RSCH. 87, 88 (2002); Fred Feinstein, *The Challenge of Being General Counsel*, 16 THE LAB. LAW. 19, 36-37 (2000).
[59] U.S. GEN. ACCT. OFF., GAO/HRD-82-80, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES 4 (1982).

complaint was issued until a hearing was closed and from when a hearing was closed until an ALJ decision was issued.[60] Three main factors contributed to these delays.

First, NLRB suffered from a shortage of ALJs during this period of time.[61] A government-wide ceiling on ALJ positions put in place during the 1970s placed restrictions on the number of judges NLRB could employ. Then, throughout the next decade, the agency had difficulty filling existing ALJ positions. Not only did the detailed application process discourage candidates from applying, but few qualified candidates were willing to relocate to NLRB's ALJ offices and most could earn higher salaries in the private sector.

Second, the performance of the agency's ALJs has varied. While most NLRB ALJs met or exceeded the agency's expectations for case processing, the productivity of a few consistently fell significantly below these standards.[62] Like many agencies, NLRB struggled with how to establish an effective performance management system or correct the timeliness of underperforming ALJs, who had statutory protection from the possibility of undue influence or pressure from their employing agency.

Finally, while a handbook for ALJs has existed in various forms since the agency's earliest days, NLRB did not have an official trial manual (called the "Bench Book") until 2001.[63] This created inconsistencies regarding how judges should handle certain recurring procedural and evidentiary issues and often could result in delay as judges imposed different standards for notice, intervention, introduction of evidence, and similar aspects of the hearing process.

2. Board

While timeliness concerns exist as a result of the ALJ hearing process, the longest delays generally have occurred during Board Members' consideration of cases.[64] At various points throughout NLRB's existence, member turnover and vacancies, the ability of a single member to hold up a case, and a lack of standards and procedures for timeliness have contributed to these delays.

Across time, frequent turnover and vacancies among Board Members has led to backlogs and delays in NLRB adjudication.[65] When a Board Member announces departure, the Board prioritizes deciding cases under that Members' purview and then reassigns any remaining undecided cases to other Members of the Board.[66] While this process is designed to prevent

[60] *Id*. at 12.
[61] U.S. GEN. ACCT. OFF., GAO/HRD-82-80, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES 4 (1982).
[62] *Id*. at 5.
[63] NAT'L LAB. REL. BD., BENCH BOOK: AN NLRB TRIAL MANUAL foreward (2022).
[64] John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 THE LAB. LAW. 1, 14 (2000).
[65] *Id*. at 4-9.
[66] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 29 (1991).

undue delay on those cases in the departing member's caseload, the process can cause delay on other cases as the remaining members adjust to an increased workload.[67]

Delay also occurs as new Board Members initially assume their positions. Some estimates suggest that new members require between six months to a year to adjust to their new positions and become fully integrated in NLRB's decision process.[68] New Members must become familiar with the Board's formal and informal procedures, learn the details of the caseloads they inherit, hire new staff, and develop a rapport with existing staff.[69] Not only do these adjustments slow new Members' abilities to hear cases, but the Board usually holds action on complex cases until new Members have gained experience on the Board.[70]

Additional delays have occurred at times when the new and departing Members have disparate policy views. In these instances, new Members occasionally have decided to send cases back to an earlier stage in the decision process because they disagree with the departing Members' initial determinations.[71]

Vacancies on the Board present additional timeliness concerns. Most obviously, vacancies increase the caseload for existing Members.[72] Furthermore, across time, some Boards have preferred to hold cases with major policy issues until a complete, five-member Board can hear them.[73] Even if a Board decides to hear a case in spite of vacancies, quorum rules can prevent action if there are multiple vacancies on the Board at the same time.[74]

Delays at the Board level also have resulted from the actions of single Members. Across time, timeliness issues have arisen if participating Members on a panel are dissatisfied with a draft of a ruling, or need time to prepare a concurrence or dissenting opinion.[75] This was particularly an issue toward the end of the 1980s, when the Board did not have standards for the total length of time it considered acceptable for a contested case to be at the Board or in the

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[67] *Id*.
[68] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-26-00-02, Review of Board Casehandling Timeliness 9 (2000).
[69] *Action Needed to Improve Case Processing Time at National Labor Relations Board Headquarters Before the Subcomm. on Employment and Housing of the H. Comm. on Gov't Operations, 101st Cong*. 24 (1990) (statement of Franklin Frazier, Director of Education and Employment Issues, Human Resources Division, U.S. General Accounting Office).
[70] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 29 (1991).
[71] *Action Needed to Improve Case Processing Time at National Labor Relations Board Headquarters Before the Subcomm. on Employment and Housing of the H. Comm. on Gov't Operations, 101st Cong*. 24 (1990) (statement of Franklin Frazier, Director of Education and Employment Issues, Human Resources Division, U.S. General Accounting Office).
[72] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 30 (1991)
[73] *Id*.
[74] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-26-00-02, Review of Board Casehandling Timeliness 9 (2000). *See also* New Process Steel v. Nat'l Lab. Rel. Bd., 560 U.S. 674 (2010).
[75] U.S. GEN. ACCT. OFF., GAO/HRD-82-80, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES 16 (1982); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 THE LAB. LAW. 1, 14 (2000); Dennis P. Walsh, *Procedural Barriers That Prevent the NLRB from Resolving Major Workers Rights Issues*, 15 EMP. RTS. & EMP. POL'Y J. 545, 550 (2011).

opinion-writing stage.[76] Historically, some members refrained from acting on cases and there was little for the remaining members to do to speed up the process.

B. Case Characteristics, Procedures, and Strategy

Across time, NLRB has experienced fluctuations in case intake both in terms of raw numbers and complexity.[77] These fluctuations, particularly when they diverge from agency projections, contribute to issues of timeliness in NLRB adjudication.

In addition to unanticipated surges in caseload, backlogs and delays have at times been exacerbated by the agency's own procedures. For example, in the 1980s and 90s, NLRB attempted to ensure consistency in decision making across cases with similar issues by using a "lead case" framework. When several undecided cases dealt with the same issue, the Board would select one case to serve as the "lead" and suspended further processing on all related cases until the Board rendered a decision on the lead.[78] However, a lack of timely decision-making on lead cases perpetuated existing delays on all related cases. To make matters worse, some cases were initially put on hold under one lead case only to be delayed later by the need for the Board to make another lead case decision.

Historically, dilatory tactics by parties also have contributed to timeliness concerns.[79] Strategic actions such as refusing to stipulate facts, calling a large number of witnesses, extending cross examinations, inflating the record with lengthy exhibits, filing motions, and asking for continuances and time extensions can add significant time to the adjudicative process. These situations require highly skilled adjudicators who can sift through delay tactics while preserving fairness in adjudication.

C. Policy Environment

Finally, throughout its history, NLRB has operated in a political climate which has, at times, been fraught. For example, in the first few decades of NLRB's existence, anti-labor movements led to consistent attacks against the agency and the statutes it administered.[80] As a whole, the political climate surrounding the Board's actions was relatively hostile.[81] In more

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[76] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 5 (1991; *Action Needed to Improve Case Processing Time at National Labor Relations Board Headquarters Before the Subcomm. on Employment and Housing of the H. Comm. on Gov't Operations, 101st Cong*. 17 (1990) (statement of Franklin Frazier, Director of Education and Employment Issues, Human Resources Division, U.S. General Accounting Office).

[77] Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570-76 (2007).

[78] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 56 (1991)

[79] Frank W. McCulloch, *The NLRB and Techniques for Expediting the Administrative Process*, 14 ADMIN. L. REV. 97, 101 (1961); Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 76 (1981).

[80] E.g., Philip M. Smith, *Social Aspects of Anti-Union Prejudice*, 13 AM. J. ECON. & SOCIO. 171 (1954).

[81] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 32 (2015).

recent decades, anti-regulatory sentiments among elected officials have affected Board Members and NLRB staff operations.[82]

At times, Board Members have been reluctant to make decisions on high-profile cases because of concern over political consequences.[83] NLRB operations also have been disrupted by the occurrence or threat of government shutdowns or other uncertainties resulting from the appropriations process. Not surprisingly, these factors have contributed to issues of timeliness in NLRB adjudication.

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

In pursuit of timeliness, NLRB has dedicated itself to improving the efficiency and accuracy of its adjudicative processes. The agency's efforts in doing so have begun, most crucially, with an examination of where delays and backlogs occur, what factors have contributed to these problems, and how NLRB can minimize those factors without undermining fairness in investigations, fact-finding, adjudication, and review.[84] Through such analysis, NLRB has been able to improve its productivity, often in the face of rising caseloads. For example, from 1970 to 1977, NLRB's workload increased twice as fast as the agency's budgeted staff.[85] Yet, the agency still increased the timeliness of case processing in the agency's regional offices by about 14 percent.[86]

NLRB's consistent work to improve performance through organizational and procedural reforms designed to increase productivity in the face of resource challenges provides insight into measures that can be used across the executive branch to promote or improve timeliness. Specifically, this Part addresses NLRB's actions with respect to (a) case management; (b) task forces and pilot studies; (c) regional offices; (d) changes to the adjudicative process; (e) Board actions; and (f) information technology.

A. Case Management

Analysis of timeliness at NLRB suggests that the problem of delay may have less to do with the average case, but rather is the result of variation in the complexity of cases.[87] Yet it can be hard for an agency with two separate adjudicative processes administered in different regions across the country to understand the complexity of its caseload or how cases move through its system.

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[82] James A. Gross, *The NLRB: Then and Now*, 26 A.B.A. J. LAB. & EMP. L. 213, 224-25 (2011).
[83] William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309, 318 (2005).
[84] Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 364 (2010).
[85] U.S. GEN. ACCT. OFF., FGMSD-78-33, IMPROVING FEDERAL AGENCY EFFICIENCY THROUGH THE USE OF PRODUCTIVITY DATA IN THE BUDGET PROCESS 22 (1978).
[86] *Id*.
[87] Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 369 (2010).

To address this problem, NLRB implemented a new, uniform system of case management in the 1990s, referred to as "Impact Analysis."[88] Under this system, cases were placed in one of three categories based on complexity and then continually reevaluated as investigation and litigation proceeded. Case categorization imposed time targets for action, helped determine the level of resources to devote to the case, and even informed regional staffing decisions.[89] Additionally, performance evaluation of each regional director was based on the region's ability to dispose of cases within the imposed time targets.

Impact analysis was intended to offer an agency-wide approach to case processing. However, in 2018, the General Counsel determined that the time devoted to the categorization of cases and the process for excusing cases that did not meet a given target actually contributed to problems of timeliness in adjudication, despite declined case intake across the agency.[90] As a result, NLRB stopped using Impact Analysis, required a five percent annual decrease in the average time to resolve cases, and gave each region the flexibility to implement its own case management system.[91] Regional directors were encouraged to develop new procedures and processes that would help their offices meet the strategic goal of decreasing case processing times. Under this new system, regional directors' performance evaluation was assessed based on the time between the filing of charges and disposition; the time between the issuance of a Board order and the closure of a case; and the time between approval of informal settlement agreements to the closure of the case.

In response to the new flexibility, regional directors developed various strategies to promote timeliness.[92] Some regional offices imposed additional supervision over the investigation process, set weekly meetings to review open cases, or imposed priority systems that encouraged board agents to address certain types of cases first. Other offices decreased the time parties had to submit evidence or increased pressure on charging parties to withdraw unsubstantiated cases.

Concerns arose over a lack of uniformity of procedure across offices and findings that certain strategies to reduce case processing times negatively affected the quality of investigations.[93] Internal stakeholders reported that the new policies not only resulted in staff cutting corners and sacrificing quality, but led to a decrease in morale across the agency.[94]

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[88] Nat'l Lab. Rel. Bd., Memorandum GC 19-02 from Peter B. Robb, General Counsel on Reducing Case Processing Time 2 (Dec. 7, 2018).
[89] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-64-11-02, Case Processing Costs 5-6 (2011).
[90] Nat'l Lab. Rel. Bd., Memorandum GC 19-02 from Peter B. Robb, General Counsel on Reducing Case Processing Time 2 (Dec. 7, 2018).
[91] *Id*. at 3.
[92] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-97-22-04, Casehandling Efficiency 14 (2022).
[93] Id. at 15.
[94] S. GOV'T. ACCOUNTABILITY. OFF., GAO-21-242, NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 24, 28 (2021); Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-97-22-04, Casehandling Efficiency 14-15 (2022).

External stakeholders suggested that the policies had mixed substantive effects, sometimes negatively affecting employees and at other times negatively affecting employers and unions.[95]

In 2022, NLRB reimplemented impact analysis and eliminated the requirement for each region to reduce annually the average number of days to process a case.[96] To ensure consistency in approach across regions, all regional directors now use a standardized list to categorize cases and a standardized list of circumstances that permit the region to place a case in abeyance.[97]

B. Use of Task Forces and Pilot Studies

Since the 1960s, NLRB has used performance data of some sort to manage its workload, estimate required resources, evaluate employees, and report on agency operations.[98] Yet the Board has not done so without carefully seeking input from those who would be affected, including internal and external stakeholders.

In developing strategies to address timeliness, NLRB regularly has consulted those within the agency who are involved in the adjudicative process – including agency unions, supervisors, managers, and regional directors – as well as practitioners who engage with the agency routinely.[99] Consistent with this tradition, in response to concerns over timeliness, the General Counsel recently established several committees to evaluate the agency's case processing methods.[100]

After developing new initiatives, but before adopting agency-wide policies and procedures, the agency often has used pilot studies. For example, in 2018, NLRB announced a pilot program to proactively engage with parties in cases pending before the Board to determine whether they are appropriate for the resolution options provided by its Alternative Dispute Resolution Program.[101] These sorts of studies have allowed NLRB to explore the benefits and unanticipated complications of, as well as the support and strategies necessary for, implementation of new initiatives.

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[95] S. GOV'T. ACCOUNTABILITY. OFF., GAO-21-242, NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 24, 28 (2021).

[96] Nat'l Lab. Rel. Bd., Memorandum GC 22-05 from Jennifer A. Abruzzo, General Counsel on Goals for Initial Unfair Labor Practice Investigations 1-2 (May 27, 2022).

[97] The point at which the investigation reaches a stopping point because the region can no longer advance the investigation pending the occurrence of some event beyond the region's control.

[98] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-16, Review of the Agency's Process for Measuring and Reporting on its Performance 2 (1996).

[99] Fred Feinstein, *The Challenge of Being General Counsel*, 16 THE LAB. LAW. 19, 21, 25-26 (2000).

[100] NAT'L LAB. REL. BD., STRATEGIC PLAN: FY 2022-2026 7 (2022).

[101] Press Release, Nat'l. Lab. Rel. Bd., NLRB Launches Pilot of Proactive Alternative Dispute Resolution Program (July 10, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-launches-pilot-of-proactive-alternative-dispute-resolution-program.

C. Effective Use of Regional Offices

While even the NLRB's predecessor agencies relied on regional administration, Congress did not statutorily authorize delegation of authority by the Board until 1959.[102] This delegation of authority to regional personnel was designed to aid in improving timeliness in the agency's adjudicative processes by helping support and facilitate effective relationships between and among the agency, employees, employers, and labor organizations.[103]

Currently, NLRB has 26 regional offices that investigate and prosecute alleged violations of the NLRA. Effective use of these offices has been instrumental in shortening the time it takes for the agency to process cases.[104] However, decentralization of agency adjudicative processes through the use of field offices is not without its challenges. Regions with larger caseloads are able to achieve a greater efficiency in case processing than those with smaller offices.[105]

Suggested improvements for future NLRB adjudication include increased flexibility in regional administration. This could mean improving the agency's ability to transfer work among and between regions.[106] For example, regions with remote areas of coverage may find that their cases overlap with other offices' activities. In these cases, increased communication across regions can ensure that the agency considers the interests of all parties and therefore prevents future need for information or party intervention.

Adherence to timeliness in regional administration may also include consolidation and/or reallocation of offices to reflect changes in the distribution of cases across the country.[107] As the concentration of employee populations, industries, and union representation change geographically, NLRB organization and allocation of resources should change accordingly.

D. Changes to the Adjudicative Process

Early in its history, NLRB recognized the value of encouraging employees, employers, and unions to work together with the agency to achieve a settlement prior to final Board action.[108] Voluntary settlement of disputes under the agency's purview has continued and expanded since. For example, in 2005, NLRB established a formal Alternative Dispute Resolution program to assist with settlement efforts.[109] In 2012, the agency then contracted with the Federal Mediation and Conciliation Service to provide mediators to parties who participate in

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[102] Made possible by the Labor Management Reporting and Disclosure Act of 1959 § 701, Pub. L. No. 86-257, 73 Stat. 519, 542 (1959) (also known as the Landrum-Griffin Act).
[103] Bernard Sarnoff, *NLRB Regional Administration*, 12 LAB. L.J. 1095, 1102 (1961).
[104] *See*, *e.g.*, Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 79 (1981).
[105] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-64-11-02, Case Processing Costs 1 (2011).
[106] Fred Feinstein, *The Challenge of Being General Counsel*, 16 THE LAB. LAW. 19, 31 (2000).
[107] *See* Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-64-11-02, Case Processing Costs 1 (2011).
[108] Frank W. McCulloch, *The NLRB and Techniques for Expediting the Administrative Process*, 14 ADMIN. L. REV. 97, 102 (1961); John H.D. Wigger, *Delay in Proceedings Under the National Labor Relations Act*, 28 GEO. L. J. 1102, 110-1111 (1940).
[109] *Decide Cases*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Dec. 4, 2023).

that program.[110] Currently, about 90 percent of meritorious cases are settled by agreement at some point during the adjudicative process, whether during regional office investigation, before or during a hearing conducted by an ALJ, or while a case is pending before the Board.

NLRB also has made more liberal use of substantive rulemaking to streamline and clarify the adjudicative process. This option became feasible after the Supreme Court's 1991 decision holding the Board has substantive rulemaking authority under the National Labor Relations Act.[111] Indeed, in its past two performance and accountability reports, the agency has noted the importance of such action for improving timeliness.[112]

E. Board Actions

Recognizing that the Board itself has been a significant contributor to issues of timeliness at the NLRB, the Board has experimented with a variety of efforts to improve its efficiency and continues to do so.[113]

The times during which the Board has been most successful in decreasing backlogs and delays have been when the Board's entire membership is dedicated to creating a culture that promotes timeliness.[114] In part, this requires relatively simple practices such as meeting as a full Board on a regular basis, making efforts to reach consensus, and working toward compromise in the appropriate circumstances. Setting deadlines for action based on standards for each of the Board's decision stages and the total length of time a case should be at the Board (and making good faith efforts to meet these standards) can also promote speed and efficiency.[115]

Additionally, the Board also has improved timeliness by prioritizing the issuance of certain types of cases, such as those that have been before the Board the longest or have precedential impact,[116] and establishing alternative procedures to expedite cases. For example, in the mid-1980s, the Board introduced procedures to advance the processing of certain types of

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[110] Press Release, Nat'l. Lab. Rel. Bd., NLRB Contracts with FMCS to Provide Mediators in Board Alternative Dispute Resolution Program (Oct. 23, 2012), https://www.nlrb.gov/news-outreach/news-story/nlrb-contracts-with-fmcs-to-provide-mediators-in-board-alternative-dispute

[111] American Hospital Association v. NLRB, 499 U.S. 606 (1991). *See* Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 364 (2010); Charles J. Morris, *NLRB in the Dog House – Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 42 (1987); Charles J. Morris, *Renaissance at the NLRB – Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 113-114 (1993).

[112] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 11 (2022); NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 4 (2023).

[113] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 9 (2023).

[114] U.S. GEN. ACCT. OFF., HRD-91-29, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 25 (1991); Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-26-00-02, Review of Board Casehandling Timeliness 2 (2000); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 THE LAB. LAW. 1, 16 (2000).

[115] *Action Needed to Improve Case Processing Time at National Labor Relations Board Headquarters Before the Subcomm. on Employment and Housing of the H. Comm. on Gov't Operations, 101st Cong.* 17 (1990) (statement of Franklin Frazier, Director of Education and Employment Issues, Human Resources Division, U.S. General Accounting Office).

[116] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 67 (2023); Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-26-00-02, Review of Board Casehandling Timeliness 2 (2000).

cases.[117] The Board used "speed-team" procedures to process relatively simple, non-controversial cases that, with the unanimous agreement of a three Member panel, can be drafted and circulated quickly without the need for detailed memoranda. Alternatively, using the "Super Panel" process, a panel of three Board Members meets each week to hear cases that involve issues that lend themselves to quick resolution without written analysis by each Board Member's staff. Instead, staff counsel present the Board Members with a draft decision that can be approved during the meeting. The Board revived these procedures in the 1990s and revised other case management procedures to directly involve all Board members in matters that may be emerging as cases requiring special attention at the Board level.[118] The Board has continued to use these or similar procedures to help address backlogs and delays.[119]

F. Use of Technology

In the mid-1990s, the NLRB undertook a multi-year initiative to develop and automate a unified information system that would track all cases from initial charge to final resolution.[120] Prior to that point, NLRB had multiple manual and electronic systems across field and headquarters offices that the agency used to collect and compile information on case processing and performance.[121] These multiple systems were ineffective at helping NLRB manage its caseload and did not adequately support the agency's need for prompt and accurate information.[122]

While the idea for this unified system was laudable, its implementation plan was not. Initial strategic planning for the development and implementation of the new system did not adequately identify the resources needed to provide supporting hardware, software, or communications infrastructure.[123] Furthermore, subsequent planning was done on a year-to-year basis based on the funds the agency had available to spend on the project. This resulted in unpredictable development of the system, as NLRB often made deliberate decisions to give higher priority and resources to other areas (such as hiring new, unrelated personnel).[124] Perhaps in part because of the agency's irregular financial support of the project, there was high turnover among those who were developing the system.[125] This resulted in a loss of institutional

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[117] John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 THE LAB. LAW. 1, 13-14 (2000).
[118] *Oversight of the National Labor Relations Board Before the Subcomm. On Human Resources of the H. Comm. on Gov't Reform and Oversight, 105th Cong*. 157 (1997) (statement of Carlotta C. Joyner, Director, Education and Employment Issues, Health, Education, and Human Services Division, U.S. General Accounting Office).
[119] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT FY2006 22 (2006); NAT'L LAB. REL. BD., JUSTIFICATION OF PERFORMANCE BUDGET FOR COMMITTEE ON APPROPRIATIONS 12 (2010).
[120] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-16, Review of the Agency's Process for Measuring and Reporting on its Performance 6 (1996).
[121] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-28, Review of the Case Activity Tracking System (CATS) 1 (1999).
[122] *Oversight of the National Labor Relations Board Before the Subcomm. On Human Resources of the H. Comm. on Gov't Reform and Oversight, 105th Cong*. 158 (1997) (statement of Carlotta C. Joyner, Director, Education and Employment Issues, Health, Education, and Human Services Division, U.S. General Accounting Office).
[123] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-28, Review of the Case Activity Tracking System (CATS) 1 (1999).
[124] *Id*. at 1, 5.
[125] *Id.* at 1.

knowledge about the project's design and NLRB processes and further delayed the agency's efforts to update its case management system.

The transition to the new system once it had been developed was also problematic. NLRB had failed to account for the need for transition assistance to ensure data accuracy and integrity. As a result, a significant number of errors were made in the initial entry of case data and in subsequent updates.[126]

Additionally, once fully implemented, not all legacy systems were incorporated. NLRB thus initiated development of a fully unified case management system in 2008.[127] This fully unified system was designed to replace 11 separate legacy systems and enable electronic sharing of case files across the agency.[128] By 2012, NLRB not only deployed the new system but integrated it with the agency's public website[129] and, in 2013, NLRB launched its first related app for smartphones.[130] All mission-related offices now work fully in the new system, which provides real-time information on all case file materials.[131]

However, the agency still experiences problems with data accuracy and integrity.[132] These issues raise questions about NLRB's use of the system for case processing statistics or other performance data. As NLRB continues to refine the system, adoption of a standard methodology and training program for data entry and the implementation of additional quality review processes and controls may help alleviate concerns in this regard.

[126] *Id*. at 1, 10.
[127] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 73 (2015).
[128] *Id*.
[129] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT (2012).
[130] NAT'L LAB. REL. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 73 (2015).
[131] NAT'L LAB. REL. BD., PERFORMANCE AND ACCOUNTABILITY REPORT 45 (2023).
[132] Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-94-22-02, NxGen Data Accuracy 5, 18 (2021); Off. Inspect. Gen, Nat'l Lab. Rel. Bd., OIG-AMR-97-22-04, Casehandling Efficiency 17 (2022).

APPENDIX K:
SOCIAL SECURITY ADMINISTRATION

This case study provides an overview of efforts to improve or promote timeliness in adjudication by the Social Security Administration (SSA). SSA currently administers two large benefits programs—the Old Age, Survivors, and Disability Insurance (OASDI) program and the Supplemental Security Income (SSI) program—and related programs. Historically, SSA has also played a role in the administration of other benefits programs, including Medicare and the black lung benefits program.

Part I provides an overview of SSA and the programs it administers, its historical development, and SSA's process for adjudicating cases under the OASDI and SSI programs. Part II describes timeliness as a value in SSA adjudication. Part III describes factors that have affected the timeliness of SSA adjudication since the agency's establishment in 1935. Part IV identifies historical concerns about timeliness since 1935 and describes efforts undertaken by SSA and Congress to promote or improve timeliness in response to such concerns.

I. BACKGROUND

A. The Program

OASDI, often referred to simply as "social security," began in 1935 as a program of old-age (retirement) insurance. The program has grown over the past nine decades to become the modern OASDI program. Survivors Insurance first became available in 1939, and Social Security Disability Insurance (SSDI) first became available in the mid-to-late 1950s.

Under the OASDI program, covered wage earners pay payroll taxes to the government, earning up to four quarters of coverage per year based on covered earnings. SSA maintains earnings records for covered workers. Wage earners become insured for different benefit types when they have earned a sufficient number of quarters of coverage. Wage earners are entitled to benefits if they are insured and meet other benefit-specific eligibility criteria—for example, if they have a "disability" as defined in the Social Security Act. Certain family members may also be entitled to benefits based on a wage earner's record.

OASDI has expanded in several important ways since it was created in 1935. In terms of coverage, only about 56 percent of the U.S. workforce worked in covered jobs in 1935. Today, more than 94 percent of jobs are covered under the program. In terms of benefits offered by the program, Social Security was limited initially to retirement benefits but now provides monthly cash payments to survivors of insured wage earners, disabled wage earners, and disabled dependents of wage earners. Geographically, the program has expanded to include all states and U.S. territories. Participation has also grown enormously. In 1945, there were about 46.4 million covered workers and 1.1 million beneficiaries. In 1970, there were about 93 million covered workers and about 25.2 million beneficiaries, roughly 2.6 million of whom were disabled

workers and dependents. In 2022, there were about 66 million beneficiaries, of whom roughly 8.8 million were disabled workers and dependents.[1]

Since 1972, SSA has also administered the SSI program, which provides monthly cash benefits to U.S. citizens and nationals and "qualified aliens" who are aged 65 or older, blind, or disabled and have limited income and resources.[2] The SSI program replaced three programs—Aid to the Blind, Aid to the Permanently and Totally Disabled, and Aid to the Elderly—that were federally funded but administered by the states. Like the OASDI program, the SSI program has also grown significantly. The number of SSI recipients has doubled over the life of the program, growing from about 4 million in 1974 to about 8 million in 2020.[3]

In addition to administering OASDI and SSI—and related programs such as the Ticket to Work program—SSA has also played a role in other benefits programs. The Medicare program, established in 1965, was originally administered by SSA before being reassigned to the Health Care Financing Administration (HCFA), later renamed the Centers for Medicare and Medicaid Services. SSA still plays a limited role in Medicare—determining eligibility and processing premium payments—and adjudicated Medicare appeals until 2005, when the Office of Medicare Hearings and Appeals was created within HHS. SSA also adjudicated hundreds of thousands of claims for Black Lung benefits between 1970, when the program went into effect, and 1976.[4]

B. The Agency

SSA was preceded by the Social Security Board (SSB), which Congress established in 1935 to administer the social security program. The agency was headed by a three-member Board until 1946, when the three-member Board was replaced with a single agency head, and the agency was renamed the Social Security Administration.[5]

Between 1935 and 1939, SSB was an independent agency. In 1939, it became a subcomponent of the new, independent Federal Security Agency (FSA).[6] When the FSA was dissolved in 1953, SSA was made a part of the new, cabinet-level Department of Health, Education, and Welfare (HEW). HEW was renamed the Department of Health and Human Services (HHS) in 1979 after the Department of Education was established as a separate, cabinet-level agency. SSA remained a part of HHS until becoming an independent agency, headed by a single Commissioner, in 1994.

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[1] *See* U.S. SOC. SEC. ADMIN., *Social Security Beneficiary Statistics*, (last visited Oct. 6, 2023), https://www.ssa.gov/oact/STATS/OASDIbenies.html.

[2] Only residents of the 50 states, the District of Columbia, and the Northern Mariana Islands are eligible for SSI. *See* United States v. Vaello Madero, 596 U.S. __, 142 S.Ct. 1539, 1542– 44 (2022).

[3] U.S. Soc. Sec. Admin., Annual Statistical Supplement, 2022, SSA.GOV table 7.A3 (2022).

[4] U.S. SOC. SEC. ADMIN., BLACK LUNG BENEFITS: AN ADMINISTRATIVE REVIEW 16 (1971).

[5] In the 1970s and 1980s, Congress considered reestablishing SSA as an independent agency headed by a three-member, bipartisan Board. *See, e.g.*, *The Social Security Administration as an Independent Agency: Hearing on H.R. 791 Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 101st Cong. (1989); CONGRESSIONAL PANEL ON SOCIAL SECURITY ORGANIZATION, A PLAN TO ESTABLISH AN INDEPENDENT AGENCY FOR SOCIAL SECURITY, S. PRT 98-204 (1984); REPORT OF THE NATIONAL COMMISSION ON SOCIAL SECURITY REFORM 2-25–26 (1983).

[6] For a history of the FSA, see MARIANO-FLORENTINO CUÉLLAR, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES (2013).

Today, several components are involved in the adjudication of cases, including:

- **Field Offices (FOs).** In addition to receiving claims, personnel in SSA's FOs are responsible for initially adjudicating matters other than disability status. Other components are responsible for adjudicating disability status. There are more than 1,200 local FOs across the country. FOs are organized into ten regions, each supervised by a Regional Commissioner. Regional Commissioners report to the Deputy Commissioner for Operations (DCO), who reports to the Commissioner.

- **Disability Determination Services (DDS).** The Social Security Act directs SSA to enter into voluntary agreements with each state and territory, under which personnel in local agencies, called DDSs, have primary responsibility for determining whether claimants and beneficiaries who reside in their jurisdictions are disabled or blind according to policies established by SSA.

- **Office of Disability Determinations (ODD).** SSA's ODD provides "broad operational, administrative, and managerial, performance, budget and technical support" to DDSs. It also adjudicates cases not covered under any agreement with a state or territory (today, mostly cases involving people living outside the United States), "[p]rocesses State agency workloads on a temporary or transitional basis," and "evaluates the impact of policy and procedural changes in State agency operations."[7] ODD is supervised by an Associate Commissioner who, like the Regional Commissioners, reports to the DCO.

- **Office of Quality Review (OQR).** SSA's OQR is responsible for carrying out SSA's statutory directive to review a random sample of DDS determinations for quality assurance purposes and may reverse those determinations when warranted. OQR is supervised by an Associate Commissioner who reports to the Deputy Commissioner for Analytics, Review and Oversight (DCARO). The DCARO reports directly to the Commissioner.

- **Office of Hearings Operations (OHO).** SSA's OHO consists of the Office of the Chief Administrative Law Judge, the nationwide network of more than 160 hearing offices (HOs), and headquarters support components. SSA's more than 1,500 administrative law judges (ALJs) are stationed at HOs around the country. OHO is headed by the Deputy Commissioner for Hearings Operations, who reports directly to the Commissioner.

- **Office of Appellate Operations (OAO).** SSA's OAO consists of the Appeals Council (AC), which reviews ALJ decisions on appeal and for quality assurance purposes, and its support staff. The AC consists of more than 50 administrative appeals judges (AAJs). OAO is headed by an Executive Director, also the Chair of the AC, who reports to the DCARO.

[7] U.S. SOC. SEC. ADMIN., SSA ORGANIZATIONAL MANUAL: CHAPTER S2-THE OFFICE OF OPERATIONS, https://www.ssa.gov/org/orgDCO.htm (last visited Oct. 6, 2023).

There have been several changes to this organizational structure. Most notable for present purposes was the organizational separation of OHO and OAO in 2017. Between 1940 and 2017, the hearing operation and Appeals Council together made up a single component—alternately called the Office of Appeals Council (OAC), the Bureau of Hearings and Appeals (BHA), the Office of Hearings and Appeals (OHA), and the Office of Disability Adjudication and Review (ODAR)—the head of which reported directly to the agency head. (This report uses the names OAC, BHA, OHA, and ODAR interchangeably.) A 2017 reorganization dissolved ODAR, establishing the hearing operation as its own Deputy Commissioner-level component (OHO) and moving OAO, along with OQR and several other components, to a new Deputy Commissioner-level component: the Office of Analytics, Review, and Oversight (OARO).

C. The Adjudication Process

Many types of actions are taken in administering the OASDI and SSI programs. SSA receives claims for OASDI and SSI benefits and adjudicates whether claimants are entitled to benefits. As required by law, SSA also periodically redetermines whether beneficiaries remain entitled to benefits. Many other administrative actions are also considered initial determinations that might prompt an appeal. For example, a covered wage earner might seek to correct an earnings record, a beneficiary might dispute the calculation of a monthly payment amount, or SSA might seek to recoup an overpayment from a beneficiary.[8] This report focuses primarily on entitlement determinations, which make up the overwhelming majority of appeals.

The current adjudication process dates to 1939, when Congress substantially overhauled the Social Security Act. The Act directs the agency head (originally the Board, now the Commissioner) to "make findings of fact, and decisions as to the rights of any individual applying for a payment." More significantly, the 1939 amendments provided individuals dissatisfied with an initial decision "reasonable notice and opportunity for a hearing with respect to such decision." If a hearing is held, the agency head must affirm, modify, or reverse its findings of fact and initial decision based on "evidence adduced at the hearing." To carry out these provisions, the agency head may administer oaths and affirmations, examine witnesses, receive evidence (including evidence inadmissible in judicial proceedings), and adopt rules governing evidence, proof, and adjudicative procedures. The Act allows the agency head to delegate these and other powers to any member, officer, or employee of the agency.[9]

The agency head has not taken a significant, active role in the adjudication of individual cases since at least 1940. In the 1930s, the Board delegated the task of rendering initial determinations to the Bureau of Old-Age Insurance, the predecessor to today's Office of Operations. In 1940, the Board adopted basic provisions for the hearing and review of old-age and survivors insurance claims, establishing OAC and the overall adjudicative system that remains largely intact today.[10]

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[8] *See* 20 C.F.R. §§ 404.902, 416.1402.
[9] 42 U.S.C. § 405(b)(1), (i).
[10] SOC. SEC. BD., FED. SEC. AGENCY, BASIC PROVISIONS ADOPTED BY THE SOCIAL SECURITY BOARD FOR THE HEARING AND REVIEW OF OLD-AGE AND SURVIVORS INSURANCE CLAIMS (1940) [hereinafter BASIC PROVISIONS]; *see also* ATT'Y GEN.'S COMM. ON ADMIN. PROC., MONOGRAPH NO. 16: SOCIAL SECURITY BOARD (1940).

SSA regulations[11] establish a four-stage administrative review process:

- **Initial Determination.** The claimant files a claim with a FO. The FO adjudicates all matters except disability. In cases where disability is at issue, the FO refers the claims to the appropriate DDS (or ODD) for disability adjudication. A disability examiner develops the record for decision making, prepares the case for a required review by a medical and/or psychological consultant, evaluates vocational aspects of the case, and finally prepares a notice determining, and explaining why, the claimant was or was not found to be disabled. After it has completed its task, the DDS returns the file to the FO. Personnel within SSA's Office of Quality Review (OQR) review a selective sample of DDS determinations for quality. If a claimant meets all criteria required for a benefit type, SSA components allow the application, compute the benefit amount, and begin paying benefits. If a party does not meet the criteria for a benefit type, SSA denies the application.[12] The initial determination becomes the final decision of the Commissioner if there is no timely appeal.[13]

- **Reconsideration.** A party who is dissatisfied with an initial determination may request that the FO or DDS (or ODD) redetermine the initial determination. The reconsideration determination becomes the final decision of the Commissioner if there is no timely appeal.[14]

- **Hearing.** A party who is dissatisfied with a reconsideration determination may request a hearing before an ALJ.[15] Except in limited cases, an ALJ will hold a hearing and decide the case de novo based on the evidence adduced at the hearing. Although the hearing level is considerably more judicialized than the initial and reconsideration levels, personnel follow highly standardized business processes set forth in administrative manuals and other directives and many tasks are performed by legal and paralegal support staff. Support staff play an important role in addition to ALJs. Support staff, including staff attorneys, are largely responsible for preparing claim files for consideration by ALJs and writing decisions for review and signature by

[11] 20 C.F.R. §§ 404.900, 416.1400.
[12] People have debated whether the involvement of state agencies in determining disability is efficient and effective. *See* STAFF OF H. COMM. ON WAYS AND MEANS, 93RD CONG., REP. ON THE DISABILITY INSURANCE PROGRAM 5–6 (Comm. Print 1974); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 94TH CONG., LEG. ISSUE PAPER ON DISABILITY INSURANCE 14–15 (Comm. Print 1976); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 95TH CONG., REP. ON DISABILITY ADJUDICATION STRUCTURE 7–8 (Comm. Print 1975); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 95TH CONG., REP. ON H.R. 8076 DISABILITY INSURANCE AMENDMENTS OF 1977 5–6 (Comm. Print 1977); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 95TH CONG., REP. ON DISABILITY INSURANCE–POSSIBLE AREAS OF SUBCOMM. ACTION 22 (Comm. Print 1978); STAFF OF SEN COMM. ON FIN., 96TH CONG., REP. ON ISSUES RELATED TO SOCIAL SECURITY ACT DISABILITY PROGRAMS 25–28 (Comm. Print 1979). At a minimum, it is worth recognizing that the current federal-state relationship limits the steps SSA can take to promote timeliness at the initial and reconsideration levels and reform state agency processes with an eye toward promoting timeliness at the hearing and AC review levels. STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 95TH CONG., REP. ON DISABILITY ADJUDICATION STRUCTURE 19 (Comm. Print 1975).
[13] 20 C.F.R. §§ 404.905, 416.1405.
[14] 20 C.F.R. §§ 404.907–404.922, 416.1407–416.1422.
[15] 20 C.F.R. §§ 404.929–404.965, 416.1429–416.1465.

ALJs. The ALJ's decision becomes the final decision of the Commissioner if there is no timely appeal.[16]

- **Review.** A party who is dissatisfied with an ALJ's decision may request that the AC review the decision. The AC only grants requests for review under limited circumstances. Review is based primarily on the record before the ALJ, and the AC will only consider limited additional evidence. Although parties may request to appear before the AC to present oral argument, such requests are almost never granted. As at the hearing level, support staff play a critical role. Support staff, including staff attorneys, analyze the sufficiency of ALJs' decisions and any additional evidence, make recommendations regarding the disposition of requests for review, and draft orders and notices for review and signature. The AC is also staffed by more than 40 appeals officers (AOs), who are authorized to issue order denying requests for review of ALJ decisions. If the AC denies a request for review, the ALJ's decision becomes the final decision of the Commissioner. If the AC grants a request a review, it will either remand the case to the ALJ for additional action or issue its own decision, which becomes the final decision of the Commissioner.[17]

Any party who is dissatisfied with a final decision of the Commissioner may seek judicial review in the federal district courts. Courts must uphold findings that are "supported by substantial evidence."[18] Civil actions seeking review of SSA decisions make up a significant portion of district courts' caseload. District courts received more than 14,000 actions seeking review of SSA decisions in 2022 and more than 16,000 the year before.[19]

II. TIMELINESS AS A VALUE IN SSA ADJUDICATION

The core objective of the OASDI and SSI programs is to provide income to vulnerable populations, and so timeliness has always been an integral value in SSA adjudication. In establishing basic provisions for the hearing and review of claims, the Board in January 1940 recognized the "need for expedition," explaining:

> Both from the standpoint of efficiency in handling so large a volume of cases and by reason of the human needs of the beneficiaries of this social insurance system, expedition in disposing of claims and of wage records is of the essence of the task to be performed. Although the necessity for prompt action is not as great as in the case of unemployment insurance, nevertheless it would often entail hardship for beneficiaries to be compelled to wait a period of months for the satisfaction of their claims. The dissatisfaction engendered by delay would be a highly adverse factor in the maintenance of satisfactory public relations in the administration of

[16] There is a longstanding debate, dating to at least the 1970s, regarding whether SSA adjudication is subject to the formal adjudication provisions of the APA. *See* 85 Fed. Reg. 73,138, 73,139 (Dec. 16, 2020). Regardless, the Supreme Court has held that procedures required by the Social Security Act do not vary from those prescribed by the APA, *Richardson v. Perales*, 402 U.S. 389, 409 (1971), and, except in a few limited situations explicitly authorized by Congress, SSA has used ALJs to conduct hearings since the 1940s.
[17] 20 C.F.R. §§ 404.966–404.982, 416.1466–416.1482.
[18] 42 U.S.C. § 405(g).
[19] U.S. Courts, *U.S. District Courts Civil Federal Judicial Caseload Statistics,* USCOURTS.GOV*,* table C-3 (2022).

> the social insurance system. In the case of some insured individuals and of many widows, dependent children, and dependent parents, undue delay might well occasion actual hardships. Whatever hearing and review procedure is adopted must be such as will not prevent prompt action in the final disposition of claims. In wage record proceedings, delay obviously would result in a well-nigh impossible accumulation of cases.[20]

The Board also noted other "requirements of the administrative task," namely the volume and geographical distribution of cases, the diversity of case types, the "need for simplicity," the "need for accuracy and fairness," and the "value of the hearing process."[21]

Since the mid-1950s, with the establishment and subsequent growth of the disability program, concerns about the timeliness of SSA adjudication have centered primarily on categories of benefits for people experiencing disabilities.[22] Benefits are a critical lifeline for claimants, who are generally out of work[23] and may be experiencing poverty. Some are experiencing terminal illnesses. Without income, many claimants are unable to access food, housing, or medical care. (Individuals who receive SSDI are eligible for Medicare, and most states provide Medicaid to individuals receiving SSI.)

The human costs of prolonged adjudication are tangible. A 2020 study by the Government Accountability Office (GAO) found that about 1.2 percent of applicants died before receiving a final decision between fiscal year (FY) 2008 and FY 2019, and about 1.3 percent of applicants filed for bankruptcy while awaiting a final decision between FY 2014 and FY 2019.[24] Media outlets report on a near-daily basis about the experience of claimants waiting months or years for a decision. Congressional caseworkers are kept busy with constituents' requests for assistance with claims pending at SSA. As one 1977 report noted: "The characteristic of the hearing process that most enrages claimants and congressmen is its torpidity."[25]

In the 70 years since the disability program was first established, external pressures to decide cases more quickly have come continually from many quarters, including Congress through legislation, oversight hearings, appropriations, the confirmation of presidential appointees, constituent service activities, and formal and informal communications with SSA

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[20] BASIC PROVISIONS, *supra* note 10, at 4–5.
[21] *Id*.
[22] This report does not address broader concerns about timeliness in SSA services, such as wait times on SSA's toll-free telephone number and in field offices and payments to beneficiaries.
[23] The Social Security Act defines disability as the inability to perform "substantial gainful activity" as the result of a physical or mental impairment. 42 U.S.C. § 423(d).
[24] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-641R, SOCIAL SECURITY DISABILITY: INFORMATION ON WAIT TIME, BANKRUPTCIES, AND DEATHS AMONG APPLICANTS WHO APPEALED BENEFIT DENIALS 6 (2020).
[25] STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., REP. ON DISABILITY ADJUDICATION STRUCTURE, *supra* note 11, at 49; *see also* STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., REP. ON DISABILITY INSURANCE–POSSIBLE AREAS OF SUBCOMM. ACTION, *supra* note 11, at 8; STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 95TH CONG., STAFF SURVEY ON CONG. CASEWORKERS 4 (Comm. Print 1978); STAFF OF SEN COMM. ON FIN., REP. ON ISSUES RELATED TO SOCIAL SECURITY ACT DISABILITY PROGRAMS, *supra* note 11, at 22.

officials; the courts; claimants, beneficiaries, and their representatives; public interest groups; and the media.

At the same time, pressures to improve timeliness have always coexisted beside other concerns about decisional accuracy, interdecisional consistency, program integrity, procedural fairness (including ALJs' decisional independence[26]), and the fiscal health of the OASDI and SSI programs. Efforts to promote all of these values simultaneously have shaped the operation, performance, and public perception of the disability program in important ways. Writing in 1991 about OHA's history, a longtime ALJ observed:

> The history of [OHA] is a story of the struggle to strike a balance between quality justice and speedy justice in the face of explosive growth. OHA started as a twelve Referee operation and has grown to what may be the largest institution for the administration of justice in the Western world. The history of OHA is the history of exponential growth and the challenges and tension that accompany such growth. It is a history of public service and innovation.[27]

This decades-long struggle to balance quality and speedy justice is prevalent throughout SSA's vast system for adjudication.

There appears to be strong cyclicality in the ways that policymakers in both the executive and legislative branches have responded to these pressures. Concerns about timeliness frequently translate into actions by Congress and agency managers to speed up case processing. Improved timeliness—or pressure on individual employees to increase productivity—has repeatedly prompted concerns about quality, program integrity, or fairness. Actions taken to promote those values have, in turn, result in renewed concerns about timeliness, beginning the cycle anew. Policymakers in Congress and the executive branch must pay careful attention to the likely consequences—intended and unintended—of any measures they take to improve timeliness.[28]

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[26] *See generally Judicial Independence of Administrative Law Judges at the Social Security Administration: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 101st Cong. (1990).

[27] TOM D. CAPSHAW & CLARK ROBINSON, SOC. SEC. ADMIN., A QUEST FOR QUALITY, SPEEDY JUSTICE: A HISTORY OF THE FIRST FIFTY YEARS OF THE ADMINISTRATIVE LAW JUDGES OF THE OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION 1 (1991).

[28] STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., LEG. ISSUE PAPER ON DISABILITY INSURANCE, *supra* note 11, at 31; STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., REP. ON DISABILITY ADJUDICATION STRUCTURE, *supra* note 11, at 47–50; *Disability Insurance Legislation: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 96th Cong. 238 (1979); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 96TH CONG., SURVEY AND ISSUE PAPER ON SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES 6 (Comm. Print 1979); *Current Problems in the Social Security Hearings and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 99th Cong. 1 (1986); STAFF OF SEN COMM. ON FIN., REP. ON ISSUES RELATED TO SOCIAL SECURITY ACT DISABILITY PROGRAMS, *supra* note 11, at 33; STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 97TH CONG., REP. ON THE STATUS OF THE DISABILITY INSURANCE PROG. 12–13 (Comm. Print 1981); *Administrative Law Judge Corps Act: Hearing Before the Subcomm. on Courts and Admin. Practice of the Sen. Comm. on the Judiciary*, 100th Cong. 41 (1987); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., REP. ON DISABILITY ADJUDICATION STRUCTURE, *supra* note 11, at 49.

III. FACTORS AFFECTING TIMELINESS

Many factors have affected the timeliness of SSA adjudication. This Part provides a brief overview of several factors, most external to SSA, that have impacted the agency's ability to process claims in a timely manner.

A. Program Startup and Expansion

As originally enacted in 1935, the social security program only covered workers employed in a limited number of industries—almost half of American workers were excluded from the program, including agricultural and domestic workers[29] and self-employed persons—and only provided retirement benefits. Over the next half century, Congress rapidly expanded the program to cover most U.S. workers and offer a wide range of benefits to workers and their dependents. Congress also created new programs and assigned adjudication under them to SSA, including the SSI program and, for limited periods, the black lung program and Medicare.

Each expansion resulted in a temporary surge in claims as individuals newly eligible for benefits applied for them. Some expansions were relatively simple to implement, and a few basic managerial controls, such as hiring new staff or detailing them from other components, were sufficient to manage them. Other expansions were more complicated, requiring the agency to develop new standards and procedures, establish new offices, hire and train additional personnel, and acquire office space and technology. Congress sometimes gave SSA a period of months or years to prepare for the expansion; sometimes it did not.

Some expansions had more lasting operational effects, most notably the establishment of the disability program in 1954. For many reasons, it is considerably more complicated and time- and resource-intensive to determine disability status than other matters decided by SSA. Adjudication often involves significant evidentiary development from multiple sources, flexible standards, technical evidence, subjective testimony, and conflicting opinions. Disability is also an evolving condition, meaning that new evidence often continues to become available while a case is awaiting a final decision. As a result, claims are more likely to be denied initially, unfavorable decisions are more likely to be appealed, and subsequent reviewers are more likely to disagree with earlier determinations.[30]

Operational statistics from the disability program's early years demonstrate this dynamic. Before 1954, appeals were infrequent, and the hearings and appeals system's primary purpose was to refine agency policy. Between 1940 and 1946, claimants requested a hearing in only about one-fifth of one percent of all cases. Twelve referees stationed around the country were

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[29] LARRY DEWITT, U.S. SOC. SEC. ADMIN., THE DECISION TO EXCLUDE AGRICULTURAL AND DOMESTIC WORKERS FROM THE 1935 SOCIAL SECURITY ACT, SOC. SEC. BULLETIN, VOL. 70, NO. 4 (2010).

[30] VICTOR CHRISTGAU, U.S. SOC. SEC. ADMIN., OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE AFTER TWENTY-FIVE YEARS (1960); AGENCY RESPONSE TO QUESTIONNAIRE, 89TH CONG., SURVEY AND STUDY OF ADMIN. ORG., PROCEDURE, AND PRACTICE IN THE FED. AGENCIES BY THE H. COMM. ON GOV'T OPERATIONS, PT. 4 485–487 (Comm. Print 1957); *see also* ARTHUR E. HESS, U.S. SOC. SEC. ADMIN., OLD-AGE, SURVIVORS, AND DISABILITY INURANCE: EARLY PROBLEMS AND OPERATIONS OF THE DISABILITY PROVISIONS 14– 15 (1957); STAFF OF H. COMM. ON WAYS AND MEANS, REP. ON THE DISABILITY INSURANCE PROGRAM, *supra* note 11, at 31–33; STAFF OF THE SUBCOMM. ON ADMIN. OF THE SOC. SEC. LAWS FOR USE OF THE H. COMM. ON WAYS AND MEANS, 86TH CONG., DISABILITY INSURANCE FACT BOOK 41–42 (Comm. Print 1959).

sufficient to manage that caseload. Even fewer required intervention by the three-member AC, and courts reviewed no more than a few dozen cases.[31]

In FY 1959, only about 9 percent of nondisability cases were initially denied, and parties requested reconsideration in only 1 out of every 70 nondisability cases. In contrast, roughly 35–40 percent of disability cases were denied initially in the late 1950s, and one out of every 12 disability cases denied at the initial level proceeded to reconsideration. More than eight times as many reconsideration requests were processed in 1958 as in 1955. Although disability cases made up only a small percentage of total claims—about 1 in 9—they accounted for more than half of all cases in which reconsideration was requested. Adjudicators allowed many disability claims on reconsideration—about 44 percent in fiscal year 1959—often based on new evidence.

Requests for hearings increased 512 percent between 1955 and 1958, from 3,000 to 23,250. More than 70 percent involved disability.[32] In FY 1959, one in every 44 disability cases reached the hearing stage, compared with only 1 in 635 for nondisability cases. Hearing examiners decided more than four times as many cases in 1958 as in 1955. They reversed the DDS determination in about 28 percent of appealed disability cases, often based on new evidence.[33] Today, all but an extraordinarily small percentage of cases appealed to the hearing and AC review levels—and to the federal courts—involve disability. SSA's hearing and appellate operations have grown substantially to accommodate these demands.

B. Economic and Demographic Trends

Far more workers are fully insured for OASDI benefits today than 88 years ago. The growth in coverage can be explained by a number of factors, including not only the extension of coverage to different categories of workers but also overall population growth (especially the Baby Boom) and increased participation in the labor force, particularly among women.[34]

Economic and demographic trends have also affected application rates. Application rates have historically increased during economic downturns and periods of high unemployment.[35] The rate of disability among the general population has also fluctuated, affecting application

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[31] ERNEST R. BURTON, U.S. SOC. SEC. ADMIN., THE APPEALS SYSTEM IN OLD-AGE AND SURVIVORS INSURANCE, SOC. SEC. BULLETIN, JULY 1946 5 (1946); U.S. SOC. SEC. ADMIN., NOTES AND BRIEF REPORTS: APPEALS UNDER OLD-AGE AND SURVIVORS INSURANCE, SOC. SEC. BULLETIN, JANUARY 1952 (1952).

[32] Christgau, *supra* note 30, at 29–30.

[33] Hess, *supra* note 30, at 20.

[34] U.S. Soc. Sec. Admin., Annual Statistical Supplement, 2022, SSA.GOV table 4.B1 (2022); U.S. SOC. SEC. ADMIN., RESEARCH, STATISTICS & POLICY ANALYSIS, POPULATION PROFILES: FULLY INSURED WORKERS (2020),https://www.ssa.gov/policy/docs/population-profiles/fully-insured-workers.html; *Social Security's Readiness for the Impending Wave of Baby Boomer Beneficiaries: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 106th Cong. 9 (2000); U.S. SOC. SEC. ADMIN., TRENDS IN THE SOC. SEC. AND SUPPLEMENTAL SEC. INCOME DISABILITY PROGRAMS 15–16 (2006).

[35] *See generally Clearing the Disability Claims Backlogs: The Soc. Sec. Admin. Progress and New Challenges Arising from the Recession,* 111th Cong. (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-641R, *supra* note 24, at 4–5; JOHN R. KEARNEY, U.S. SOC. SEC'Y ADMIN., SOCIAL SECURITY AND THE "D" IN OASDI: THE HISTORY OF , SOC. SEC'Y BULLETIN, VOL. 66, NO. 3 (2005/2006); KALMAN RUPP AND DAVE STAPLETON, U.S. SOC. SEC'Y ADMIN., SOCIAL SECURITY AND THE "D" IN OASDI: THE HISTORY OF , SOC. SEC'Y BULLETIN, VOL. 66, NO. 3 (2005/2006); https://www.ssa.gov/policy/docs/ssb/v58n4/v58n4p43.pdf; https://www.ssa.gov/policy/docs/ssb/v42n10/v42n10p3.pdf

rates.[36] For example, applications for disability benefits skyrocketed during the period when Baby Boomers were in their most disability-prone years but not yet eligible for retirement benefits.[37]

C. Increased Program Participation

The rate of individuals who actually apply for and receive benefits for which they are eligible under the OASDI and SSI programs has grown. This growth can be explained by a number of factors, including broader awareness of the program due to public- and private-sector outreach and educational efforts.[38]

D. Resource Constraints

Like most federal agencies, SSA relies on the annual appropriations process to secure funding necessary to manage its operations. Supplemental resources can be especially important for IT investments, which often have hefty startup costs but show a return on investment down the road. Securing necessary resources requires accurate projections and the cooperation of actors in the executive and legislative branches. Many stakeholders have argued that concerns about timeliness are the direct result of chronic underfunding.[39]

In addition to annual appropriations, SSA's ability to adjudicate cases in a timely manner has been affected by agency- and governmentwide events such as staff reductions, hiring freezes, furloughs, and shutdowns,[40] as well as workforce trends such as waves of retirement (and associated loss of institutional knowledge) and increased competition from the private sector.[41]

Organizationally, the offices that operate SSA's adjudication system compete with other agency components for limited resources—to update the information technology (IT)

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[36] SOC. SEC. ADMIN., BRIEFING PAPER NO. 2019-01, TRENDS IN SOCIAL SECURITY DISABILITY INSURANCE (2019); U.S. SOC. SEC. ADMIN., THE SOCIAL SECURITY STRATEGIC PLAN: A FRAMEWORK FOR THE FUTURE 6–7 (1991); U.S. SOC. SEC. ADMIN., BRIEFING PAPER NO. 2019-01, TRENDS IN SOCIAL SECURITY DISABILITY INSURANCE (2019).

[37] SIKA KOUDOU AND JETHRO DELY, U.S. SOC. SEC. ADMIN., RESEARCH AND STATISTICS NOTE NO. 2022-02, QUICK DISABILITY DETERMINATION CASES: DESCRIPTIVE STATISTICS FOR FISCAL YEARS 2015-2020 (2022).

[38] BARBRA LEVENSON AND AARON KRUTE, U.S. SOC. SEC. ADMIN., DELAYED FILING FOR DISABILITY BENEFITS UNDER THE SOCIAL SECURITY ACT, SOC. SEC. BULLETIN, OCTOBER 1964 21–24 (1964); JACK S. FUTTERMAN, U.S. SOC. SEC. ADMIN., IMPERSONALITY AND ADMINISTRATION, SOC. SEC. BULLETIN, SEPTEMBER 1965 (1965); U.S. SOC. SEC. ADMIN., SSA'S OUTREACH EFFORTS TO CONTACT BENEFICIARIES ELIGIBLE FOR SSI PAYMENTS, SOC. SEC. BULLETIN, JANUARY 1988 13–17 (1988); MATT MESSEL, TOKUNBO B. OLUWOLE, AND DAVID ROGOFSKY, U.S. SOC. SEC. ADMIN., PUBLIC KNOWLEDGE ABOUT THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY PROGRAMS: FINDINGS FROM THE UNDERSTANDING AMERICA STUDY, SOC. SEC. BULLETIN VOL. 82 NO. 4 (2022); U.S. SOC. SEC. ADMIN., BRIEFING PAPER NO. 2019-01, *supra* note 36; WILLIAM J. NELSON, JR., U.S. SOC. SEC. ADMIN., DISABILITY TRENDS IN THE UNITED STATES: A NATIONAL AND REGIONAL PERSPECTIVE, SOC. SEC. BULLETIN, FALL 1994 29–34 (1994).

[39] *The Performance of Social Security Administration Appeals Hearing Offices: Hearing Before the Subcomm. On Soc. Sec. of the H. Comm. on Ways and Means*, 110th Cong. 2–3, 24, 37 (2008).

[40] *Disabled Yet Denied: Bureaucratic Injustice: Hearing Before the Sen. Special Comm. on Aging*, 101st Cong. 44 (1990); *Establishing the Social Security Administration as an Independent Agency: Hearing Before the Sen. Comm. on Fin.,* 103rd Cong. 23 (1993).

[41] U.S. SOC. SEC. ADMIN., FISCAL YEARS 2018 - 2022 AGENCY STRATEGIC PLAN 12–13 (2018); CAROLYN PUCKETT, U.S. SOC. SEC. ADMIN., ADMINISTERING SOCIAL SECURITY: CHALLENGES YESTERDAY AND TODAY, SOC. SEC. BULLETIN, VOL. 70, NO. 3 (2010).

infrastructure used by adjudicators and support staff.[42] Adjudicative components also rely, to a certain extent, on actors at other agencies, for example the General Services Administration.[43]

E. Cooperative Federalism

A unique feature of SSA's adjudication process is the role that state agencies play at the initial and reconsideration levels. The relationship between SSA and state governments was originally regulated by individual agreements with each state but is now governed largely by a set of regulations adopted in 1981. Under those regulations, SSA funds and exercises policy control over DDSs but is very limited in its ability to direct their operations. SSA "does not control the selection of DDS staff," for example, and "[e]ach DDS is also subject to the laws and regulations in its state, from employee qualification standards to accounting and fiscal requirements."[44]

F. Program Integrity

The integrity of the OASDI and SSI programs—disability, in particular—is a perpetual concern among certain key stakeholders, including many members of Congress. Legislative and administrative mechanisms have been put in place over the years to review DDS determinations and ALJ decisions for accuracy, to periodically review whether beneficiaries receiving benefits based on a disability continue to be disabled, and to readjudicate cases in which there is a suspicion of "fraud or similar fault." SSA and DDSs must divert resources to manage these caseloads, which affects their ability to decide initial applications in a timely manner.[45]

IV. MEASURES TO PROMOTE OR IMPROVE TIMELINESS

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[42] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., MANAGEMENT ADVISORY REPORT A-14-18-50437, THE SOCIAL SECURITY ADMINISTRATION'S INFORMATION TECHNOLOGY INVESTMENT PROCESS 3–6 (2022).

[43] *Disability Amendments of 1982: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 97th Cong. 338 (1982); *Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1982: Hearings Before a Subcomm. of the H. Committee on Appropriations,* 97th Cong. 164–167 (1981); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 97TH CONG., BACKGROUND ON SOCIAL SECURITY OFFICE SPACE PROBLEM 15–18 (Comm. Print 1981).

[44] *See generally* BOB JOONDEPH ET AL., SOC. SEC. ADVISORY BD., SOCIAL SECURITY AND STATE DISABILITY DETERMINATION SERVICES AGENCIES: A PARTNERSHIP IN NEED OF ATTENTION (2023).

[45] STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., 97TH CONG., REPT. ON SOCIAL SECURITY HEARINGS AND APPEALS: PENDING PROBLEMS AND PROPOSED SOLUTIONS 3–14 (Comm. Print 1981); *Social Security Disability: The Effects of the Accelerated Review: Joint Hearing Before the Special Comm. on Aging and the Subcomm. on Civil Serv., Post Office, and Gen. Serv. of the Sen. Comm. on Gov't Affs.,* 97th Cong. 2–5 (1982); *Social Security Disability Insurance Program: Cessations and Denials: Hearing Before the H. Select Comm. on Aging,* 97th Cong. 5–10 (1982); *Disability Amendments of 1982: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 42, at 5–9; *Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the H. Select Comm. on Aging*, 98th Cong. 3 (1983); *Social Security How Well is it Serving the Public?: Hearing Before the Sen. Special Committee on Aging,* 98th Cong. 120–122 (1983); *Current Problems in the Social Security Hearings and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 28, at 1–4; *Nomination of Dorcas R. Hardy: Hearing Before the Sen. Comm. on Fin.,* 99th Cong. (1986).

SSA has faced concerns about the timeliness of its adjudication system on and off for at least the past seven decades. This Part examines chronologically how Congress and SSA have responded to different concerns about timeliness throughout the agency's history.

A few high-level trends emerge from this examination. First, SSA has considered or introduced an enormous range of measures to promote or improve timely adjudication, including structural, organizational, procedural, personnel, informational, and technological strategies. SSA has turned to informational and technological strategies, in particular, to collect and leverage management information about the performance of current and novel processes; automate routine tasks; and develop tools to support more timely case processing. GAO and SSA's Office of the Inspector General (OIG) have repeatedly encouraged SSA to collect reliable management information, develop metrics useful for measuring the effectiveness of different interventions to promote timeliness, and adopt best practices for IT modernization.[46]

Second, there is an enormous number of individuals and groups affected by or interested in the performance of SSA's adjudication system, including both external and internal stakeholders. The most successful interventions are those that have satisfied key stakeholders. Conversely, it has been more challenging for SSA to achieve its objectives through interventions that failed to achieve buy-in from key stakeholders, especially adjudicators and staff responsible for operationalizing them.

Third, many of the initiatives described in this case study required additional funding, staff, or other resources to be successful. SSA has needed to continually develop and refine how it collects, analyzes, and uses management information to accurately calculate current resource levels and predict future resource needs. Effective budget planning and budget advocacy before Congress have always been foundational to achieving timeliness.[47]

OIG has made similar observations. In a 2015 report, it identified seven "lessons learned" from its own review of previous backlog initiatives:

> (1) baseline data to measure progress, (2) sufficient oversight, (3) pilots to test initiatives, (4) good internal and external communication, (5) legal review of

[46] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-677T, SSA DISABILITY PROGRAMS: BETTER METRICS AND EVALUATION NEEDED TO INFORM DECISION-MAKING 6–8 (2018); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-501, SOCIAL SECURITY DISABILITY: BETTER TIMELINESS METRICS NEEDED TO ASSESS TRANSFERS OF APPEALS WORK 10–23 (2018); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-495, SOCIAL SECURITY ADMINISTRATION: IMPROVED PLANNING AND PERFORMANCE MEASURES ARE NEEDED TO HELP ENSURE SUCCESSFUL TECHNOLOGY MODERNIZATION (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS (2007); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION (2002); U.S. SOC. SEC. ADMIN. OFF. OF INSPECTOR GEN., QUICK RESPONSE EVALUATION A-07-09-29162, OFFICE OF DISABILITY ADJUDICATION AND REVIEW MANAGEMENT INFORMATION 3–6 (2009).

[47] U.S. SOC. SEC. ADMIN., THE OBJECTIVES OF THE SOCIAL SECURITY ADMINISTRATION 11 (1965); U.S. GOV'T ACCOUNTING OFFICE, GAO/HRD-89-42, SOCIAL SECURITY STATUS AND EVALUATION OF AGENCY MANAGEMENT IMPROVEMENTS INITIATIVES, 27 (1989); STAFF OF H. COMM. ON WAYS AND MEANS, 102d Cong., REPT. CARD ON THE SOC. SEC. ADMIN. 23–24 (Comm. Print 1991).

initiatives, (6) comprehensive management information, and (7) reliable cost and savings data.[48]

A. Establishment of Retirement and Survivors Insurance (1935–1954)

In the two decades after the Social Security program was created, it grew from a program providing retirement benefits to a limited range of employees to a program providing retirement and survivors benefits to a much broader range of wage earners, including self-employed persons and agricultural and domestic workers. Each expansion of the program saw a temporary surge in claims at the initial level, and the agency took steps to augment the Bureau's adjudicative capacity, such as by hiring and training new staff, detailing and reassigning staff from less burdened units to more burdened units, authorizing overtime, and prioritizing relatively simple cases that could be adjudicated quickly over more difficult ones that required more time. Caseloads soon returned to expected levels, however, and long-term concerns about timeliness were uncommon.

There was no concern about timeliness at subsequent levels of SSA's adjudication system. Requests for reconsideration were rare, and requests for hearing and AC review rarer still. OAC remained "a small, low key agency" until at least the Social Security Act Amendments of 1950, which extended coverage to most self-employed workers, increased benefit amounts, and provided for the payment of benefits to additional dependents. Even then, dockets remained manageable. According to one account, the "docket pressures were so light [during this period] that statistics were kept only on a sporadic or informal basis."[49]

B. Establishment and Expansion of Social Security Disability Insurance (1954–1964)

The disability program began with the disability freeze provisions of the Social Security Act Amendments of 1954 and expanded rapidly over the next decade to provide monthly cash payments first to disabled workers aged 50–64 and disabled adult children and then to disabled workers of any age and their dependents.

Each expansion of the program saw a surge in claims at the initial level.[50] SSA quickly expanded the Bureau's workforce to handle the surges—both to adjudicate nondisability matters and to adjudicate the many cases that were excluded from contracts with the states. There were 13,953 Bureau staff at the beginning of 1954 and 15,530 by year's end. Plans were in place to increase the workforce to 17,952 by June 30, 1955,[51] and the Bureau recruited thousands more

[48] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REP. A-05-16-50167, COMPASSIONATE AND RESPONSIVE SERVICE PLAN TO REDUCE PENDING HEARINGS 8–11 (2016).
[49] Capshaw & Robinson, *supra* note 27, at 4.
[50] ARTHUR E. HESS, U.S. SOC. SEC. ADMIN., FIVE YEARS OF DISABILITY INSURANCE BENEFITS: A PROGRESS REPORT, SOC. SEC. ADMIN BULLETIN JULY 1962 12– 13 (1962); *See also* Hess, *supra* note 30, at 20.
[51] STAFF OF THE SEN. COMM ON GOV'T OPERATION, 84TH CONG., REP. ON ORG. OF FED. EXEC. DEP'T AND AGENCIES 24–25 (1955).

employees over the next several years to manage the agency's growing workload.[52] Overtime also played an important role in expanding the Bureau's capacity.[53]

The decentralized federal-state system for determining disability presented unique management challenges. Some state agencies were unable to recruit and hire staff quickly enough to keep up with their growing caseloads, and laws in some states constrained state agencies' flexibility to use overtime and other managerial controls to increase productivity. This resulted in "heavy pending claims loads and long delays in the processing of some cases."[54] Nonetheless, state agencies' disability staff more than doubled between December 1956 and September 1957, and by 1957, state agencies reportedly had "significantly increased overall production while continuing to emphasize quality."[55] To provide additional policy, procedural, and operational leadership for this decentralized program, SSA established the Division of Disability Operations.[56]

Appeals to the reconsideration, hearing, and AC review levels increased substantially during this period, giving rise to the agency's first "appeals crisis." Facing intense public and congressional scrutiny,[57] SSA introduced several measures to manage the rapidly growing number of hearing requests.

Two interventions were intended, at least in part, to facilitate the resolution of cases before the hearing level. The chief innovation at the initial level was to include with denial notices some personalized explanation for why a party's application was denied. SSA developed a bank of standardized paragraphs for this purpose. It was hoped that including such language would clear up "misconceptions" about the program and help the party "pinpoint where his evidence did not meet the requirements of the act, and assist him in exploring the possibility of developing further evidence to meet this deficiency."[58]

Adjudicators at the reconsideration level also began explaining with greater specificity their evaluation of the medical evidence.[59] More fundamentally, SSA issued a rule in 1959 mandating that parties dissatisfied with an initial determination first request and receive a reconsideration determination before requesting a hearing.[60] Responding to objections that mandatory reconsideration violated the Act, SSA explained that because reconsideration

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[52] STAFF OF THE SEN. COMM ON GOV'T OPERATION, 86TH CONG., REP. ON ORG. OF FED. EXEC. DEP'T AND AGENCIES 26 (1959).
[53] *Labor-Health, Education, and Welfare Appropriations for 1956: Hearings Before the Subcomm. of the Sen. Comm. on Appropriations,* 84th Cong. 609–12 (1956); STAFF OF THE SEN. COMM. ON GOV'T OPERATION, REP. ON ORG. OF FED. EXEC. DEP'T AND AGENCIES, *supra* note 52, at 26.
[54] Hess, *supra* note 30, at 19.
[55] Hess, *supra* note 30, at 20; *see also Administration of Social Security Disability Insurance Program: Hearings Before The Subcomm. on the Admin. of the Soc. Sec. Laws of the H. Comm. on Ways and Means,* 86th Cong. 49 (1960).
[56] *See Organizational History: Brief Graphic Organizational History*, SOC. SEC. ADMIN., https://www.ssa.gov/history/orghist.html (last visited Oct. 6, 2023).
[57] Capshaw & Robinson, *supra* note 27, at 8.
[58] CHARLES A. HORSKY & AMY RUTH MAHIN, THE OPERATION OF THE SOCIAL SECURITY ADMINISTRATION HEARING AND DECISIONAL MACHINERY 15 (1960).
[59] *Id*. at 33.
[60] STAFF OF THE SUBCOMM. ON ADMIN. OF THE SOC. SEC. LAWS FOR USE OF THE H. COMM. ON WAYS AND MEANS, DISABILITY INSURANCE FACT BOOK *supra* note 30 at 52–54.

procedures were less formal than the procedures used at the hearing level, mandating reconsideration might offer a less costly and time-consuming alternative to a hearing in at least some cases.[61] An SSA report subsequently found that mandatory reconsideration saved time and administrative expense, resulting in many allowances at the reconsideration rather than the hearing level and reduced processing times at the hearing level.[62]

Several interventions were introduced by OHA to manage the unprecedented demand for hearings. First, OHA moved quickly to increase the size of its referee corps. There were only 12 referees when the 1954 amendments went into effect. (Referees were renamed "hearing examiners" in 1959.) That number grew substantially over the next decade, reaching 82 in 1958, 140 in 1959, and 216 in 1965.[63]

One challenge to appointing hearing examiners quickly was the fact that SSA appointed hearing examiners, a position regulated by the APA, through a competitive-service process administered by the Civil Service Commission (CSC). To expand its examiner corps more quickly, SSA in 1958 and 1959 requested and received congressional authorization to hire temporary examiners outside the CSC process.[64] SSA recruited Bureau employees to serve in this role. Only a year later, the new House Subcommittee on Social Security expressed concern with this approach. It concluded in its first report that although the agency might have been justified in recruiting temporary examiners from the Bureau given the "tremendous backlog" of cases pending at the hearing level, "the principles of the [APA] should not continue to be disregarded through annual exceptions to its provisions."[65]

Second, OHA hired a substantial number of staff to support the hearing examiners. The number of support staff grew from 47 in 1955 to 163 in 1958, 286 in 1959, and 434 in 1965.[66] Staff details and transfers were also used to augment capacity where needed.

Third, to manage the rapidly growing hearing system more effectively, SSA in 1959 substantially reorganized OHA's structure. Under the reorganization, the Chair of the AC remained OHA's Director. But whereas all chief Central Office personnel and hearing examiners previously had reported directly to the Chair, the reorganization plan separated OHA personnel into operating units. The four primary operating units were (1) the AC, (2) the Program Division,

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[61] At the time, some examiners argued that SSA lacked statutory authorization to mandate reconsideration. *See* STAFF OF H. COMM. ON WAYS AND MEANS, 85TH CONG., REPT. ON HOSPITALIZATION INSURANCE FOR OASDI BENEFICIARIES 33 (Comm. Print 1959).
[62] STAFF OF H. COMM. ON WAYS AND MEANS, REP. ON THE DISABILITY INSURANCE PROGRAM, *supra* note 11, at 36.
[63] ROBERT G. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 163 (1973).
[64] Pub. L. No. 85-766 (1958).
[65] STAFF OF H. COMM. ON WAYS AND MEANS, REPT. ON HOSPITALIZATION INSURANCE FOR OASDI BENEFICIARIES *supra* note 61, at 3637.
[66] ROBERT G. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 163 (1973).

(3) the Field Division, and (4) the Administrative Services Division. In 1960, OHA combined the Field Division and Administrative Services Division, creating the Operations Division.[67]

The nationwide field organization, including hearing examiners, worked within the Operations Division. The Division was headed by a Division Director who reported directly to the OHA Director. The Division Director was responsible for directing and supervising the administration of the field organization, overseeing the implementation of program policy, and evaluating examiners' implementation of program policy. The Division Director was also authorized to develop production goals and determine the extent to which personnel were meeting those goals.

The Operations Division was itself divided into geographical regions, each directed by one of six Regional Hearings Representatives (RHRs). RHRs were charged with providing "substantive assistance and administrative direction" to hearing examiners in a manner "consistent with the APA," as well as "leadership . . . in implementation of substantive administrative and operating policies and procedures." In this role, RHRs provided substantive support and were also authorized to observe "the conduct of hearings," "periodically post-review[] decisions of Hearing Examiners to detect trends, training or orientation needs, and need for improved work habits, and methods of operation," and counsel examiners on how to improve their performance.[68]

Fourth, OHA's head, Chairman Joseph McElvain, introduced performance goals. He initially asked hearing examiners to decide 10 cases per month. When he later increased that amount to 14, he explained: "[W]e make it clear that we will not consider that a Referee is meeting his responsibility if he merely issues 10 decisions month in and month out. . . . We obviously do not expect the newer Referees to immediately meet the above minimum."[69]

At all levels of the adjudication system, greater attention was paid to standardizing the substantive and procedural rules and policies used by adjudicators. Substantive policymaking centered on interpreting the statutory of definition of "disability." With the agency slow to adopt rules, interpretation had been left largely to individual district judges—a result that satisfied no one. Responding to congressional criticism, SSA began to adopt policies for determining disability, some of which Congress later enacted into law. With respect to procedures, SSA in 1960 substantially expanded its regulations to include "a full-length, self-contained, current statement of practices and procedures" from initial application through AC review.[70]

SSA also began developing elaborate manuals and handbooks to guide adjudicators during this period, though their use varied across levels of the adjudication system. Some—such as General Council Opinions, Commissioner's Action Minutes, and Social Security Rulings—were binding on all levels. Bureau and DDS employees relied on vast and growing compendia of manuals, handbooks, and guides. Hearing examiners received AC Mimeographed Decisions and

[67] The Office of the Director and Chairman and the Medical Advisory Staff also functioned as separate operating units. *Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Admin. Of the Soc. Sec. Laws of the Comm. on Ways & Means*, 86th Cong. 726 (1960).
[68] HORSKY & MAHIN, *supra* note 58, at 308–309.
[69] Capshaw & Robinson, *supra* note 27, at 6.
[70] 25 Fed. Reg. 6465 (July 9, 1960); HORSKY & MAHIN, *supra* note 58, at 94–95.

Hearing Examiner Mimeographed Decisions, which formed a system of precedent, as well as Policy Memoranda from OHA's Central Office.[71]

C. Expansion Beyond the OASDI Program (1964–1974)

Applications for disability benefits continued to rise through the 1960s and 1970s, especially after the Act was amended in 1965 to expand and liberalize Social Security disability.[72] During the same period, Congress established several major programs—including Title VI of the Civil Rights Act (1964), Medicare (1965), black lung (1969), and SSI (1972)—and assigned certain adjudicative functions under them to SSA. The creation of the black lung and SSI programs had the greatest operational impact on SSA during the 1960s and 1970s.

The Federal Coal Mine Health and Safety Act (Coal Act) directed the Secretary of HEW to adjudicate all black lung benefits claims filed before 1973 using the personnel and procedures used to determine entitlement to disability insurance benefits.[73] Within a month of the Coal Act's passage, 100,000 new claims had been filed with SSA. SSA introduced "emergency" measures to handle the surge in applications and appeals, for example opening a "new black lung center in headquarters to facilitate the process of securing additional evidence in advance of the face-to-face hearing" and additional offices in the "major coal mining areas."[74]

Nevertheless, the number of pending cases and wait times—particularly at the hearing level—reached levels that were unacceptable to many stakeholders, and SSA was repeatedly the target of public scrutiny and congressional oversight. To handle increased case receipts, and a sharp increase in the number of pending requests for reconsideration under the black lung program, SSA authorized overtime and reassigned personnel between workloads. The agency also reduced the number of DDS determinations it reviewed from 60 to five percent—which it determined was sufficient to assure quality—and reassigned quality review personnel to process the surge in initial applications.[75]

SSA invested in developing better systems for collecting and analyzing management information and automating routine tasks. The new Disability Case Control System, used by Bureau personnel, was specifically designed to "speed the processing of disability claims and to permit prompt location of sensitive cases from among the 350,000 claims folders in circulation."[76]

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[71] HORSKY & MAHIN, *supra* note 58, at 89–90.
[72] *See History of SSA During the Johnson Administration: Disability Changes*, SOC. SEC. ADMIN., https://www.ssa.gov/history/ssa/lbjdib1 (last visited Oct. 6, 2023).
[73] Pub. L. No. 91-173, pt. B, 83 Stat. 742, 793–95 (1969).
[74] *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 92d Cong. 103 (1972).
[75] SSA reduced the number of DDS determinations it reviewed from 60 to five percent, which it determined was sufficient to assure quality. *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations, supra* note 74, at 61–62; STAFF OF H. COMM. ON WAYS AND MEANS, REP. ON THE DISABILITY INSURANCE PROGRAM, *supra* note 11, at 167–68.
[76] *See History of SSA During the Johnson Administration: Operating Methods*, U.S. SOC. SEC. ADMIN., https://www.ssa.gov/history/ssa/lbjoper4.html (last visited Oct. 6, 2023); JACK S. FUTTERMAN, U.S. SOC. SEC. ADMIN., ADMINISTRATIVE DEVELOPMENTS IN THE SOCIAL SECURITY PROGRAM SINCE 1965, SOC. SEC. BULLETIN, APRIL 1972 (1972).

SSA also introduced specific measures intended to reduce appeals from the initial to the reconsideration level and from the reconsideration to the hearing level. At the initial level, it sought to "make sure that our initial decision is the best we can possibly make so as to reduce the number of claimants who feel another look should be taken at their cases." At the reconsideration level, SSA piloted the introduction of a face-to-face interview, during which agency personnel met informally with parties to discuss their cases. The objective was "a final settlement of the case at the reconsideration stage."[77] The experiment reportedly resulted in "a rather significant increase in the allowance rate for the cases with a personal interview and lower reversal rate on appeal for this type of case," though "almost as high a percentage of the interviewed cases requested a hearing as those who were not interviewed."[78]

At the hearing level, SSA significantly expanded its corps of APA-qualified hearing examiners—retitled ALJs in 1972—and hired additional staff to support them.[79] OHA encountered two challenges in hiring additional hearing examiners and staff. The first was the fact that the CSC's roster of applications, especially for particular hearing offices, was "not very extensive." The agency—successfully, apparently—helped boost the number of applicants by encouraging regional offices and hearing offices to conduct outreach activities and actively recruit qualified applicants.[80]

The second challenge was "a fear of taking on too many judges . . ., then losing them in a Reduction In Force (RIF) if the case load fell off." This was especially true for SSA's black lung workload, which was limited to claims filed before 1973. Congress ultimately authorized SSA to hire temporary examiners outside the APA process to hear black lung cases.[81]

Congress also authorized SSA to use non-ALJ hearing examiners to hear SSI appeals, which led to some confusion as to whether the law thereby barred SSA from assigning SSI appeals to ALJs. CSC said it did, which effectively required OHA to simultaneously manage three different corps of adjudicators: one for OASDI, one for black lung claims, and one for SSI. Congress eventually resolved the issue by authorizing ALJs to hear claims under both programs and converting SSI examiners to ALJs.

OHA continued to develop and communicate performance goals during this period. According to an account by James Nease, who served as Director from 1968 to 1970: "Our stated objective was to produce a final decision within 60 days of request for hearing. Our interim goal was to reach a decision within 90 days on average and to realize a productivity factor of 15 decisions a month from each Hearing Examiner unit." To obtain better management information, OHA sought to implement an "integrated Bureau-wide daily tally system by case category using electronic transmission."[82]

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[77] *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations, supra* note 74, at 14; Capshaw & Robinson, *supra* note 27, at 19.
[78] Capshaw & Robinson, *supra* note 27, at 19.
[79] *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations, supra* note 74, at 15.
[80] Capshaw & Robinson, *supra* note 27, at 11, 13–14.
[81] *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations, supra* note 74, at 110.
[82] Capshaw & Robinson, *supra* note 27, at 12.

There was also an important shift in OHA's organizational culture at this time. Joseph McElvain, who had directed the office since its creation in 1940, retired in 1965 and was succeeded by Charles Erisman, who was "one of the first management specialists" assigned to supervise the office. Prior to taking the position, he had worked for about a year as staff advisor to the Commissioner on management matters and for 35 years before that "chiefly in the fiscal and management aspects of Federal operations."[83]

Related to this cultural shift, OHA underwent substantial reorganization. The Central Office delegated much of its responsibility for case management to the regional offices in the late 1960s.[84] In 1973, SSA created the position of Regional Chief ALJ (RCALJ). (OHA also created a Regional Development Center and a Regional Appeals Center, but they did not last long.) OHA's Central Office was completely reorganized in 1974. For the first time, there was a Chief ALJ within the Immediate Office of the Director. (The position of Deputy Chief ALJ was created in 1980.) The Central Office's core functions were distributed across several components. In addition to the AC and its staff, these components included the Division of Policy and Procedures, which was responsible for developing and disseminating OHA-wide policy and procedural guidelines; the Division of Administration, which was responsible for coordinating administrative support activities and overseeing OHA's management information system; and the Appraisal Staff, which was responsible for continually appraising OHA's performance and the extent to which it was meeting its performance goals.[85]

D. Implementation of the SSI Program (1974–1979)

Case receipts and processing time continued to increase substantially into the mid-1970s, especially after the SSI program became operational in 1974. Congressional offices continued to receive complaints about delays from their constituents and interact on a daily basis with SSA,[86] and HEW and SSA officials became the target of a great deal of oversight activity.

Parties frustrated with delays at the reconsideration and hearing levels also increasingly turned to the courts for relief. They alleged that delays deprived them of due process and violated the APA's requirement that agencies proceed to conclude matters "within a reasonable time." Some courts—particularly in the Second Circuit—entered injunctions that imposed judicially prescribed deadlines on the agency and required the agency to pay interim benefits when it failed to meet those deadlines.[87] The Sixth Circuit in 1978 ordered HEW to develop rules establishing enforceable timeframes for decision making at each level of the administrative review process.[88] SSA later proposed—but never adopted—a rule that would require OHA to schedule a hearing within 80 days after receiving a hearing request and issue a decision within 30 days thereafter,[89]

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[83] *Id*. at 10.
[84] *Id*. at 13.
[85] Statement of Organization, Functions, and Delegations of Authority, 39 Fed. Reg. 11,616–17 (Mar. 29, 1974).
[86] STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., STAFF SURVEY ON CONG. CASEWORKERS, *supra* note 25 at 1.
[87] *See, e.g.*, Day v. Schweiker, 685 F.2d 19 (2d Cir. 1982); Sharpe v. Harris, 621 F.2d 530, 531–532 (2d Cir. 1980); Barnett v. Califano, 580 F.2d 28, 31–32 (2d Cir. 1978); White v. Mathews, 559 F.2d 852, 859 (2d Cir. 1977); *see also* STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., REP. ON DISABILITY INSURANCE–POSSIBLE AREAS OF SUBCOMM. ACTION, *supra* note 11, at 10–11.
[88] Blankenship v. Sec'y of HEW, 587 F.2d 329, 336 (1978).
[89] 45 Fed. Reg. 12,837 (Feb. 27, 1980).

and in June 1980, Congress directed the Secretary of HHS to submit a report "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under [the OASDI program]."[90] Congress never adopted time limitations, and the Supreme Court ultimately ended the practice of the lower courts, finding in 1984 that Congress had "determined that it is inappropriate to subject disputed disability claims to mandatory deadlines."[91]

OHA's cultural shift continued in the face of intense pressure from Congress, the courts, and the public. Director H. Dale Cook stepped down in December 1974 after he was nominated for the federal bench, and Robert Trachtenberg succeeded him in January 1975. Whereas Cook had been a trial lawyer before becoming Director,[92] Trachtenberg had been HEW's Deputy Assistant Secretary for Grants and Procurement and was appointed "expressly for the purpose of reorganizing and revitalizing the hearings and appeals process." Trachtenberg himself viewed his role as "being responsible for eliminating the backlog, stabilizing the workload, reducing processing times, all while maintaining a system of administrative justice which afforded claimants due process and assured quality decisions."[93] One ALJ described Trachtenberg's legacy as "chang[ing] the agency's culture by adopting a bureaucratic worldview and subsuming the judicial perspective."[94]

To achieve these objectives, Trachtenberg introduced more than a dozen initiatives in the first years of his tenure, including:

- **Providing Legal Support Staff for ALJs.** OHA began hiring attorneys (and in the interim detailed AC support staff) to support ALJs.[95] As part of a two-year pilot, staff attorneys were tasked with developing cases for hearing and drafting decisions for ALJs. An internal study found that a cohort of ALJs supported by staff attorneys decided 35,100 more cases per year than a comparably sized cohort of ALJs not supported by staff attorneys.

- **Contracting Out Transcript Production.** Finding that the typing of hearing transcripts in federal civil suits "materially interfered with the support staff's ability

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[90] Congress directed the Secretary to recommend "the maximum period of time" within which initial determinations, reconsideration determinations, hearing decisions, and AC review should occur. Congress noted that in determining these time limitations, the Secretary "shall take into account both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined." Pub. L. No. 96-265, § 308. The Secretary's report to Congress is available at https://www.google.com/books/edition/Status_of_the_Disability_Insurance_Progr/R5jFdkKkXrAC?hl=en&gbpv=1&pg=PA43&printsec=frontcover.

[91] Heckler v. Day, 467 U.S. 104, 118 (1984). In contrast to disability claims, the Act requires SSA to decide nondisability matters "within ninety days after the individual requests [a] hearing." 42 U.S.C. § 1383(c)(2).

[92] According to one account: "These were good years for the corps of judges because Dale Cook had a highly developed sense of due process. He considered the Administrative Law Judges to be judges and treated them as such. But, he did emphasize currency of dockets." Capshaw & Robinson, *supra* note 27, at 18.

[93] *Future Directions in Social Security: Hearing Before the Sen. Special Comm. on Aging,* 94th Cong. 987 (1975).

[94] Jeffrey S. Wolfe, *Civil Justice Reform in Social Security Adjudications*, 33 J. NAT'L ASS'N ADMIN. L. JUDGES 152 (2013); *see also* Charles N. Bono, *The Evolution and Role of the Administrative Law Judge at the Office of Hearings and Appeals in the Social Security Administration*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES (1995) available at https://digitalcommons.pepperdine.edu/naalj/vol15/iss2/5.

[95] U.S. GEN. ACCOUNTING OFFICE, HRD-76-173, PROBLEMS AND PROGRESS IN HOLDING TIMELIER HEARINGS FOR DISABILITY CLAIMANTS 25 (1976).

to dispose of pending hearing cases," Trachtenberg outsourced that workload.

- **Streamlining Decision-Writing.** OHA rented automatic typewriters to expedite the preparation of decisions. OHA also developed standardized paragraphs for decisions and disseminated them to the ALJs for use with the automatic typewriters. Use of the paragraphs was optional, but Trachtenberg reported that "virtually all ALJs use the standardized version or their own standardized paragraphs in almost all cases." Additionally, OHA encouraged ALJs to issue "short form" decisions in cases where claims were awarded in full. Such decisions merely stated that the claim was allowed and included a short memorandum providing some rationale. (A renewed emphasis on quality led SSA to abandon short-form decisions in the 1980s, though the agency has reintroduced short-form decisions periodically.[96])

- **Reorganizing Hearing Office (HO) Supervisory Structures.** Until the 1970s, each HO was managed by an ALJ-in-Charge (ALJIC), and ALJs were assigned their own dedicated support staff with "no interchange of staff with other ALJs based upon office needs." Trachtenberg hired Administrative Officers for the larger HOs so that the ALJIC and ALJs would not spend time handling management tasks. Administrative Officers were charged with allocating support staff "based upon workload and ALJ need." Trachtenberg also deployed "manpower utilization teams" to visit HOs and take action to improve performance. Many "ineffective ALJICs," in Trachtenberg's words, were removed as a result.

- **Reestablishing Production Goals.** To reduce the backlog and "stabilize" the hearing level workload, OHA established and publicly announced a "reasonable ALJ production goal" of 26 cases per month.[97]

- **Counseling Adjudicators.** Trachtenberg established a program for Regional Chief ALJs (RCALJs) to "counsel" ALJs who did not meet production expectations.

- **Securing Congressional Authorization to Convert Non-ALJs to ALJs.** Congress had previously authorized SSA to use non-ALJs to hear SSI and black lung cases. Trachtenberg secured congressional authorization to convert these adjudicators to temporary ALJs authorized to hear all SSA cases. After the CSC refused Trachtenberg's request to make the temporary ALJs permanent, Congress included language in an appropriation statute making them permanent.

- **Standardizing ALJ Travel Practices.** OHA eliminated "[u]ncontrolled, indiscriminate travel by ALJs" through "strict, published standards on travel and caseload management."

- **Improving Communication Between ALJs and Management.** Trachtenberg established a Policy Council, made up of more than 20 ALJs, to advise him. The

[96] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, *supra* note 46, at 25–27.
[97] U.S. GEN. ACCOUNTING OFFICE, HRD-76-173, *supra* note 95, at 24.

Policy Council established an ALJ-led continuing education program to continually develop judicial skills among the ALJ corps.

- **Adopting Electronic Case Management.** OHA installed an "automated case control and management information system." According to Trachtenberg, "[p]reviously, the thousands of cases received each year were controlled manually, and management information on the age of individual cases was non-existent."

- **Implementing a Quality Assurance System.** According to Trachtenberg: "To assure that decisional quality did not suffer with increased production, a comprehensive quality assurance system was implemented to measure overall performance."[98]

- **Developing a Process for "Informal Remands" to the Reconsideration Level.** SSA introduced a procedure by which DDSs were asked to reconsider cases appealed to the hearing level in which new circumstances suggest a likely allowance. Under the procedure: "When a claimant requests a hearing and alleges that new circumstances have arisen, and such circumstances (such as a worsening of his condition) increase the likelihood of reversal, the SSA [FO] will return the case to the State agency. The latter has 60 days to update the file and render a decision. If the decision is favorable, there is no need for a hearing; if unfavorable, the claim reenters the hearing process in the place it would have had if it had not been remanded."[99]

- **Testing and Expanding Reconsideration Interviews.** SSA studied whether it could "prevent cases from reaching the hearing level unnecessarily" through an opportunity for face-to-face contact at the reconsideration level. Under the procedure: "Unless the claim was clearly awardable when reconsidered, the State agency interviewed the claimant to explain the basis of the original denial, obtain an explanation from the claimant as to why he disagreed with the initial determination, and determine whether any additional evidence was available which would result in the claim being awarded."[100]

Some interventions were made permanent, and a few even remain in effect today. Staff attorneys continue to play a critical role in HOs, especially in readying cases for hearing and drafting decisions for ALJs.[101] HOs are managed by Hearing Office Directors (HODs) and Hearing Office Chief ALJs (HOCALJs), positions that largely mirror the roles of Administrative

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[98] STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., SURVEY AND ISSUE PAPER SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES, *supra* note 28, at 64–65; *see also* Capshaw & Robinson, *supra* note 27, at 18.
[99] U.S. GEN. ACCOUNTING OFFICE, HRD-76-173, *supra* note 95, at 27.
[100] *Id*. at 28.
[101] STAFF OF H. COMM. ON WAYS AND MEANS, REP. ON THE DISABILITY INSURANCE PROGRAM, *supra* note 11, at 42–44; *Disability Insurance Legislation: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, *supra* note 28, at 274; STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., SURVEY AND ISSUE PAPER SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES, *supra* note 28, at 64–65; Social *Security Appeals and Case Review Process: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 97th Cong. 175– 76 (1981); *Social Security Disability Insurance Program: Hearing Before the Sen. Comm. on Fin.,* 97th Cong. 78 (1982); *Disability Amendments of 1982: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 42, at 5–9.

Officer and ALJIC as implemented by Trachtenberg. Decision writers use software that includes a large catalog of standardized paragraphs. Electronic case management remains critical to SSA's ability to manage its large caseload. And quality assurance remains an integral part of SSA's strategy for managing its vast and complicated adjudicative system.

Other interventions were more controversial and established, in the words of a report by the Social Security Advisory Board, a long-lasting relationship of "confrontation" between SSA and ALJs.[102] Particularly controversial were the insertion of non-adjudicator management officials through SSA's hierarchy, the new quality review program, the establishment of performance goals, and the initiation of disciplinary actions taken against ALJs who did not meet those goals. Some ALJs filed lawsuits alleging measures implemented by OHA during this period interfered with ALJs' decisional independence. Courts generally upheld the development of performance goals for ALJs so long as they were not used as production quotas.[103] And although the Merit Systems Protection Board found that a failure to meet production goals could be cause for removal, they set a "virtually insurmountable burden of proof" for such cases.[104]

By all accounts, OHA did successfully reduce average processing times during this period—from 288 days in 1978 to 179 days in 1978.[105] The causes for the successful reduction in average processing times were debated. Trachtenberg argued that interventions under his directorship were directly responsible for the improvements in timeliness. Some ALJs argued that ALJs and support staff improved processing times through their own efforts, in spite of initiatives they viewed as ineffectual or counterproductive.

One other development during this period bears mentioning. As noted previously, consistently interpreting and applying the statutory definition of disability has proved to be one of the greatest management challenges for SSA in administering the disability program. Consistent interpretation and application became even more challenging with increased exposure to the courts throughout the 1960s and 1970s. Until the late 1970s, hearings and hearing-level decisions were highly individualized. Members of Congress and their staffs continually prodded SSA to develop more specific and objective rules for interpreting and applying the statutory definition of disability. In an important report, congressional staff suggested that the adoption of "operational presumptions" would allow SSA to more "effectively" apply the definition to "greatly accelerating caseloads." Pressure from Congress in the 1960s had led to the adoption of

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[102] DORCAS R. HARDY ET AL., SOC. SEC. ADVISORY BD., IMPROVING THE SOCIAL SECURITY ADMINISTRATION'S HEARING PROCESS 15 (2006); *see also* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 490 (2007); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., SURVEY AND ISSUE PAPER SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES, *supra* note 28, at 95–98.

[103] *See, e.g.* Bono v. United States of America Social Security Administration, No. 77-0819-CV-W-4 (W.D. Mo. July 24, 1979); Nash v. Califano, 613 F.2d 10 (2d Cir. 1979); Nash v. Bowen, 859 F.2d 675 (2d Cir. 1989). ALJs are excluded from the civil service performance appraisal system, and Office of Personnel Management regulations categorically prohibit agencies from rating ALJs' job performance or granting them performance awards or incentives. 5 C.F.R. § 930.206. *See* Ass'n of Admin. Law Juges, Inc. v. Heckler, 594 F. Supp. 1132 (DDC 1984); STAFF OF H. COMM. ON WAYS AND MEANS SUBCOMM. ON SOC. SEC., SURVEY AND ISSUE PAPER SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES, *supra* note 28, at 64–65; *Disability Insurance Program, 1978: Hearings Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 95th Cong. 98 (1978); Bono, *supra* note 94, at 225–227.

[104] Taylor, *supra* note 102, at 494.

[105] Capshaw & Robinson, *supra* note 27, at 23.

publicly available Medical Listings, under which claimants who meet certain diagnostic criteria are, by regulation, considered disabled.[106] SSA has continued to review and refine the Listings over time.

Vocational factors, which the Act requires SSA to consider in determining disability, have always been much more difficult to interpret and apply consistently. Continued pressure to adopt operational presumptions led, in 1978, to the adoption of the Medical-Vocational Guidelines—a matrix of presumptions, codified in SSA's regulations, that supplanted the more individualized method of adjudication, heavily reliant on testimony from vocational experts (VEs), that preceded their use. While the Guidelines, also called the "grid rules," were intended primarily to promote uniform decision making, stakeholders also recognized their potential to reduce the time required to decide cases.[107]

E. Emphasis on Reviewing Beneficiaries' Continuing Disability (1980–1993)

Beginning in 1980, there was an aggressive push—first from Congress and then from the Reagan Administration and political leadership within HHS and SSA—to reduce the rolls by aggressively reviewing whether individuals receiving benefits based on a disability were still disabled. (The Social Security Act directs SSA to conduct such continuing disability reviews (CDRs).) DDSs were asked to conduct more and more CDRs, and appeals of individuals whose benefits were terminated flooded OHA. The number of cases pending at OHA shot up by 20 percent in early 1981.[108]

OHA hired additional ALJs during this period, at least 20 of whom had previously worked at federal regulatory agencies but removed from office through RIFs. OHA also hired additional support staff, reaching a staff-to-ALJ ratio of about 4.7.[109] Many HOs took the initiative to experiment with efficiency measures, for example by pooling support staff among ALJs and using screening units to identify dismissals and likely allowances as early as possible.[110] OHA also established a centralized Hearing Office Innovations Staff in January 1982.[111]

Initiatives piloted or implemented during this period include:

- **Pooling HO Support Staff.** One intervention tested during this period was the viability of pooling all staff within a HO as an alternative to the traditional "unit system" under which support staff were assigned to specific ALJs. This was called "reconfiguration" or "functional teaming." Some ALJs felt this reconfiguration "deprived them of control over their cases," "interfered with their decisional independence," and violated the APA. The vast majority of HOs underwent

[106] *See* U.S. SOC. SEC. ADMIN., *Oral History Collection: Robert M. Ball Interview No. 3*, https://www.ssa.gov/history/orals/ball3.html (last visited Oct. 6, 2023).
[107] *See* Heckler v. Campbell, 461 U.S. 458, 461–462 (1983).
[108] Capshaw & Robinson, *supra* note 27, at 24; PUCKETT, *supra* note 41, at 54; KEARNEY, *supra* note 35, at 15.
[109] Capshaw & Robinson, *supra* note 27, at 28–29.
[110] Capshaw & Robinson, *supra* note 27, at 25.
[111] *Social Security Disability Insurance: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 98th Cong. 40 (1983).

reconfiguration during the 1980s.

- **Contracting Out the Recording of Hearings.** Until the 1980s, when an ALJ traveled to a remote hearing site, a staff member would accompany the ALJ to record the hearing. To recoup support staff time, OHA outsourced responsibility for recording hearings to local independent contractors.

- **Opening Regional and National HOs.** OHA created three regional and one national HO that could augment the capacity of the most backlogged HOs when needed.

- **Making Decision Writing More Efficient.** To expedite decision writing, OHA implemented a new Wang word processing system and directed ALJs to use standardized text developed for the system.

- **Providing Management Training.** Central Office provided management training for ALJICs and HO managers.

- **Establishing and Enforcing Measures.** OHA established performance metrics that many staff members were required to meet. Leadership estimated that ALJs could achieve an average disposition rate of 45 cases per month. SSA instituted removal actions against several ALJs based on unsatisfactory productivity, but none were successful.[112]

- **Using Government Representatives in Hearings.** The agency piloted the SSA Representative Program (SSARP), under which an SSA representative participated as a party in hearing-level proceedings at five HOs.[113] SSA hoped the SSARP would, among other things, "[r]educe delays in conducting hearings and issuing hearing decisions" and "[i]ncrease the productivity of ALJ's."[114] While the Association of Administrative Law Judges (AALJ) supported the program,[115] the program faced intense public and congressional scrutiny,[116] and a district judge found it unconstitutional.[117]

Caseloads became more manageable after an 18-month moratorium on CDRs went into effect in 1984 but increased again in the late 1980s and early 1990s. In its 1991 strategic plan, SSA committed to achieving a level of service at which it could decide cases at the initial level

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[112] Capshaw & Robinson, *supra* note 27, at 26–27.
[113] Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Experiments to Improve the Hearing Process by Having SSA Represented at the Hearing, 45 Fed. Reg. 6977 (Jan. 31, 1980); *Current Problems in the Social Security Hearings and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 28, at 12–13.
[114] *Government Representatives Advocates or Adversaries: Hearing Before the H. Select Comm. on Aging,* 99th Cong. 26 (1985).
[115] Capshaw & Robinson, *supra* note 27, at 30.
[116] *Government Representatives Advocates or Adversaries: Hearing Before the H. Select Comm. on Aging, supra* note 115, at 26–28; *Current Problems in the Social Security Hearings and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 28, at 1–2, 12–13.
[117] Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986).

within 60 days, at the reconsideration level within 60 days, at the hearing level within 120 days, and at the AC level within 90 days.[118] To achieve these goals, SSA planned broadly to invest heavily in a modern IT infrastructure, and develop automated processes where appropriate, to "deal with the pressures of growing workloads and service demands."[119] Specific improvements included better management information capabilities, replacing paper records, and developing decision support systems with a "high degree of imbedded intelligence, mostly using sophisticated decision-support logic." It was expected that these and other developments would enable the agency to deliver "faster, more accurate and more consistent service."[120]

SSA also undertook specific initiatives to improve processing time at each level of the adjudication system and reduce the likelihood of appeals. At the initial and reconsideration levels, SSA arranged for staff to be detailed between DDSs to expedite case processing at overburdened offices.[121] The agency also took steps to improve the development of evidence upon which initial determinations were decided and piloted a program under which claimants were provided a face-to-face interview before receiving an initial determination.[122]

Under these circumstances, OHA attempted to "increase quality and quantity at the same time." Director Eileen Bradley reinstituted the continuing judicial education program, developed a new format for hearing decisions, encouraged ALJs to rely less on standardized text, and conducted training sessions for decision writers. The rate of cases remanded from federal court dropped during this period—from 59.3 percent in FY 1986 to 42.6 percent in 1987—and the average case disposition rate rose to 37 per ALJ per month. To augment capacity, OHA directed ALJs in HOs with fewer pending cases to travel to HOs with higher caseloads and temporarily rehired five retired judges.[123] Other measures taken during this period include providing HO managers with more powerful case tracking software, instituting an "ongoing program for reassessing needs in the [HOs] and allocating or reallocating resources to locations where they are needed most," and setting "production goals for the number of dispositions necessary to provide prompt service to claimants."[124]

Facing a growing backlog and a still-high reversal rate in the courts, OHA staff drafted rules that would have required parties to submit all evidence at least seven days before their hearing, limited the introduction of new evidence at the AC review level, and limited the issues

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[118] U.S. SOC. SEC. ADMIN., THE SOCIAL SECURITY STRATEGIC PLAN: A FRAMEWORK FOR THE FUTURE, *supra* note 36, at 30–31.
[119] *Id*. at 42
[120] *Id*. at 43.
[121] STAFF OF THE SUBCOMM. ON HOUSING AND CONSUMER INTERESTS OF THE H. SELECT COMM. ON AGING, SOCIAL SECURITY: QUALITY SERVICE IS YOUR ENTITLEMENT 16 (Comm. Print 1992).
[122] *Social Security Administration Disability Determination and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 102nd Cong. 6 (1991); *Social Security Disability Insurance Program: Hearing Before the Sen. Comm. on Fin., supra* note 101, at 164; *Disability Insurance Legislation: Hearings Before the Subcomm. on Soc. Sec'y of the H. Comm. on Ways and Means*, *supra* note 28, at 238; U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-89-22, SOCIAL SECURITY: SELECTIVE FACE-TO-FACE INTERVIEWS WITH DISABILITY CLAIMANTS COULD REDUCE APPEALS (1989).
[123] Capshaw & Robinson, *supra* note 27, at 32–33.
[124] *See Current Problems in the Social Security Hearings and Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 28, at 14–15; *Adjudicatory Procedures of the Department of Health and Human Services: Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary,* 101st Cong. 9 (1989).

considered by the AC on review. The Commissioner formally rejected the proposal after a draft became public and the *New York Times* published a scathing article about it.[125]

Still facing a growing number of claims, and with limited resources at its disposal to process them expeditiously, SSA in January 1992 launched a series of short-term initiatives to reduce delays. Commissioner Gwendolyn King convened a team of SSA and DDS employees and charged them with "analyzing the situation and examining options to handle the pending workloads of disability claims." On January 31, King issued a Plan for Disability Program Initiatives, which attempted to reduce wait times by (1) "providing selected DDSs, with their concurrence, temporary help from other States," (2) "refining our case development and documentation procedures to increase productivity," and (3) "using SSA employees to assist States in processing cases."[126]

F. Plan for a New Disability Claims Process (1993–1999)

With a growing caseload, low employee morale, and demands for better customer service, SSA increasingly faced calls for dramatic structural reform. Beginning in the 1970s, policymakers considered proposals for internal reorganizations,[127] reestablishing SSA as an independent agency, granting SSA greater budget autonomy from the Office of Management and Budget, federalizing the initial and reconsideration levels of the disability adjudication process, establishing an independent ALJ corps, reimagining or eliminating outright the reconsideration and AC review levels,[128] and establishing an Article I court to hear appeals from final agency decisions.[129]

SSA, for its part, continued to invest heavily in updating its technology, with an eye toward fully electronic case processing and increased automation.[130] The agency also increased staff levels, authorized overtime, and enabled DDSs to shift resources from conducting CDRs to processing initial claims.[131] The most significant effort during this period, however, was the Disability Process Reengineering Program, initiated in 1993. In an oral history, Commissioner Shirley Chater recalled:

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[125] Martin Tolchin, *U.S. Drafts Rules Limiting Appeals on Social Security,* N.Y. TIMES, Nov. 16, 1988; *Proposed Changes in the Social Security Appeals Process: Hearings Before the H. Comm. on Ways and Means*, 100th Cong. 9–12 (1988).

[126] *Measures to Reduce Delays in the Social Security Administration's Payment of Disability Insurance to Qualified Workers and their Families,* 102nd Cong. 12–13 (1992).

[127] U.S. GEN. ACCOUNTING OFFICE, GAO-87-39, SOCIAL SECURITY ADMINISTRATION: STABLE LEADERSHIP AND BETTER MANAGEMENT NEEDED TO IMPROVE EFFECTIVENESS (1987).

[128] At multiple junctures, congressional staff observed that the "question whether a claimant becomes exhausted in the process of exhausting his administrative remedies is always a real one." STAFF OF H. COMM. ON WAYS AND MEANS, REP. ON THE DISABILITY INSURANCE PROGRAM, *supra* note 11, at 5.

[129] *See generally, Need for Structural Reform of Social Security Disability Insurance: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. for Ways and Means,* 102nd Con. 65 (1991) (describing a similar process in Canadian disability decisions).

[130] *President's Stimulus and Investment Proposals Affecting the Social Security Administration: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 103rd Cong. 10–11 (1993).

[131] *President's Stimulus and Investment Proposals Affecting the Social Security Administration: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, *supra* note 131, at 14–15.

> Under the major goal of providing world class service to our customers, the Disability program surfaced as a major attention getter and having a committee actually take a look at how we could redesign the entire Disability process and taking claims seemed to be a number one priority. It was unacceptable to all of us in the Agency that people would have to wait so very long to hear about the decisions and whether or not they qualified for disability. And then again they had to wait an enormous long period of time if they were turned down and asked for a hearing.[132]

Inspired by similar "reengineering efforts" undertaken by other public- and private-sector organizations during this period, the Project's objective was to overhaul the disability adjudication process in order to achieve several goals, including improved timeliness.[133]

The reengineering team was made up of 18 federal and state agency employees operating under the auspices of the Program's Director and a steering committee of SSA executives. The team was charged with developing a wide-ranging plan to redesign the entire disability claims process under the OASDI and SSI programs. It was instructed that "[e]very aspect of the process except the statutory definition of disability, individual benefit amounts, the use of an [ALJ] as the presiding officer for administrative hearings and vocational rehabilitation for beneficiaries is within the scope of this reengineering effort."[134]

The team's proposal was announced in the *Federal Register* on April 1, 1994,[135] and SSA requested public comments on it.[136] Between April 1 and June 14, SSA received over 6,000 comments from a wide range of stakeholders, including "SSA and DDS employees, employee unions, professional associations, members of the public, claimant representatives, physicians, State governors, claimant advocacy groups, Federal entities, and other interested parties." The team also held feedback sessions with about 2,000 SSA and DDS employees at more than 80 sites across the country, conducted briefings and spoke with more than 3,000 individuals, and held a public forum in Washington. The "most common complaint" in focus groups was that parties "[w]ait too long for a decision."[137] The team submitted its revised proposal to the Commissioner on June 30, and on September 7, the Commissioner released SSA's final *Plan for a New Disability Claims Process*.[138]

The Plan rested on five key objectives: (1) "making the process 'user friendly' for claimants and those who assist them"; (2) "making the right decision the first time"; (3) "making the decision as quickly as possible"; (3) "making the process efficient"; and (4) "making the work satisfying for employees." It was extremely ambitious, calling for 38 initiatives to be

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[132] *See Oral History Collection: Shirley Chater*, SOC. SEC. ADMIN., https://www.ssa.gov/history/orals/ShirleyChater.html (last visited Oct. 6, 2023).
[133] *A Proposal to Restructure the Social Security Administration's Disability Determination Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 103rd Cong. 11 (1994).
[134] 59 Fed. Reg. 47,926 (Aug. 31, 1994).
[135] A summary of the proposed Plan is available at https://babel.hathitrust.org/cgi/pt?id=pst.000023026698&view=1up&seq=23.
[136] 59 Fed. Reg. 73 (April 15, 1994).
[137] *See Social Security History: History of SSA 1993-2000*, *Chapter 4: Program Changes*, SOC. SEC. ADMIN., https://www.ssa.gov/history/ssa/ssa2000chapter4.html (last visited Oct. 6, 2023).
[138] 59 Fed. Reg. 22,491 (May 13, 1994).

implemented by the end of FY 1995 and an additional 45 initiatives to be implemented by FY 2000. Initiatives targeted all aspects and levels of the disability adjudication process. Key initiatives included:

- **Improving Consistency Between DDS and Hearing Level Decisions.** To help adjudicators "make the correct decision as early as possible," SSA began to modify the substantive policies in an attempt to minimize the variance in allowance rates at the DDS and hearing levels.[139] This was referred to as "Process Unification."

- **Creating the Position of Disability Claim Manager (DCM) at the Initial Level.** DCMs were intended to serve as parties' primary contact and manage their cases at the initial level. DCMs would make initial determinations for the cases they managed using "a simplified disability decision methodology designed to produce consistent decisions among adjudicative levels" and effectuate payment.

- **Establishing a Pre-Denial Interview in Lieu of Reconsideration.** SSA proposed eliminating the reconsideration level and instead offering parties whose claims were likely to be denied "an opportunity to submit additional information and/or to have an in-person or telephone interview with the decisionmaker before the claim is formally denied."

- **Shifting the Burden to Develop the Evidentiary Record.** The Plan proposed that decision makers would "[r]ely on evidence submitted by claimants (to the extent that they are able to do so) to make the decision and, if the claimant is represented, make the representative responsible for developing evidence."

- **Creating the Position of Adjudication Officer at the Hearing Level.** Like DCMs, Adjudication Officers were intended to serve as parties' primary contact and manage their cases at the hearing level. Adjudication Officers were authorized to conduct prehearing conferences to narrow the issues for decision making and, when supported by the evidence of record, issue fully favorable decisions in appropriate cases.

- **Authorizing DDSs to Reconsider Cases Appealed to the Hearing Level.** A rule adopted in 1980 permitted SSA to return a case awaiting a hearing to a DDS for review and possible revision. SSA clarified that OHA could return cases to the DDS in which there was new evidence. The expectation was that, at least in some cases, the new evidence might show that the party was disabled. In such cases, the DDS could revise its determination and the case could be resolved without a hearing. (A similar initiative had been tried in the 1970s.[140])

- **Reimagining the AC Review Level.** The Plan called for eliminating AC review as a precondition to seeking judicial review of ALJ decisions and "revise the Council's

[139] *Oversight of the Disability Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 105th Cong. 14 (1997).
[140] Bono, *supra* note 94, at 223–224; U.S. GEN. ACCOUNTING OFFICE, PROBLEMS AND PROGRESS IN HOLDING TIMELIER HEARINGS FOR DISABILITY CLAIMANTS, *supra* note 95, at 24.

role to include only discretionary own-motion preeffectuation reviews of ALJ decisions and review of all claims in which a civil action has been filed, to determine whether to defend the ALJ decision as the [agency's] final decision."

- **Providing Automation and Decision Support Systems.** As noted previously, SSA invested in significant modernization of its IT infrastructure during this period. Some improvements were intended to automate routine tasks or streamline decision making.

- **Establishing a Holistic System of Quality Review.** The Plan called for establishing a quality review system "that would include comprehensive review of the whole adjudication process, both disability and nondisability issues, allowances and denials, and at all levels of decisionmaking."[141]

SSA recognized that several of these initiatives likely required legislative action. Some also required regulatory action, and SSA adopted rules giving itself "authority to test procedures that modify the disability determination process." SSA intended to test different "model procedures" under this authority, including the Single Decision Maker (SDM) model, under which DDS disability examiners would be permitted to make determinations on their own and would only need to obtain input from a medical or psychological consultant when they decided such input was necessary, and offer parties an opportunity for an informal conference when they found the evidence did not support a fully favorable determination.[142] Between April 1997 and 1998, SSA randomly selected more than 30,000 claims in eight DDSs to test the Full Process Model, which combined several proposed reforms.[143] SSA also planned to test elimination of the AC review level, measuring success in terms of the rate at which parties sought judicial review.[144]

Recognizing that a full redesign of the disability adjudication process would take time, SSA launched the Short-Term Disability Project (STDP). STDP included 19 temporary initiatives to improve timeliness at the DDSs and OHA. Under STDP, SSA provided additional funds and detailed headquarters staff to expand DDSs' capacity. At the hearing level, SSA established units to screen appeals for claims that could likely be allowed without additional development, expanded prehearing conference procedures, established specialized decision writing units, and piloted a program under which Adjudication Officers in HOs could conduct

[141] *A Proposal to Restructure the Social Security Administration's Disability Determination Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 134, at 16.
[142] 60 Fed. Reg. 20,023 (April 24, 1995).
[143] *See* U.S. SOC. SEC. ADMIN., *Social Security History: History of SSA 1993-2000*, *supra* note 138.
[144] Administrative Review Process, Testing Elimination of the Fourth Step of Administrative Review in the Disability Claim Process, 62 Fed. Reg. 49598 (Sep. 23, 1997).

prehearing development and, when warranted, issue fully favorable decisions.[145] SSA also continued to expand electronic case process and the use of videoconferencing.[146]

At the AC, SSA reimagined the role of the appeals officer (AO), a position created in 1988 to provide legal support to AC members. In 1995, SSA authorized AOs to issue orders denying requests for AC review. Although there were several reasons for this change, SSA noted that authorizing AOs to deny requests for review would enable the AC to "give the public a more timely response to their requests for review" and improve the "quality and efficiency of the service the [AC] is able to provide." [147]

It is also worth noting the enactment of the Government Performance and Results Act (GRPA) in 1993. Strategic plans and Performance and Accountability Reports released by SSA since GPRA became law have consistently emphasized improved timeliness alongside other goals and values.

G. Disability Claims Process Redesign Prototype and the Hearing and Appeals Process Improvement Initiatives (1999–2003)

In March 1999, SSA released a report titled *Social Security and Supplemental Security Income Disability Programs: Managing for Today, Planning for Tomorrow*." As described by Commissioner Kenneth Apfel, the report outlined a plan to "improve the disability adjudication process at all levels." The report's "guiding principles" were "quality, timeliness and efficiency."[148] The intent was to "mov[e] the agency from 'proof of concept' testing to the next phase of development, incorporating decisions on redesign."[149]

Beginning in August 1999, SSA began prototyping the SDM model, along with the elimination of the reconsideration level, in ten states.[150] The prototype lasted until 2015, when Congress directed SSA to end SDM authority. SSA also tested the alternative DCM model during this period.[151]

Interested in experimenting with changes at the hearing level, and expecting that hearing requests would increase significantly in FY 2001 as a result of the elimination of the

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[145] *See Social Security Testimony Before Congress: Statement by Dr. Shirley Charter, Comm'r of Soc. Sec., Before the H. Comm. on Ways and Means (May 23, 1995)*, U.S. SOC. SEC. ADMIN., https://www.ssa.gov/legislation/testimony_052395.html (last visited Oct. 6, 2023); *Oversight of the Disability Appeals Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, supra* note 140, at 61; U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-28, APPEALED DISABILITY CLAIMS: DESPITE SSA'S EFFORTS, IT WILL NOT REACH BACKLOG GOAL 1 (1996).

[146] U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-75, SSA CUSTOMER SERVICE: BROAD SERVICE DELIVERY PLAN NEEDED TO ADDRESS FUTURE CHALLENGES 14 (2000).

[147] 59 Fed. Reg. 1364 (Jan. 10, 1994).

[148] *Management of Disability Cases: Hearing Before the Subcomms. On Soc. Sec. and Hum. Resources of the H. Comm. on Ways & Means*, 106th Cong. 10 (1999).

[149] *See Social Security History: History of SSA 1993-2000*, *Chapter 4: Program Changes*, SOC. SEC. ADMIN., https://www.ssa.gov/history/ssa/ssa2000chapter4.html (last visited Oct. 6, 2023).

[150] 64 Fed. Reg. 47,218 (Aug. 30, 1999).

[151] *See Social Security History: History of SSA 1993-2000*, .SOC. SEC. ADMIN., *supra* note 138.

reconsideration level, the growing Medicare workload,[152] and an aging population, SSA undertook an initiative, called the Hearing Process Improvement (HPI) initiative, to reduce hearing-level processing times from 313 days in FY 1999 to less than 200 days in FY 2002. To develop a plan, SSA convened a "high-level interdisciplinary team" under the direction of the Regional Chief ALJs, and contracted with Booz Allen Hamilton, to analyze case data and identify sources of delay. The researchers concluded that delays were caused "by multiple handoffs and a high degree of functional specialization, by the fact that no manager had overall responsibility for ensuring effective work flow in hearings offices, and by inadequate automation and management information."[153]

SSA released its final plan, *The Hearings Process Improvement Initiative: Delivering Better Service for the 21st Century*, in August 1999. As described in congressional testimony, HPI differed from "the more traditional response of committing additional resources to the existing hearing process that SSA has taken over the last few years" and relied instead on "process changes, including new administrative processes for local HOs to achieve dramatic improvements." HPI consisted of several components, including:

- **Increasing Prehearing Procedures.** HPI called for a "national workflow model" that combined "pre-hearing activities, a standardized pre-hearing conference, and processing-time benchmarks for various tasks."[154] Objectives included "increasing the level of analysis and screening done on a case before it is scheduled for a hearing with an ALJ" and getting cases to ALJs more quickly.[155] SSA proposed amending its rules in 2000 to standardize informal conferences and authorize ALJs to designate staff attorneys to hold formal conferences,[156] but the proposal was later withdrawn.[157]

- **Reorganizing HO Staff.** HPI reorganized HO staff into small "processing groups," in order to "ensure better accountability and control in the handling of each claim."

- **Expanding Automation.** SSA took steps to develop and implement an electronic case management system that would enable OHA managers nationwide to assign and track cases more efficiently, an improved system for scheduling hearings, and a system for generating decisions, notices, and routine correspondence. SSA also distributed speech recognition software to help ALJs and decision writers prepare decisions more quickly.[158]

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[152] Medicare Part B beneficiaries and providers gained the right to a hearing before an SSA ALJ in 1986. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(1)(C), 100 Stat. 1874, 2037.
[153] *Management of Disability Cases: Hearing Before the Subcomm. on Soc. Sec. and Subcomm. on Human Resources of the H. Comm. on Ways and Means,* 106th Cong. 51 (1999).
[154] *Id*. at 16.
[155] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, *supra* note 46, at 19–20; U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., QUICK RESPONSE EVALUATION A-07-00-10055, STATUS OF SSA'S DISABILITY PROCESS IMPROVEMENT INITIATIVES (2002).
[156] 65 Fed. Reg. 38,796 (June 22, 2000).
[157] 74 Fed. Reg. 61,292 (2009).
[158] U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-75, *supra* note 147, at 14–15.

SSA opted not to implement HPI all at once. Instead, it divided its nationwide network of more than 130 HOs into three groups and implemented HPI in stages between January and November 2000.[159]

SSA launched the related AC Process Improvement (ACPI) initiative in March 2000. Barred from "reintroducing productivity metrics into performance plans," ACPI relied on "differentiated case management" to reduce case processing times at the AC review level. At a basic level, ACPI recognized that strict first in-first out (FIFO) case processing can result in longer wait times for all appellants, especially in a system where new evidence is frequently received.[160] ACPI attempted to "triage the work by splitting it into two categories: easier cases with a more obvious likely resolution in one category and complex cases with a less obvious likely resolution in the other category." Adjudicators and senior support staff categorized cases. Cases were forwarded, as appropriate, to a smaller cohort of support staff responsible for reviewing easier cases and a much larger cohort of support staff responsible for reviewing more difficult cases.[161] In addition, staff were encouraged to "discuss difficult cases with adjudicators before preparing more time-consuming written analyses."[162]

H. Disability Service Improvement (2003–2007)

In congressional testimony in July and September 2003, Commissioner Jo Anne Barnhart laid the foundations for what became the Disability Service Improvement (DSI) initiative.[163] There followed a "massive outreach effort" involving "more than 100 meetings with more than 60 groups involved in the disability process—inside and outside of SSA." SSA proposed significant changes to its regulations in July 2005,[164] and after receiving almost 900 comments, a final rule was published in March 2006.[165] DSI was heralded as the "[f]irst significant change to the disability determination process in 50 years" and was intended to "improve the accuracy,

[159] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, *supra* note 46, at 3–4; U.S. SOC. SEC. ADMIN., *Social Security History: History of SSA 1993-2000*, *supra* note 138.
[160] Although SSA generally adjudicates cases on a FIFO basis, it has a long history of prioritizing certain workloads, for example "critical cases" (e.g., cases in which a party has a terminal illness or cannot afford housing, food, or necessary medical care) and, at the hearing level, remands from the AC. U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REPORT A-12-18-50290, ADMINISTRATIVE LAW JUDGES' APPEALS COUNCIL REMAND DECISIONS (2019); U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., CONGRESSIONAL RESPONSE REPORT A-12-10-20169, OFFICE OF DISABILITY ADJUDICATION AND REVIEW'S SCHEDULING PROCEDURES FOR HEARINGS 1 (2011); U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., CONGRESSIONAL RESPONSE REPORT A-12-10-20154, SCHEDULED HEARINGS 1 (2010).
[161] GERALD RAY AND GLENN SKLAR, SSDI SOLUTIONS INITIATIVE, AN OPERATIONAL APPROACH TO ELIMINATING BACKLOGS IN THE SOCIAL SECURITY DISABILITY PROGRAM 21 (2019).
[162] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, *supra* note 46, at 24; U.S. SOC. SEC. ADMIN., *Social Security History: History of SSA 1993-2000*, *supra* note 138.
[163] *Social Secuity Administration Service Delivery Budget Plan: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 108th Cong. (2003); *Social Security Administration's Management of the Office of Hearings and Appeals: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means,* 108th Cong. (2003).
[164] *See* 70 Fed. Reg. 43,590 (July 27, 2005).
[165] 71 Fed. Reg. 16,424 (March 31, 2006).

consistency, and fairness of our disability determination process and to make the right decision as early in the process as possible."[166] DSI included many initiatives, chief among them:

- **Implementing a New Electronic Disability (eDIB) System.** To "handle all new claims in an expedited manner," SSA began replacing its old paper-based system for adjudicating disability claims at all levels with a new electronic system, called eDIB. SSA expected that eDIB would allow adjudicative components to "avoid delays that result from having to mail, locate, and organize paper folders" and enable "more than one employee or component to work on a claim at the same time, thus speeding up the process." SSA also encouraged representatives and sources of medical evidence to submit records electronically.

- **Establishing a "Multi-Dimensional" Quality System.** SSA designed a new "integrated quality system" of in-line and end-of-line processes that used a "multi-dimensional definition of quality" that included timeliness and productivity as elements alongside accuracy, service, and cost. SSA intended to gather data to "provide timely, meaningful feedback" and deploy specialized units "responsible for fostering continuous improvements in the Agency's work products."

- **Improving Management Information.** SSA undertook a "major effort" to enhance its capacity to collect and analyze management information. SSA intended to use this effort to, among other things, determine whether DSI and other initiatives improved timeliness, accuracy, and consistency.

- **Providing Quick Disability Determinations (QDDs).** SSA established a process by which parties who were "clearly disabled" could receive an initial determination within 20 days. SSA intended to develop and implement a predictive model software tool that would identify and automatically refer to a specialized QDD unit within each DDS "claims that involve a high potential that the claimant is disabled and that evidence of the claimant's allegations can be easily and quickly obtained."[167]

- **Creating the Federal Reviewing Official (FedRO) Position.** SSA implemented a process by which parties dissatisfied with a DDS's initial determination could, in lieu of reconsideration by a DDS, request on-the-record review by a centrally managed SSA attorney called a FedRO. Some commenters believed the FedRO level would "cause delays." SSA responded that "the benefit from review by a [FedRO] will far outweigh the time that this administrative step will take because we expect [FedRO] officials will work to create a complete record and will explain fully the rationale underlying their decisions."

- **Providing Clearer Explanations for Decisions.** The final rule required DDSs and FedROs to explain their decisions "in clear and understandable language."

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[166] JO ANNE B. BARNHART, U.S. SOC. SEC. ADMIN., THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY SERVICE IMPROVEMENT PROCESS, SOC. SEC. BULLETIN, VOL. 66, NO. 3 44 (2006).
[167] 71 Fed. Reg. 16,429 (Aug. 1, 2006).

- **Establishing Timeframes for Submitting New Evidence at the Hearing Level.** The final rule preserved the right of claimants to a de novo hearing before an ALJ but made two changes regarding the submission of evidence at the hearing and AC review levels. First, to eliminate the amount of additional evidence received after a hearing had already been held, the final rule required parties, except in limited circumstances, to submit evidence no later than five business days before the hearing. To ensure parties had sufficient time to submit evidence before the hearing, the rule required SSA to give claimants at least 75 days' notice of the time and place of the hearing. Second, the rule provided that, except when there was good cause, the record would be closed after the ALJ issues a decision.

- **Creating the Decision Review Board (DRB) and Phasing Out the AC.** SSA planned to gradually phase out the AC in favor of the DRB, created to "identify and correct decisional errors and to identify issues that may impede consistent adjudication at all levels of the process." Crucially, parties would not have a right to appeal ALJ decisions to the DRB. Instead, the DRB would select on its own motion a mix of favorable and unfavorable ALJ decisions, including "claims where there is an increased likelihood of error, or claims that involve new policies, rules, or procedures in order to ensure that they are being interpreted and used as intended." SSA expected to develop and implement an automated predictive software tool to screen cases. The final rule required the DRB to complete its action within 90 days, otherwise the ALJ's decision became the final agency decision subject to judicial review. DRB members were experienced ALJs and AAJs, appointed by the Commissioner, who would serve staggered terms on a rotational basis.[168]

As with earlier overhauls, SSA piloted DSI on a limited basis—in the New England states, in this case—in order to monitor DSI's effects and make improvements before expanding the program. It intended to wait at least a year before expanding the program.

A few DSI reforms were eventually expanded nationwide and made permanent, such as the QDD program[169] and, almost a decade later, the timeframes for submitting evidence at the hearing level.[170] Others were soon abandoned. The FedRO process, for example, was suspended after the agency found it entailed greater administrative costs than initially expected and did not clearly yield the anticipated benefits.[171] The DRB was also abandoned after the agency was unable to implement the automated predictive model that it intended to use to screen and select cases for DRB review. The DRB's workload increased rapidly and became "overwhelming," diverting "significantly more resources" than expected from other initiatives.[172]

I. Plan to Eliminate the Hearing Backlog and Prevent Its Recurrence (2007–2013)

Backlogs continued to escalate during the 2000s and, shortly after Michael Astrue was confirmed as Commissioner, SSA quickly developed "an operational plan that focused on the

[168] 71 Fed. Reg. at 16,438; Barnhart, *supra* note 166, at 44.
[169] 72 Fed. Reg. 45,701 (Aug. 15, 2007); 72 Fed. Reg. 51,173 (Sep. 06, 2007).
[170] 81 Fed. Reg. 45,079 (July 12, 2016).
[171] 72 Fed. Reg. at 45,702; 73 Fed. Reg. 2411 (Jan. 15, 2008).
[172] 76 Fed. Reg. 24802 (May 3, 2011); 74 Fed. Reg. 63,688 (Dec. 4, 2009).

gritty work of truly managing the unprecedented hearings workload." The plan involved "dozens of incremental changes."[173]

At the initial level, SSA introduced two processes to fast-track likely allowances. The Quick Disability Determination process used a "predictive model to identify certain claims that are likely allowances, such as low birth-weight babies, many cancers, and end-stage renal disease." Under the Compassionate Allowance program, SSA personnel were directed to expedite claims processing for claimants with any of several dozen, clearly disabling medical conditions.[174]

Measures introduced at the hearing level included hiring additional ALJs and support staff, temporarily rehiring retired ALJs, opening new hearing and satellite offices, realigning HOs' geographical jurisdictions, simplifying policies, and other initiatives including:

- **Managing Cases Electronically.** SSA introduced several initiatives to transform the hearing process from a paper-based process to an electronic one, including deploying electronic case folders, standardizing electronic business process, automating certain routine tasks, and giving representatives electronic access to case folders.[175] The shift to electronic case processing allowed SSA to easily and securely transfer cases between offices, which facilitated many of the following initiatives.

- **Expanding the Use of Video Hearings.** SSA increasingly relied on video hearings, which reduced travel time and costs and enabled the agency to transfer cases as needed from overburdened HOs to HOs with additional capacity. SSA also established National Hearing Centers, which were staffed by ALJs, not assigned to a local HO, who could supplement capacity at local HOs by conducting hearings remotely.[176]

- **Expanding the Senior Attorney Advisor (SAA) Program.** Between 1995 and 2001, SSA piloted a program under which SAAs (GS-13) in HOs could conduct prehearing development and, if warranted, issue decisions that were fully favorable to parties. Parties who received a decision by a SAA retained their right to a hearing before an ALJ. SSA amended its rules to make the program permanent in 2008.[177]

- **Establishing Centralized Units to Support Timely Processing Nationally.** SSA created "federal disability units" that could be deployed around the country to assist overburdened components as needed. SSA first deployed the units to assist DDSs and later deployed them to HOs to screen hearing requests and, when appropriate, render

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[173] *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions: Hearing Before the Permanent Subcomm. on Investigation of the Sen. Comm. on Homeland Sec. and Gov't Affs.,* 112th Cong. 56 (2012).
[174] *See Social Security Testimony Before Congress: Statement of Michael J. Astrue , Comm'r of Soc. Sec., Before the Permanent Subcomm. of the Sen. Comm. on Homeland Sec. and Gov't Affs. (Aug. 4, 2010)*, SOC. SEC. ADMIN., https://www.ssa.gov/legislation/testimony_080410.html (last visited Oct. 6, 2023).
[175] *Id*.
[176] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., CONGRESSIONAL RESPONSE REPORT A-05-12-21287, CURRENT AND EXPANDED USE OF VIDEO HEARINGS (2012).
[177] 73 Fed. Reg. 11,349 (March 03, 2008).

fully favorable decisions.[178] At the hearing level, SSA established National Hearing Centers (staffed by ALJs available to augment capacity at overburdened HOs) and National Case Assistance Center (staffed by paralegal support staff and staff attorneys available to conduct pre-hearing development activities and draft decisions for HOs across the country).[179]

- **Establishing ALJ Productivity Expectations.** SSA established a productivity expectation that ALJs should issue 500–700 dispositions each FY. GAO evaluated this expectation in a 2021 report, recommending that the Commissioner develop and implement a process for periodically evaluating the annual productivity expectation, document that process, and seek input from ALJs and other relevant stakeholders. GAO recommended that SSA consider case-processing realities, including expectations of quality, to ensure productivity expectations were reasonable.[180]

- **Developing Decision Support Tools.** SSA developed a streamlined decision-writing tool to "improve productivity and legal sufficiency" at the hearing level.[181] It also invested in the development of a case analysis and decision support tool which was intended, in part, to reduce case processing times,[182]

Initiatives at OAO included improved use of management information to calculate and predict workloads and resources needs more accurately, the adoption of component-wide performance goals, the development and refinement of productivity metrics for support staff, a redesigned training program, more advanced case analysis and decisional assistance tools, and increased investment in and reliance on data analytics.[183]

J. Plan for Compassionate and Responsive Service (2013–2018)

Caseloads increased again in the mid-2010s. Eventually, more than one million cases were pending at the hearing level for the first time in SSA's history, and average wait times at the hearing level exceeded 600 days. To promote timeliness, SSA increasingly used data analytics to identify potential process improvements and invested in modernizing its IT infrastructure—for example improved access to electronic medical records, a new case processing system to be used across DDSs, and greater use of video hearings.[184]

In January 2016, SSA released the Plan for Compassionate And REsponsive Service (CARES). The Plan identified four "broad categories of drivers" to reduce wait times without

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[178] *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions: Hearing Before the Perm. Subcomm. on Investigations of the Sen. Comm. on Homeland Sec. & Gov't Affs.*, 112th Cong. 61 (2012).
[179] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REPORT A-12-15-15005, THE SOCIAL SECURITY ADMINISTRATION'S EFFORTS TO ELIMINATE THE HEARINGS BACKLOG (2015).
[180] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HRD-89-42, SOCIAL SECURITY DISABILITY: PROCESS NEEDED TO REVIEW PRODUCTIVITY EXPECTATIONS FOR ADMINISTRATIVE LAW JUDGES 36–46 (2021).
[181] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REPORT A-12-15-15005, *supra* note 179, at c-4.
[182] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REPORT A-01-12-11217, ELECTRONIC BENCH BOOK 3–9 (2016).
[183] Ray and Sklar, *supra* note 161, at 3–4.
[184] U.S. SOC. SEC. ADMIN., AGENCY STRATEGIC PLAN FISCAL YEARS 2014-2018 19–23 (2014).

adversely affecting decisional quality: (1) business process improvements, (2) IT initiatives, (3) staffing and facilities, and (4) employee engagement activities.

The original Plan and subsequent updates identify dozens of discrete initiatives within these categories, including hiring additional adjudicators and support staff, detailing and transferring support staff between components as needed, increasing the use of SAAs as appropriate, expanding the use of video hearings, improving electronic case management systems, introducing a machine learning-based tool to identify duplicate evidence, providing a process for parties to request AC review online, reducing the number of cases that could not be processed electronically, encouraging representatives to submit and review evidence through an online portal, simplifying and unifying policies, improving the collection and provision of management information, updating decision writing tools and templates, expanding the use of on-the-record and bench decisions in appropriate situations, introducing productivity metrics for decision writers, and improving "organizational health." Other initiatives proposed, tested, or implemented as part of the CARES Plan include:

- **Expanding the Use of Prehearing Conferences for Self-Represented Parties.** OHO tasked specially trained HO staff to make Pre-Hearing Development Contacts (PHDCs) to "explain the hearings process to and better prepare unrepresented claimants for their hearing." HOs used PHDCs to update party information, explain parties' right to representation, and obtain authorization to obtain updated medical evidence. OHO attributed a reduction in the number of postponed hearings to PHDCs.

- **Using Predictive Modeling and Data Analytics to Identify Likely Allowances.** Through the Proactive Analysis and Triage for Hearings (PATH) initiative, OHO used predictive modeling and data analytics to flag cases for review that could potentially be decided on the record without a hearing.

- **Using Natural Language Processing (NLP) to Identify Likely Errors Before Issuing a Decision.** Originally used at the AC review level, OHO implemented an NLP tool that scans draft ALJ decisions and flags potential errors that might result in a remand.

- **Increasing Prehearing Support for ALJs.** OHO piloted a program under which legal support staff reviewed cases that included more than 1,000 pages of medical evidence, summarized the information, and provided an analysis for the ALJ.

- **Moving from Office-Based to National-Based FIFO.** Taking advantage of electronic case management and video hearings, OHO tested the assignment of cases on a FIFO basis nationwide rather than according to the geographic jurisdiction of individual HOs.

- **Making Scheduling More Efficient and Reducing Postponements.** OHO introduced several measures to streamline the scheduling of hearings and ensure it was holding as many hearings as possible. For example, OHO established Centralized Scheduling Units to schedule hearings for HOs in close geographic proximity. OHO

introduced the Voluntary Standby List initiative, allowing parties who waived 75 days' advance notice of hearing the opportunity the opportunity to use hearing slots that became available on short notice. OHO also centralized vocational expert (VE) and medical expert (ME) resources to simplify scheduling VEs and MEs to appear at hearings and avoid postponements in cases when no expert is available.

- **Clustering Work Assignments.** OAO, and later OHO, used data science to automate the batch assignment of cases involving similar issues to individual adjudicators and support staff, on the theory that individuals "might recognize the similarities in issues and require less time researching the relevant regulations and policies." SSA found that clustering appeared to reduce processing times.[185]

- **Encouraging the AC to Issue Final Decisions Instead of Remanding to ALJs.** When the AC grants a request to review an ALJ's decision, it can either remand the case to the ALJ or issue a decision, which becomes the final decision of the agency. Under the CARES Plan, AAJs were encouraged to issue final decisions, when possible, instead of remanding.

- **Using AAJs to Expand Hearing-Level Capacity.** A regulation on the books since 1940 authorized the AC to assume responsibility for pending hearing requests.[186] Relying on this authority, the CARES Plan proposed using AAJ to hold hearings and issue decisions "on a subset of cases."[187] AAJs are paid commensurate with ALJs,[188] and they are similarly qualified, but they are not subject to the APA's restrictions on appointment, supervision, and removal.

The most controversial part of the CARES Plan was the proposal to use AAJs to hold hearings and issue decisions on a subset of cases. Some members of Congress questioned whether SSA had statutory, or at least regulatory, authority to implement this strategy.[189] Although SSA in 2020 issued a final rule revising its rules to "clarify when and how [AAJs] may hold hearings and issue decisions,"[190] SSA has not assigned AAJs to conduct hearings in the three years since it adopted the final rule and has confirmed publicly that it does not currently have any plans to assign hearing requests to AAJs.[191]

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[185] U.S. SOC. SEC. ADMIN., 2017 UPDATED COMPASSIONATE AND RESPONSIVE SERVICE (CARES) AND ANOMALY PLAN 12 (2017); KURT GLAZE, ET AL., ARTIFICIAL INTELLIGENCE FOR ADJUDICATION: THE SOCIAL SECURITY ADMINISTRATION AND AI GOVERNANCE 13 (2021).
[186] 20 C.F.R. § 404.956, 416.1456.
[187] U.S. SOC. SEC. ADMIN., LEADING THE HEARINGS AND APPEALS PROCESS INTO THE FUTURE: A PLAN FOR COMPASSIONATE AND RESPONSIVE SERVICE 10–11 (2016).
[188] 5 U.S.C. § 5372(b).
[189] *Examining Due Process in Administrative Hearings: Hearing Before the Subcomm. on Reg. Affs. and Fed. Mgm't of the Sen. Comm. on Homeland Sec. and Gov't Affs.,* 114 Cong. 27–29 (2016).
[190] In the preamble to the final rule, SSA explained that the flexibility to assign hearing requests to AAJs would "increase our adjudicative capacity when needed, and allow us to adjust more flexibly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level." *See* 85 Fed. Reg. 73,138 (Nov. 16, 2020).
[191] U.S. SOC. SEC. ADMIN., FY 2024 CONGRESSIONAL JUSTIFICATION: LIMITATIONS ON ADMINISTRATIVE EXPENSE 95 (2023).

OIG recently released an audit report examining whether reductions in the hearings backlog and average processing time (APT) since 2016 are attributable to CARES. OIG "could not determine whether the CARES Plan initiatives reduced the hearings backlog and APT," due primarily to a lack of "sufficient measurements or metrics." OIG recommended that for future CARES Plan initiatives, SSA "establish and document metrics to measure a direct impact on the hearing backlog and APT."[192]

K. The COVID-19 Pandemic and Beyond (2020–2023)

Although there was a significant drop in the number of initial applications filed in the first year of the COVID-19 pandemic, processing times increased as a result of operational challenges, a lack of access among parties to recent medical evidence, and "record high attrition among DDS employees."[193] As described in recent congressional testimony, DDSs are currently experiencing backlogs and delays, with more than one million cases pending at the initial and reconsideration levels in February 2022 and parties waiting an average of seven months for an initial determination and another seven months for a reconsideration determination. Strategies SSA is implementing to reduce DDS processing times include replacing DDS staffing losses, working with DDSs to "implement new strategies for employee recruitment and retention," launching a "special team dedicated to improving DDS operations," and "deploying cadres of technical experts from SSA to help work down the backlogs."[194] The agency's most recent strategic plan notes that the agency is planning to improve timeliness through increased access to electronic medical records and "technology enhancements, including greater automation and policy and process efficiencies."[195]

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[192] U.S. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., AUDIT REPORT A-05-22-51159, THE SOCIAL SECURITY ADMINISTRATION'S HEARINGS BACKLOG AND AVERAGE PROCESSING TIMES 3–8 (2023).

[193] U.S. Soc. Sec. Admin. Office of Inspector GeN., Informational Report A-05-21-51062, COMPARING THE SOCIAL SECURITY ADMINISTRATION'S WORKLOAD STATISTICS DURING THE COVID-19 PANDEMIC TO PRIOR YEARS 3–11 (2022); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-023-104650, SOCIAL SECURITY ADMINISTRATION: REMOTE SERVICE DELIVERY INCREASED DURING COVID-19, BUT MORE COULD BE DONE TO ASSIST VULNERABLE POPULATIONS 36–42 (2022).

[194] *Statement for the Record of Chad M. Poist, Deputy Comm'r for Budget, Fin., and Mgm, Soc. Sec. Admin.*, *Please Leave Your Message at the Tone: Addressing Post-Pandemic Backlogs and Delays at Federal Agencies: Hearing Before the Subcomm. on Gov't Operations and the Fed. Workforce for the H. Comm on Oversight and Accountability*, 118th Cong. (2023); *see also Statement for the Record of Linda Kerr-Davis*, *Acting Deputy Comm'r for Operations*, *One Million Claims and Growing: Improving Social Security Disability's Adjudication Process: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 118th Cong. (2023).

[195] U.S. SOC. SEC. ADMIN., AGENCY STRATEGIC PLAN FISCAL YEARS 2022-2026 14–15 (2022).