Tulsa Law Review

Volume 33
Issue 1 *Dedicated to the U.S. Supreme Court*

Fall 1997

Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer

Jeffrey S. Wolfe

Lisa B. Proszek

INTERACTION DYNAMICS IN FEDERAL ADMINISTRATIVE DECISION MAKING: THE ROLE OF THE INQUISITORIAL JUDGE AND THE ADVERSARIAL LAWYER*

The Honorable Jeffrey S. Wolfe†
Lisa B. Proszek††

The judicial intern sat at the back of the hearing room, prepared to observe her first administrative hearing before an administrative law judge. The judge, wearing the traditional black robe, entered the hearing room, assumed her seat behind the bench, and turned to the first case file. To her right, her legal assistant made final adjustments on the four-channel recorder. Placing newly received exhibits on the bench, the legal assistant then excused herself to bring the claimant and counsel back to the hearing room. The lawyer and his client entered, greeted the judge and took seats around a single table perpendicular to the small bench. The intern looked around, confused. The judge went on the record. But where was the other lawyer? Only one party was present. The intern silently observed the proceedings as they unfolded. The claimant was sworn and his lawyer began the examination. When he concluded, he looked at the judge, uttering the words, "I pass the witness." To whom? thought the intern, still puzzled. To the intern's surprise the judge began asking questions. The judge asking the questions? When the judge concluded, she turned to the only other person in the room, a vocational expert. After administering the oath, the judge proceeded to inquire of the expert. The judge calling her own witness? Baffled, the intern tried to understand what she was seeing. It went against everything she knew of the Anglo-American judicial system.

---

* *The views expressed in this Article are not those of the United States Social Security Administration, the Office of Hearings and Appeals, or any other department or component of the Social Security Administration. Rather, the views expressed herein are solely the personal views of the authors.*

† Jeffrey S. Wolfe is a U.S. Administrative Law Judge with the United States Social Security Office of Hearings and Appeals. He was previously a U.S. Magistrate Judge for the Northern District of Oklahoma from 1987-1995. He is currently a member of the adjunct faculty at the University of Tulsa College of Law. He has previously served as Visiting Associate Professor at Texas Wesleyan University and as Lecturer at California Western School of Law.

†† Lisa B. Proszek is a Staff Attorney with the United States Social Security Administration Office of Hearings and Appeals.

I. INTRODUCTION

Overwhelmingly, the number of proceedings before United States Administrative Law Judges occur before the Office of Hearings and Appeals, Social Security Administration.[1] The import of the issues thus raised are neither arcane nor minimal, affecting hundreds of thousands of individuals and families throughout the United States each year.[2]

As of March, 1996, 1,310 Administrative Law Judges and 33 Senior Administrative Law Judges served in various agencies of the United States government; 1,060 (with 33 Senior Administrative Law Judges) with the Social Security Administration.[3] In the first quarter fiscal year 1997, a total of 518,862 Social Security cases were pending, awaiting administrative hearing.[4] It is the nature of these proceedings which gives rise to the issues addressed here. It is the magnitude of the system which gives impetus to the seriousness of the consideration.

An Administrative Law Judge within the Office of Hearings and Appeals, Social Security Administration, presides over a hearing during which both documentary and sworn testimonial evidence is taken.[5] The vast majority of these proceedings concern entitlement to disability benefits under the Social Security Act.[6] At the hearing both expert and lay witnesses testify, often about complex

---

1. "The Social Security Administration (SSA) adjudicates more cases than all the federal courts combined. Its complex processes include four levels of adjudication and appeal from which further appeals lie to the federal courts with three additional levels." Milton M. Carrow, *A Tortuous Road to Bureaucratic Fairness: Righting the Social Security Disability Claims Process*, 46 ADMIN. L. REV. 297, 297 (1994).

2. Commendation is to be given to the more than 6,000 individuals who serve with the Office of Hearings and Appeals of the Social Security Administration. They work under an egregious caseload, serving those most in need in American society. The issues raised in this article address the jurisprudence of the decision-making process, and not the efforts of those who strive to work within the framework of the current jurisprudential system.

3. *See* Bernard Schwartz, *Adjudication and the Administrative Procedures Act*, 32 TULSA L.J. 203, 213 (1996).

4. THE OHA STORY, FISCAL YEARS 1991-1997, Office of the Chief Administrative Law Judge, Office of Hearings and Appeals, Falls Church, Virginia, March 1997.

5. The rules of evidence do not apply in federal administrative hearings. Richardson v. Perales, 402 U.S. 389, 411 (1971) (Douglas, J., dissenting) (citing 5 U.S.C. § 556© (Supp. V. 1964)).

> All of this hearsay may be received, as the Administrative Procedure Act provides that "[a]ny oral or documentary evidence may be received." But this hearsay evidence cannot by itself be the basis for an adverse ruling. The same section of the Act states that "[a] party is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Id. at 411.

6.

> "The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. [Such decision] shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the . . . reason or reasons upon which it is based."

42 U.S.C. § 405(b)(1) (1994).

Information, as of July 1997, from the Office of the Chief Administrative Law Judge, reflects "over 90%" of requests for hearings "involve the issue of disability". (On file with the author).

subject matter[7] involving both medical and vocational issues.[8] Other issues, addressing status and eligibility, as well as reasonableness of medical care provided, are also subject to administrative adjudication.[9] Over eighty percent (80%) of all persons appearing before an Administrative Law Judge are represented,[10] either by counsel or non-lawyer "representatives."[11]

But what of the administrative proceeding itself? What form does it take?

In the example at the beginning of the article only the claimant appeared. The government, having denied benefits at an earlier administrative stage, is unrepresented before the United States Administrative Law Judge. More significantly, *both* the lawyer and the judge engaged in the solicitation and production of evidence. Both actors called witnesses; both solicited testimony. What are the jurisprudential principles governing such hearings? How are such proceedings reconciled with the traditional form of Anglo-American jurisprudence—the adversarial system of justice, where the judge is passive and the lawyers active?

Neither the Social Security Act ("Act") nor its implementing regulations prescribe the manner of proceeding by which the Commissioner is to "make findings of fact, and decisions as to the rights of any individual applying for payment under this [title]."[12]

Instead, the implementing regulations provide that the "administrative law judge may decide when the evidence will be presented and when the issues will be discussed."[13] While the Act and its implementing regulations specifically prescribe the functions of the actors, the Administrative Law Judge is free to interpret the form of the proceeding within the ambit of his or her interpretation of the regulations, leaving, in effect, *form to follow function.*[14] The result is a system bearing little resemblance to the traditions of Anglo-American jurisprudence. Brief overview is important at this juncture.

---

7. "An attorney who was once an administrative law judge . . . said the job is challenging and requires sorting through complicated medical evidence to decide whether an applicant is eligible for disability benefits." Frank Davies, *Judge Put on Leave; Lawyers Say He is Rude, Abusive*, THE MIAMI HERALD, July 22, 1997, at 1A.

8. *See Perales*, 402 U.S. at 405-06.

9. Medicare and retirement/survivor issues comprise the remaining seven to eight percent of requests for hearings. This data is obtained from the Office of the Chief Administrative Law Judge. (On file with the author).

10. Obtained from the Office of the Chief Administrative Law Judge. (On file with the author).

11. Persons, other than attorneys, may represent claimants before the Commissioner of Social Security. Such persons must be "of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases." 42 U.S.C. § 406 (a)(1) (1994).

12. 42 U.S.C. § 405(b)(1) (1994).

13. 20 C.F.R. § 404.944 (1997).

14. *Cf. Perales*, 402 U.S. at 407. "We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA." *Id.* at 409. The only criteria is that due process be satisfied. The question remains, however, whether the form of proceeding now followed before the Office of Hearings and Appeals satisfies the requisites of due process from a jurisprudential perspective. As noted, the very nature of the proceedings themselves give rise to serious jurisprudential question. This is not to say, however, that the form of the proceedings is a creation of administrative law judges. The hearing, as described, is a formulation of the Social Security Administration; and, as shown, is a significant departure from the traditional adversarial system employed elsewhere throughout both the executive and judicial branches of government.

The administrative hearing before an Administrative Law Judge is the first opportunity for an individual to appear before a judicial officer. To that point the individual has applied for benefits and has been denied by the State Disability Determination Service ("DDS") twice—once initially, and again on reconsideration.[15] On his third administrative appeal which is, in effect, a *de novo* trial, the individual is given his first opportunity to present his case to an individual bearing the title, "judge." For many, this is the only experience with what they come to associate with the American judicial system.[16] Yet, this proceeding is far different from any other before other federal executive branch agencies or the courts.

The roles of claimant's counsel and the Administrative Law Judge, as described within the implementing regulations, describe the *adversarial lawyer* and the *inquisitorial judge*. Each is briefly discussed below.

A. *The Role of Claimant's Counsel*

Traditionally, the role of the adversarial plaintiff is to meet his burden of proof, challenged through the course of litigation by the defendant, against whom he seeks to prevail. To this end, it is the plaintiff, through the assertion of his claim, and not the court, who establishes the nature and extent of the proceedings. It may be argued that administrative undertakings before the Office of Hearings and Appeals do not involve cognizable disputes, the question being one of entitlement, not a contest of rights and responsibilities or prosecution. The only issue, it can be argued, is whether the facts entitle the individual to the benefit sought. The need for, and the value of, an adversarial proceeding under such circumstances may thereby be questioned.

The question, however, is more of semantic interpretation than legal in origin. Is the grievance between an individual and his government any less a dispute because it involves denial of benefits? Where an individual has been denied benefits, and the government has affirmatively so acted, such that the burden then rests upon the individual to appeal the denial, there can pragmatically be no doubt as to the existence of a dispute.[17] The question ultimately remains: who presents the facts and applies the law; and who determines what facts are to be considered in rendering judgment? In the face of such questions, what role does the claimant's attorney play when the only other lawyer in the room is the judge?

---

15. *See* 20 C.F.R. § 404.900 (1997). These proceedings are undertaken by administrative, clerical and medical personnel, not lawyers. Indeed, anecdotal evidence suggests that many persons, asking whether they "should get a lawyer," are told by District Offices that "you can handle it without a lawyer;" despite the fact that Volume 20 *Code of Federal Regulations, Parts 400 to 499*, governing the claims and hearing process, exceeds 1000 pages.

16. "It's a little-known judicial system rivaling the federal courts for size and impact on people's lives." Frank Davies, *supra* note 7, at 1A.

17. The Social Security Act and its implementing regulations plainly provide for discrete time limitations within which to appeal adverse decisions. The regulation provides for a 60 day appeal period following an initial denial. Thereafter, upon a further denial, a Request for Hearing before an administrative law judge must also be filed within 60 days of an adverse decision. *See* 20 C.F.R. §§ 404.933(b)(1) and 404.909(a)(1) (1997).

The scope of activity[18] permitted counsel in such cases is broad; virtually without limit as regards the issues and evidence then before the Administrative Law Judge. Once before an Administrative Law Judge, the regulations specify that the individual "may appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses."[19] The entirety of the records then before the agency are thus subject to scrutiny and inquiry, as are the issues which they encompass.[20] Request can be made by counsel of an administrative law judge for the issuance of subpoenas "for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing."[21] Written statements and oral argument can be made[22] and the individual has, what amounts to an absolute right, "to appear . . . to present evidence and to state his or her position."[23] Indeed, it is well-settled that it is the claimant who has the burden of proof with regard to entitlement through step four of the five-step *sequential evaluation* to determine entitlement to benefits established by the implementing regulations.[24] Thus, claimant's counsel is required to be active by virtue of the burden placed upon him to prove his client's claim, at least through step four of the sequential evaluation. He has the right to call witnesses, present documentary evidence and cross-examine the witnesses who testify on behalf of the government.[25] He is, in every sense of the word, performing the same functions as his counterpart in the traditional courtroom setting, hence the descriptor — *the adversarial lawyer.*

B. The Judge's Role

Unlike her adversarial counterpart, the Administrative Law Judge is equally active, with a scope of inquiry fundamentally co-extensive with that of the individual whose claim now appears before her.[26] The presiding judge may

18. The term "activity" is used in a jurisprudential sense, referring to the ability of the individual to engage in the production, solicitation and submission of testimony and evidence, in effect, "fact selection."

19. 20 C.F.R. § 404,929 (1997).

20. "The issues before the administrative law judge include all the issues brought out in the initial, reconsidered or revised determination that were not decided entirely in your favor." 20 C.F.R. § 404.946(a) (1997).

21. 20 C.F.R. § 404.950(d)(1) (1997).

22. *See* 20 C.F.R. § 404.949 (1997).

23. 20 C.F.R. § 404.950(a) (1997).

24. The regulations establish a five-step sequential evaluation through which entitlement to disability is determined. Step one inquires whether the person is working (or has worked since the claim of disability); step two asks whether the individual suffers from a "severe impairment"—a medically documented ailment which has lasted (or is expected to last) at least 12 months or result in death, and which is reasonably likely to produce the limitations which the individual alleges are disabling; step three asks whether the individual's condition meets or equals an impairment listed in the federal regulations (if so, entitlement is essentially "automatic"); step four asks whether, in light of the limitations suffered by the individual, he can nevertheless return to his past work; and step five asks whether, even if the individual cannot return to past work, he can perform other work. *See* 20 C.F.R. § 404.1520 (1997).

25. "The Social Security Act gives those claiming disability benefits a right to a hearing in which witnesses may testify and evidence may be received." Ventura v. Shalala, 55 F.3d 900, 902 (3rd Cir. 1995) (citing 42 U.S.C.A. § 405(b)(1) (West 1991)).

26. "ALJs have a duty to develop a full and fair record in social security cases . . . . Accordingly, an

freely inquire of the claimant regarding any matter at issue.[27]

Governing regulations create an evidentiary environment in which virtually any evidence "material to the issues" may be considered,[28] whether or not such evidence would be admissible before a court of law.[29] Subpoena power also extends to the decision-maker, who "may, on his or her own initiative . . . issue subpoenas" in the same manner and to the same extent as would a party.[30]

The active role of the Administrative Law Judge is, in part, mandated by the federal courts, whose decisions speak of the judge's duty to develop the administrative record.[31] The administrative law judge has a basic duty of *inquiry* to fully and fairly develop the administrative record.[32] This "duty is especially strong in the case of an unrepresented claimant,"[33] but even if the claimant is represented by counsel, the duty to "develop the record" never disappears.

Furthermore, just as the implementing regulations place the burden upon the claimant to demonstrate entitlement through step four of the sequential evaluation,[34] an equal burden is placed upon *the Commissioner* when denying benefits to show that the individual, while unable to return to his or her past work, can nevertheless perform other, less demanding work in the national or regional economy.[35]

The problem, of course, is that the Commissioner is *unrepresented* by counsel in the administrative hearing. The task of eliciting such evidence befalls the Administrative Law Judge, who must cull from the evidentiary record pertinent facts upon which to base his or her inquiry of the vocational expert, who must then opine regarding the existence of other work within the national or regional economies. The inquiry is undertaken by the judge, subject to cross-examination by the claimant's lawyer. The courts have described this process as a sort of judicial schizophrenia, i.e. Social Security Administration Administrative Law Judges wear the "dual hats" of investigator *and* adjudicator.[36]

Nevertheless, the judge is not counsel, at least in the view of reviewing courts: "Neither are we persuaded by the advocate-judge-multiple-hat suggestion . . . . The social security . . . [Administrative Law Judge] . . . does not act

---

ALJ must secure relevant information regarding a claimant's entitlement to social security benefits." *Id.*

27. *See* 20 C.F.R. § 404.929 (1997). "At the hearing . . . [t]he administrative law judge who conducts the hearing may ask you questions." *Id.*

28. *See* 20 C.F.R. § 404.944 (1997). The regulations require the Administrative Law Judge "[look] . . . fully into the issues," accepting "as evidence any documents that are material to the issues." *Id.*

29. The regulations specifically allow the *receipt* of all evidence "even though the evidence would not be admissible in court under the rules of evidence. . . . " 20 C.F.R. § 404.950(c). Thus, hearsay evidence, in the form of documentary and testimonial evidence can be used to prove one's claim for benefits. Calvin v. Chater, 73 F.3d 87 (6th Cir. 1996).

30. 20 C.F.R. § 404.950(d)(1) (1997).

31. *See, e.g.*, Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir., 1995); Kendrick v. Shalala, 998 F.2d 455, 456 (7th Cir. 1993); Miller v. Sullivan, 953 F.2d 417, 422 (8th Cir. 1992); Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992); and Brown v. Shalala, 44 F.3d 931, 934 (11th Cir. 1995).

32. *See* Carter v. Chater, 73 F.3d 1019, 1021 (10th Cir. 1996).

33. *See id.*

34. See Hammerstone v. Heckler, 635 F.Supp. 1089, 1092 (E.D. Pa. 1986).

35. *See* Diaz v. Secretary of Health & Human Services, 898 F.2d 774, 776 (10th Cir. 1990). *See also,* Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

36. Pastrana v. Chater, 917 F.Supp. 103, 106-107 (D.P.R. 1996).

as counsel. He acts as an examiner charged with developing facts."[37]

The simple truth is, the judge engages, like the lawyer, in a fact-finding process, which, apart from the judicial appellation, looks remarkably like the activity of a lawyer. The Administrative Law Judge calls witnesses to testify; examines witnesses;[38] and develops the facts upon which the ultimate decision is made. Unlike the traditional court setting, there is but one party present; and the only lawyer in the proceeding, apart from claimant's attorney, is the judge.[39] Unlike the lawyer, however, the judge has no pecuniary stake in the outcome of the case, and must "critically assess [the] claim, as well as decide it."[40] He must, however, at the same time remain "unbiased."[41] In all but this, the role of the Administrative Law Judge differs significantly from that of his adversarial counterpart.

II. ISSUES

The issues raised by the system of administrative jurisprudence promulgated by the Social Security Administration's Office of Hearings and Appeals are neither academic nor insignificant. The jurisprudential parameters postulated by the regulatory scheme embrace the following essential characteristics:

1. A single party system;
2. A single decision-maker;
3. A non-adversarial system (in both outcome and conduct of the proceeding); and
4. A system required to demonstrate traditional notions of fair play and substantial justice, encompassing modern concepts of due process.

The question thus becomes, does "due process," as defined within the Anglo-American system of jurisprudence, fundamentally change within the confines of a single party "non-adversarial" system in which the decision-maker is actively engaged in the solicitation and production of evidence?[42] Overarching, is the requirement that modern concepts of due process operate

37. Richardson v. Perales, 402 U.S. 389, 410 (1971).

38. Examination also extends to witnesses presented by claimant's counsel or representative. In effect, the judicial officer engages in what can only be described as "cross-examination"—raising a fundamental question, as discussed throughout this article, of the appearance of neutrality.

39. To be selected as a U.S. Administrative Law Judge, one must compete nationally in a merit-based selection process administered by the United States Office of Personnel Management ("OPM"). Candidates must, at the minimum, demonstrate at least seven (7) years significant litigation experience, and are questioned closely as to actual experience. Multiple references inquire into judicial demeanor, capability and integrity. A personal interview is followed by a six-hour essay examination, in which the prospective candidate must demonstrate his or her ability to analyze and write judicially. Once complete, the candidate's cumulative score is tallied, and his or her name placed on a national register. Agencies then interview candidates on the register for eventual appointment to the administrative judiciary. *See* Robert M. Viles, *The Social Security Administration versus the Lawyers . . . and Poor People Too*, 40 MISS. L. JNL. 24, 38-39 (1968-69).

40. *Pastrana*, 917 F. Supp. at 106-07.

41. *See Ventura*, 55 F.3d at 902.

42. At least one court has found that a claim of entitlement to Social Security benefits triggers due process protections, further finding "[t]hat there is a significant property interest in the fair adjudication of a claimant's eligibility to receive disability benefits." Rooney v. Shalala, 879 F. Supp. 252, 255 (E.D.N.Y. 1995) (citing Wright v. Califano, 587 F.2d 345, 354-56 (7th Cir. 1978)).

within the system; and that it be possessed of traditional notions of fair play and substantial justice, as defined within the Anglo-American system of jurisprudence. Absent such requirements, the administrative decision-making process becomes a lifeless construct, subject to whimsical and arbitrary outcomes. Or does it? Each of the features of the administrative hearing implicates an element of Anglo-American due process.[43]

In the American system "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[44] The challenge posed by administrative decision making in the form described is distinctive for those trained within the structure of the Anglo-American system of jurisprudence. The adversarial encounter is part-and-parcel of legal thought in America. Indeed, the very appellations by which lawyers are often known reflects this premise.[45]

Thus, it is well settled that in administrative adjudications before the executive branch and judicial proceedings in the judicial branch, minimum due process requirements include "reasonable notice [and] an opportunity for a hearing . . . ."[46] The opportunity is not just for a hearing, but for a hearing which is "full and fair."[47]

Integral to a "full and fair" hearing is the requirement (assumed by all) that the presiding officer or judge be neutral and unbiased.[48] The court in *United*

---

43. The question becomes, what constitutes due process in a given situation? Is "all the process that one is due," the same in a non-adversarial, single-party system as it is in adversarial two-party litigation? The procedures required in a given circumstance may vary, depending upon the nature of government involvement. This implies a flexible standard, which, in a non-adversarial system, may objectively require less due process than is called for in the contest of adversarial litigation. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). Thus, in a system of "mass justice," less due process may be required where the procedures are less formal.

44. *See* Richardson v. Perales, 402 U.S. 389 (1971); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

45. *See* Brenda Danet and Bryna Bogoch, *Fixed Fight or Free-For-All? An Empirical Study of Combativeness in the Adversary System of Justice*, 7 BRIT. J. L. & SOC'Y 36, 38 (1980). Lawyers are often called "sharks" and "predators;" while trials are termed "combat" and courtrooms "arenas." "Trials are often compared with any or all of the following: a drama, a fight, a game, a debate." *Id.*

Each of these descriptions reference a cultural milieu in which lawyers and the system in which they practice is seen as a hostile environment. It is in the midst of the "heat" of this adversarial encounter that the limits of and requirements of due process have been forged. Can such limits be found within a "non-adversarial" single party system? The question delves more deeply into our cultural assumptions than would, at first glance, appear.

46. *See* Rosa v. Bowen, 677 F. Supp. 782, 783 (D.N.J. 1988).

47. *See* Miles v. Chater, 84 F.3d 1397, 1400 (11th Cir. 1996); Ventura v. Shalala, 55 F.3d 900, 902 (3rd Cir. 1995).

48. *See* 20 C.F.R. § 404.940. "An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision." *Id.* Neutrality among those who oversee competitive endeavors throughout all aspects of Anglo-American cultural life is expected. From the earliest experiences in Little League baseball, softball, basketball, and any number of other sports, Americans are raised to expect neutrality among those who serve as "umpires," "referees," and "sporting event judges." This is much more the case for those who serve in positions of public trust, such as "judges" and "prosecutors," overseeing administration of justice and resolution of disputes, both civil and criminal.

For example, in one case, a reviewing court held that:

States v. Orbiz succinctly framed this requirement: "A defendant is entitled to the cold neutrality of an impartial judge and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent."[49] Indeed, it is axiomatic in both judicial and administrative proceedings (before a member of the administrative judiciary) that a fair hearing before an unbiased judge is essential to due process.[50]

A "full" hearing is one in which the party before the proceeding is entitled to fully present his or her case, *free of judicial interference or comment.* Such judicial activity is viewed as inherently contrary to expectations of fairness in the adversarial system. One court, observing that the presiding judge failed to conduct a "full and fair" hearing, noted that the judge "demonstrated . . . impatience and hostility towards [the] representative" and continuously interfered with his attempts to introduce the treating physician's opinion on the cause of the claimant's pain.[51] Conversely, another court noted:

> [A] trial judge is vested with the duty and broad power to do those things reasonably necessary to ensure the integrity of the trial, and that in the pursuit of that objective, he may elicit from the witnesses such testimony as the judge may reasonably deem proper in order to acquaint the jury with facts that are calculated to aid in resolving the issues.[52]

In reaching its conclusion, the court noted:

> one who challenges a judgment or decree on the ground that acts of the trial judge prejudiced a fair and impartial trial assumes the heavy burden not only of showing the commission of an act that is inherently, or under the peculiar circumstances of the case, of a prejudicial nature, but also of demonstrating that the act complained of produced a prejudicial effect.[53]

A different standard applies in federal judicial proceedings conducted before the administrative judiciary in the executive branch or before judges in the judicial branch. The issue of judicial disqualification turns on

> whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of a rea-

---

suspension from office without pay for a period of 60 days was the proper punishment for a judge who impugned the integrity of a defendant in a civil case. The judge stated in open court that he would not believe the defendant on his oath, that he had lost respect for the defendant, and that he had little or no regard for the defendant, his ethical conduct, or his intellectual honesty. The court also sanctioned the judge for his failure to disqualify himself from the case after his statement of prejudice against the defendant.

Annotation, *Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like*, 89 A.L.R.4th 278, 303 (1991) (citing *In re* Inquiry Concerning a Judge No. 506, 300 S.E.2d 808 (Ga. 1983).

49. United States v. Orbiz, 366 F. Supp. 628, 629 (D.P.R. 1973).

50. *See Ventura*, 55 F.3d at 902; *see also*, Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (law governing disqualification applies with equal force to administrative adjudicators).

51. *Ventura*, 55 F.3d at 902-04.

52. Christopher Vaeth, Annotation, *Prejudicial Effect of Trial Judge's Remarks, During Civil Jury Trial, Disparaging Litigants, Witnesses, or Subject Matter of Litigation-Modern Cases*, 35 A.L.R.5th 1, 21 (1996) (citing Crews v. Warren, 157 So.2d 553 (Fl. Dist. Ct. App. 1963)).

53. *Id.*

sonable man.[54]

This objective standard governs despite the lack of any actual bias on the judge's part.[55] Thus, "[a] judge must disqualify himself when he might be perceived as biased, and the perception of bias is grounds for a reviewing court to vacate the judgment below."[56] A judge who fails to allow a party to go forward, or who, because of improper judicial activity, usurps a party's role in presenting evidence, by his own personal behavior or rulings may be found to have denied due process.[57]

Fundamental questions surface as to the efficacy of due process in a single party, single decision-maker system where both the lawyer and the judge produce evidence and examine the witnesses. Can the "cold neutrality of an impartial judge" be found within such a system? Does the absence of counsel for the government, and the placement of the government's burden upon the decision-maker imperil the requirement of a "full and fair" hearing? Does the ability of the decision-maker to determine the nature and course of the proceedings, including the examination of witnesses, raise similar questions of jurisprudential concern?

III. DISCUSSION

A. *The Adversarial Versus The Inquisitorial Jurist*

Two dispute-resolution paradigms exist within Western society—the *inquisitorial* and *adversarial* systems of jurisprudence. Each system contains similar elements; however, the arrangement of those elements differs dramatically. The adversarial system of justice exists in contrast to "a very different system . . . the inquisitorial model [which] prevails in continental Europe."[58] In the inquisitorial system:

> [T]here are no separate witnesses for the prosecution and the defense. All witnesses are evidentiary sources of the bench, and it is the judge, not the parties, who has the primary duty to obtain information from them. The parties are not supposed to try to affect, let alone to prepare, the witness'

---

54. Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1460 (1st Cir. 1992) (quoting United States v. Arache, 946 F.2d 129, 140 (1st Cir. 1991) (citing United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976)).

55. *Pastrana*, 917 F. Supp. at 106 (citing *In re* Cargill, 66 F.3d 1256, 1260 n.4 (1st Cir. 1995)).

56. *Id.* Thus, unlike a claim for ineffective assistance of counsel, there is no required showing in the federal venue of actual prejudice. *See* Strickland v. Washington, 466 U.S. 668, 667 (1984), for a discussion of the necessity of a showing of prejudice to the defendant's case as essential to a successful claim of ineffective assistance of counsel.

57. *See* Vaeth, *supra* note 52, at 16-17, wherein the author noted:

> the trial judge should be cautious and circumspect in his language and conduct before the jury, it being the trial court's duty to maintain an impartial attitude and a status of neutrality, and keep its questions and comments to a minimum. It is the trial court's duty not to do or say anything that might leave the impression it was not according all of the parties a fair and impartial hearing. The manner and tone of a judge's remarks, as well as gestures or facial expressions, may propose the question whether the jury is being influenced to the prejudice of a party.

Id. (footnotes omitted).

58. Danet & Bogoch, *supra* note 45, at 36.

testimony.

. . . .

At trial, the witness is first asked by the judge to present a narrative account of what he knows about the facts of the case. His story will be interrupted by questions from the bench only to help the witness express himself, to clarify a point or steer the witness back from the labyrinth of utter irrelevancy . . . . When the interrogation from the bench has been completed, the two parties are permitted to address questions to the witness, in an attempt to bring out omitted aspects favourable to them, or to add emphasis to certain points . . . [t]he bulk of information is obtained through judicial interrogation, and only a few informational crumbs are left to the parties.[59]

In the inquisitorial system the judge is an "active" participant in the solicitation of evidence critical to the fact-finding process. The reverse is true in the adversary system. In the adversarial system

direct examination is the rehearsed questioning by attorneys of their own witnesses, while cross-examination is the unrehearsed questioning of the other side's witnesses. The purpose of cross-examination is to test the credibility of the other side's witnesses and, if possible, to destroy or reveal inconsistencies and gaps in their testimony presented during direct examination.[60]

The result is a passive decision-maker who defers to the parties the active solicitation of evidence upon which a decision will ultimately rest.[61]

The differences may imperceptibly affect the ultimate outcome.

The practice of putting the judge between the lawyer and the witness . . . further illustrate[s] the traditional lack of orality in the civil law. Ordinarily the lawyer who wishes to put questions to a witness must first prepare a written statement of "articles of proof," which describes the matters on which he wishes to question the witness. These articles go to both the judge and the opposing counsel in advance of the hearing at which the witness is to be examined. In this way the opposing counsel (and possibly also the witness himself) has advance written knowledge of what will go on at the hearing and can prepare for it. *This profoundly affects the psychological positions of [the] questioning lawyer and responding witness at the hearing, and the fact that any questions the lawyer asks must pass through the judge at the hearing reinforces this effect. The familiar pattern of immediate, oral, rapid examination and cross-examination of witnesses in a common law trial is not present in the civil law proceeding.*[62]

The adversarial system demands not only passivity from its decision-makers, but neutrality as well. Indeed, the two concepts are integrally related, such that violation of one affects the other. The judge

---

59. *Id.* at 37 (quoting Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-89 (1975)).

60. *Id.*

61. *See* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 739 n.8 (1983), where he comments: "[T]he term 'passivity' will be defined as a significant degree of judicial deference to the parties in the management and presentation of litigated questions."

62. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 115 (2d ed. 1985) (emphasis added).

> is expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence or in the parties' settlement of the case. Adversary theory suggests that if the decision maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence.[63]

Nevertheless, the inquisitorial judge is described, as with his common law counterpart, as being "professionally and impartially interested in getting the relevant facts."[64] Unlike proceedings in the common-law tradition, however, "[c]ross-examination, in particular, seems foreign to the civil law proceeding . . . [t]here is little effort to discredit witnesses . . . ."[65] Thus, under such a system, Fuller's observation is correct, "that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it."[66]

In a study designed to test this very hypothesis, Thibaut *et al* constructed an experimental system designed to replicate both the adversarial and inquisitorial models.[67] The results are telling. They conclude that "the most important result of the experiment is some empirical support for the general claim advanced by Fuller that an adversary presentation significantly counteracts decision-maker bias. The overall significant effect on final judgments exercised by the biasing experience lays the substructure for this empirical result."[68] They further conclude:

> In the adversary mode, the choice alternatives are given a special salience through their physical separation and embodiment in the counterpoised adversary roles. The decisionmaker is presented with a clear opposition of viewpoints that dramatizes the act of choosing. In the inquisitorial mode, the act of choosing may be less clear. The decisionmaker may be influenced unobtrusively without ever being fully aware that choices are being foreclosed to him.[69]

---

63. Landsman, *supra* note 61, at 714-15.

64. MERRYMAN, *supra* note 62, at 116.

65. *Id.* at 115.

66. Lon Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW, 43 (H. Berman ed. 1971). The more cogent question is, how could the inquisitorial decision-maker not formulate such an impression when the full panoply of the proposed inquiry is thus laid out in advance, and where the fiery interchanges of direct and cross-examination are so lacking? More importantly, how can the decision maker's own inquiry not be so affected, when it is she, and not the parties who must devise the nature and scope of the evidentiary inquiry?

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

Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Re-Examination of the Adversary Process*, 36 B.C. L. REV. 479, 508 (1995).

67. John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 393 (1972).

68. *Id.* at 397 (footnote omitted).

69. *Id.* at 400.

. . . .
[T]he act of choosing between positions consistent and inconsistent with one's bias is less obvious in an inquisitorial setting, and a decisionmaker's perceived vulnerability to attribution of bias is consequently reduced. Thus it is principally in the adversary mode of presentation that the biased decisionmaker feels compelled to struggle to suppress any behavioral evidence that would sustain an attribution of bias.[70]

Nevertheless, some commentators criticize the adversarial system, decrying it as the "sport or game theory of justice" which "looks at every step in the criminal process as if it were a game to be played according to technical rules, and which decides cases based on whether the 'technicalities in criminal procedure' have been observed."[71] In particular, it has been suggested that we have lost the real objective of our system of justice.

We have been so deeply engrossed for so long a period of time in the effort to see that all of the rules of the game are duly observed under our "sporting theory of justice," that we have to an alarming degree lost sight of the real purpose of the investigation, which should be to determine whether the defendant is innocent or guilty.[72]

In Anglo-American jurisprudence, the adversarial system ultimately becomes a means by which society adjudges the efficacy of its dispute resolution mechanism. "Neutrality and passivity are essential not only to ensure an even-handed consideration of each case, but also to convince society that the judicial system is trustworthy . . . ."[73]

[A]n important functionalist justification of democracy is the belief that '[t]hrough confrontation among people who disagree, errors of fact maybe revealed as such,' that the best decisions are reached through 'reasoned debate,' by assessing 'the force of the argument[s]' for all sides. What could be more true to this ideal than adversary litigation, the paradigm of a decisionmaking procedure that relies on confrontation and reasoned debate among competing interests?[74]

The answer to the question is best found in looking to the obverse condition. What is the result when an adversarial judge trespasses and assumes the role of an inquisitorial jurist? As in every circumstance, there is some measure of grace. "Judges in both traditions have some power to undertake inquiries on their own . . . ."[75]

---

70. *Id.* at 401. The authors further conclude: "As a case is presented, the adversary mode apparently counteracts judge or juror bias in favor of a given outcome and thus indeed seems to combat, in Fuller's words, a 'tendency to judge too swiftly in terms of the familiar that which is not yet fully known.'" *Id.*

71. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 450 (1992) (citing Rollin M. Perkins, *The Great American Game*, HARPER'S MONTHLY, November 1927, at 750, 754).

72. *Id.* at 450 n.189 (quoting Rollin M. Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 324-25 (1926)).

73. Landsman, *supra* note 61, at 715.

74. Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 358-359 (1997) (footnotes omitted).

75. MERRYMAN, *supra* note 62, at 115.

In *Reynolds v. Little Rock*,[76] the Eighth Circuit attempted to circumscribe the boundaries of the trial judge's activity.[77] During trial, the district judge interjected, inquiring of an expert as to the certainty of the standards to which the expert was testifying.[78] In addressing the question on appeal, the Eighth Circuit noted that a "District Court should carefully refrain from making comments that might prejudice a litigant in the eyes of the jury."[79] However the Eighth Circuit also observed that a trial judge has a right to make judicious comments on the evidence, noting that "such comments can be significantly helpful in focusing the issues."[80]

Similarly, the Tenth Circuit in *United States v. Sowards* determined that:

> [A] trial judge in a federal court has the unquestioned right to comment reasonably upon the evidence, and to express his opinion of it, provided it is made clear to the jury that it is not bound by his views and that [the jurors] are the sole judges of the facts.[81]

The right to comment has its limitations. Those limitations are exceeded when the judge does more than reasonably comment. When the judge engages in extensive cross-examination he assumes the role of an advocate, acting to destroy the witness' credibility.[82] Such conduct has been found to constitute prejudicial error, mandating reversal.[83] Where the court engages in interrogation of the witness, such that by the manner of such examination he conveys his own feelings, such action invades the province of the jury, for only they may determine the witness' credibility.[84]

The long-held view of adversarial theorists is that when a judge engages in the examination of witnesses he "descends into the arena and is liable to have his vision clouded by the dust of the conflict."[85] This view is not without challenge. One writer notes:

> [T]he idea of a more judicially-controlled presentation of testimony in a more natural form is very appealing. Eliminating the opportunity for an initial, one-sided presentation of the facts, as well as the stilted manner of first presenting evidence in the form of direct and then cross-examination, would not be a great loss provided the opportunity for questioning by the lawyers was available at some point.[86]

---

76. 893 F.2d 1004 (8th Cir. 1990)
77. *See id.* at 1007.
78. *See id.*
79. *Id.* (quoting Coast-to-Coast Stores, Inc. v. Womack-Bowers, Inc. , 818 F.2d 1398, 1401 (8th Cir. 1987)).
80. *Id.*
81. 339 F. 2d 401, 403 (10th Cir. 1964).
82. Block v. Target Stores, 458 N.W.2d 705, 712-13 (Minn. Ct. App. 1990).
83. State *ex rel.* Wise v. Chand, 256 N.E.2d 613, 618 (1970).
84. *See id.* at 617. The court further observed that the "intensity, tenor, range and persistence of the [trial] court's 'interrogation' compelled the conclusion that the trial judge's opinion as to the weight which should be given the expert's testimony was implicit therein, and that the jury was exposed to that opinion." *Id.* at 617-18.
85. Van Kessel, *supra* note 71, at 527 (footnote omitted).
86. *Id.* at 525.

The danger lies in placing the burden on a single inquisitor.[87] She becomes a "super-judge," taking the full burden of the case upon herself, leaving the lawyers little to do.

> A super-active judge may have the effect of rendering the lawyers complacent or unmotivated by over-reliance on the judge. The highly regarded German scholar Hans Heinrich Jescheck has pointed to unprepared lawyers deferring too much to the judge as a weakness in the Continental approach: The exceedingly small participation of the parties in the trial itself leads to unfortunate consequences.
>
> . . . .
>
> *So accustomed are they to the taking of evidence by the judge, that they rely completely upon him and often fail to direct the taking of proof in the manner most favorable to their client.*[88]
>
> . . . .
>
> Professor Langbein also pointed out the extremely passive role of the Continental lawyer during the taking of evidence. [Q]uoting an observer of German trials . . . "*In my own experience . . . I have never seen the legendary sleeping prosecutor, but I have seen a prosecutor reading a novel while the court conducted the proofs.*"[89]

It is not only the lawyers who suffer. Eventually, the judge herself succumbs to the exigencies of the system. "Judges who are constantly called upon to make rulings and otherwise direct the contest, become deeply involved in the management of lawsuits. Their passivity and neutrality are likely to be strained as they perform these functions."[90]

What effect, then, does the absence of two parties have upon the role of the inquisitorial judge? Does she, by reason of her active role, *de facto* assume the role of "the other side?" How would that scenario unfold when the only lawyer present is adversarial?

B. Adjudication in A Single Party System of Jurisprudence

If the decision-maker is able to define the adjudicative framework within which disputes are resolved, the study of the system becomes not so much objective as subjective. The focus of one's inquiry necessarily shifts from objective structure to subjective influence.[91] Does the same paradigm apply in a single party system? Morris Cohen summarizes the problem:

> According to prevailing popular theory—a theory for which popular philosophy is largely indebted to a famous lawyer, Francis Bacon— facts are "out there" in nature and absolutely rigid, while principles are somewhere

87. Serious criticisms regarding the quality of fact-finding have been leveled at the non-adversary model for its heavy reliance on the presiding judge. First, it is argued that the system suffers from inadequate pretrial fact gathering as well as inadequate presentation of evidence at trial because both the investigating magistrate and the presiding judge lack the initiative to probe deeply enough into the facts. *Id.*

88. *Id.* at 516-17 (emphasis added).

89. *Id.*at 547 n.493 (quoting John H. Lunbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 434, 448 (1974)).

90. Landsman, *supra* note 61, at 739 n.10 (footnotes omitted).

91. That is, to what extent is the structure affected, and even designed, by reason of individual choice?

> "in the mind" under our scalps and changeable at will. According to this view scientific theories are made to fit pre-existing facts somewhat as clothes are made to fit people. A single inconsistent fact, and the whole theory is abandoned. Actually, however, facts are not so rigid and theories not so flexible; and when the two do not fit, the process of adaptation is a bilateral one. When new facts come up inconsistent with previous theories, we do not give up the latter, but modify both the facts and the theory by the introduction of new distinctions or of hypothetical elements.[92]

The question, in a single party system, becomes one of selection. Which facts does the party select to present to the decision-maker?[93] Accepting Cohen's view, the party-supplicant, whose case must be decided by the decision-maker, will likely modify both the facts and the theory, thereby enhancing the probability of a favorable decision.

In an adversarial system, with two parties striving to present evidence and thus persuade a *neutral* decision-maker, the selection of facts by one party is tempered by the actions of the other.

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision-maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.[94]

In such manner balance is achieved. The efforts of one party to identify facts favorable to his argument are countered by the selection of facts by the opposing party to the contrary.

Recent changes in the Federal Rules of Civil Procedure, implementing "mandatory discovery," highlight the issue, bringing into question adversarial theory as foundational to Anglo-American jurisprudence.[95]

The effect of the new rules is conceptually startling. Implementation of the

---

92. Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 626 (1916).

93. A corresponding problem arises for the decision-maker. In selecting facts presented by a single party in a non-adversarial system, the decision-maker has equal opportunity to identify only those facts which support a decision, which, conceivably, may be reached prior to conclusion of the proceedings. In a nutshell, the decision-maker in a single-party system does not have benefit of an opposing viewpoint. The only other viewpoint in such a proceeding is his own. This is true even where, as would otherwise be expected, the decision-maker has no stake in the outcome. He is still called upon to accept or reject the evidence presented by the single party. If he rejects, he has no other opinion to rely upon but his own. Succinctly put, absent adversarial interaction, what prevents the decision-maker from effectively pre-judging the case, and selecting only those facts which support the preconceived decision? As noted earlier, the "objective decision-maker" is able to define the structural context within which decisions are made, thus effectively mandating a pre-determined result. The decision making process is thus subject to influence by the decision-maker without counter-balance from others. Here, we examine the effect of a single party as affecting the decision-making dynamic.

94. Landsman, *supra* note 61, at 714.

95. *See* Fed. R. Civ. P. 26(a). "The new rules have not . . . been universally embraced. The new mandatory disclosure provisions of Rule 26(a) are . . . the center of the controversy. Few amendments to the FRCP have been as hotly debated or as vehemently attacked. Although the new rules went into effect on December 1, 1993, the storm over automatic disclosures rages unabated." Lasso, *Gladiators Be Gone*, *supra* note 66 at 481. Nevertheless, the demand for reform in the discovery process was insistent. "Although the number of lawsuits may or may not be a problem, the length and cost of resolving lawsuits undoubtedly is. Judges, lawyers and clients agree that discovery is the root of the problem. Discovery is riddled with abuse, delay and expense." *Id.* at 480-81.

new rules was permitted on a "patchwork" basis, encouraging experimentation in local rule making by each of the 94 federal district courts. In effect, the question became for many judges whether *mandatory disclosure* gutted the essential underpinnings of adversarial decision making.

> Voluntary disclosure of information that might expose the faultlines in a client's case seemed at first like high treason. Voluntary disclosures also seemed antithetical to the adversary process because, by providing a level field in discovery battles, they diminish the advantage that a cunning lawyer might have over a less gifted opponent.[96]

Professor Lasso best expressed many lawyers' reactions:

> I am a lawyer trained in the winning-is-everything model of adversary practice. I am also conservative by nature and, even if unhappy with the status quo, I distrust change. More to the point, I was a civil litigator. A gladiator. Considering how infrequently I actually went to war . . . er . . . I mean, trial, I admit enjoying the thrill of victory-at-any-cost that discovery battles afforded me.[97]

None of these issues arise in a single party system. *Voluntary disclosure* becomes merely the process by which the sole party presents his selected facts to the decision-maker. Unlike an adversarial encounter, the selection of facts *adverse* to the party is less likely to occur in such a system.[98] Thus, an adversarial system "encourages the adversaries to find and present their most persuasive evidence and, therefore, affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof."[99]

A single party presentation leaves the decision-maker with one of two choices—acceptance of the party's theory of the case and the issues to be resolved; or, rejection of same, and adoption of a theory and construction of issues which the decision maker believes to be of most significance. Two party advocacy "focuses the litigation upon the questions of greatest importance to the parties, thereby increasing the likelihood of a decision tailored to their needs."[100] A single party system, naturally, focuses upon the questions of greatest import to the party.

Finally, there arises the issue of reliability of factual presentation. While the decision-maker in an adversarial system "is presented with a clear opposition of viewpoints that dramatizes the act of choosing . . . [i]n the inquisitorial mode, the act of choosing may be less clear. The decision maker may be influ-

---

96. Lasso, *supra* note 66, at 481.

97. *Id.*

98. *See The Model Code of Professional Responsibility* which requires zealous advocacy on the part of the advocate, but tempers the requirement, establishing an independent obligation on the part of the advocate to submit all governing *legal authority* to the court, even if contrary to the advocate's position. Furthermore, a lawyer may not knowingly mislead the court. The question becomes, in every case, one of balance. When engaging in selection of facts to be presented to the decision-maker, the lawyer must balance each of these considerations, ultimately acting *both* as a zealous advocate for his client, *and* as an officer of the court. *See* Canons 4-7 and DRs 4-101 to 7-110, *The Model Code of Professional Responsibility. See also* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM, 6-7 (1968).

99. Landsman, *supra* note 61, at 715.

100. *Id.*

enced unobtrusively without ever being fully aware that choices are being foreclosed to him."[101] More plainly, many contend that opposition in factual submission ensures reliability to a greater extent than single party presentation, both as to the accuracy of the facts submitted as well as the totality of those within the realm of possible consideration.[102]

In the administrative adjudicatory paradigm serious questions exist as to the assurance of the accuracy of the facts submitted as well as to the totality of those within the realm of possible consideration, particularly in the absence of government counsel. Federal regulations do not establish criteria for evidentiary inclusion other than to require a decision by an Administrative Law Judge utilizing a *sequential evaluation process.*[103]

The rules of evidence do not apply in the administrative hearing; no rules govern the precedence of examination or proceedings by which evidence is excluded.[104] Instead, the "neutral and unbiased" adjudicator is required to determine, as a result of evidence presented both by the claimant, and by *herself,* whether the record is "fully developed." No standard exists by which such a determination is to be made; that is, whether sufficient evidence has been marshalled to ascertain if the record is "fully developed," or even if the claimant is telling the truth, much less whether additional evidence is required to make a determination to the contrary. While the Administrative Law Judge is required to engage in a critical analysis of the evidence, no threshold boundaries are drawn by which she can decide at what juncture her inquiry should reasonably end.

Instead, a body of case law has arisen, addressing individual circumstances and cases, from which Administrative Law Judges attempt to glean the limits of required inquiry—by definition a "hit and miss" system. The question becomes whether a decision-maker, absent opposition to the submission of evidence (that is, absent the presence of an opposing party) can remain neutral when she is charged with the duty to fill the evidentiary gaps? Do objective rules provide a threshold by which neutrality can be achieved notwithstanding: (1) the absence of an opposing party, and (2) the presence of a single party able to engage in

---

101. Thibaut, *supra* note 67, at 400.

102. This view is far from uniform. *See* Danet & Bogoch, *supra* note 45, at 56. In answer to the question, *"Is the adversary system the best way to do justice?,"* the authors note that many lawyers and judges compare the merits of the adversary system versus the inquisitorial model. For them the key issue is: Does the system bring out the truth? Analysts like Frank and Weinreb say clearly, "The answer is *no.*" Too often, trials degenerate from games played fairly and well into ruthless fights in which truth is sacrificed. The parties fight too hard, and too often use unethical means to win their cases.

> The conduct of a criminal trial resembles a highly ritualized struggle between good and evil, the State and the Malefactor, more than it does an effort to determined facts. In that respect, it retains scarcely below the surface traces of ancient trial by combat. . . . In one way or another every aspect of trial is distorted by the presentation of evidence exclusively through the prisms of the prosecution and defence. The substitution of tactics for principle pervades the trial.

Id.

103. *See supra* note 24, for a discussion of the steps of sequential evaluation set forth at 20 C.F.R §§ 404.1520-404.1594.

104. The regulatory scheme does address the *types* of evidence which can be considered, including birth records, medical findings (including those from various medical sources, excluding, for example, chiropractic evidence), but offers no means by which the *validity* of the submission, once made, can be measured.

unfettered submission of evidence? More simply, in the absence of a rule-based adjudicatory system, can interposition of an objective rule-based framework fill the "interstitial gap" left by the departure of the opposing, non-moving party (here, the government)?

C. *Rules In Single Party Adjudicatory Jurisprudence*

What procedural, evidentiary or ethical rules are required, should the inquisitorial judge be transplanted to a judicial system in which counsel are active? What additional protections, if any, are required if the system were then changed, such that only one party were present? The answers lie initially in an assessment of the general operation of rules within the organized precepts of each system.

It is well settled, that absent rules, society degenerates into an anarchical collage of individual belief systems governing individual perceptions of appropriate conduct. Without a defined set of rules, there is no baseline standard by which society functions. "For men to live together successfully they need rules that will keep peace among them, make them deal justly with one another, and enable them to collaborate effectively."[105] Rules in some form, are, by definition, integral to harmonious societal function.

Unless one is to be governed by Darwin's "survival of the fittest," rules necessarily define the very existence of any organized dispute resolution mechanism. This is true in both the common law and the civil law traditions. Each is briefly explored below.

A defining element of the adversarial form of justice is that it occur in a "highly structured forensic" setting.[106] Absent such a setting the fact-finding process becomes an arbitrary exercise of individual judgment, with no standard by which to adjudge the validity and reliability of the facts adduced and decisions made.[107] In the current system of adversarial justice, "[r]ules of procedure produce a climactic confrontation between the parties in a single trial session or set of trial sessions. This confrontation yields the evidence upon which the decision will be based and diminishes the opportunity for the fact-finder to undertake a potentially biasing independent investigation."[108]

As in the common law tradition, the civil law courts apply rules of procedure to govern the means by which the ultimate decision is reached, but in much different form. The civil law and adversarial processes dramatically differ "in terms of the interrelated criteria of concentration, immediacy, and orality . . . ."[109] "In a typical civil action in a common law court, this entire sequence of events—stretching over several weeks or months in a civil law

105. LON FULLER, ANATOMY OF THE LAW 6 (1968).

106. Landsman, *supra* note 61, at 716.

107. "Elaborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system." *Id.*

108. *Id.* (footnotes omitted).

109. MERRYMAN, *supra* note 62, at 116.

court—would be telescoped into less than a minute of oral colloquy between judge and counsel."[110] With heightened immediacy and extensive orality, the common law court enables a rapid exchange of information; contrast this with a civil law court, which often requires that each set of questions, proposed to be asked of a witness, be submitted to the judge in advance, together with an "offer of proof" supporting the proffered inquiry. To this, objections may be had, hearings held and interlocutory judgments entered—all as a precursor to simply questioning a witness.[111] These rules constitute a type of protection, insuring against unwarranted fact finding by the decision-maker.

Similarly, the rules of evidence:

> protect the integrity of the testimonial segment of adversary proceedings. They prohibit the use of evidence that is likely to be unreliable and thereby insulate the trier from misleading information. By strict enforcement of this prohibition, the adversary system seeks to preserve the neutrality and passivity of the decision maker . . . . Thus the rules confine the authority of the judge to manage the proceedings: judges are not free to pick and choose the evidence they think most appropriate, but are bound to obey the previously fixed evidentiary precepts.[112]

Not so in the civil law tradition. There, judges *are* expected to choose the evidence they think most appropriate. Evidentiary rules, as such, "do not exist in civil law jurisdictions."[113] What does exist is a set of "irrebuttable presumptions," evolved from medieval rules which gave *a priori* arithmetical value (full proof, half proof, quarter proof and the like) to testimony offered by different persons, depending upon age, status and gender, among other things.[114] Today, reform is sought to allow "free evaluation of the evidence by the judge . . . [but] . . . its thrust has been limited by the general weakness of the civil law judge and by the widespread mistrust of judges among civil lawyers."[115]

Because the adversarial judge is "neutral" and "passive" in regards to production and solicitation of evidence, there must also be a set of ethical rules governing the conduct of counsel, who are responsible for submission of evidence, and who, because of the highly competitive nature of the proceeding, may tend to promote a win-at-any-cost attitude.[116] Such rules are designed to "ensure the integrity of the process [and limit] tactics designed to harass or intimidate an opponent, or to mislead or prejudice the trier of fact."[117] Under such rules, the attorney occupies a dual role, serving first as an officer of the court, and then as a zealous advocate on behalf of his client.

Rules *per se* do not, however, hold the day, particularly in the adversarial system. The so-called "effective lawyer" will turn the rules to his advantage,

110. *Id.*
111. *Id.*
112. Landsman, *supra* note 61, at 716 (footnote omitted).
113. *See* MERRYMAN, *supra* note 62, at 117.
114. *Id.* at 118.
115. *Id.* at 117.
116. Landsman, *supra* note 61, at 716.
117. *Id.* at 716-717.

often using the very tool designed to limit harassment as an instrument of the same ilk. The "paper wars" evident in pleading and discovery practice are prime examples of the rules run amok. Computer-generated discovery requests, heaped upon *pro forma* motions to dismiss, haunt the hallways of American trial courts. Endless rounds of depositions, followed by seemingly unending motions *in limine* and objections to discovery designations plague the interstitial spaces of the rule-based adversarial framework.

Such abuses have prompted increasing calls for change, including recently implemented mandatory discovery practice in the federal courts.[118] Additionally, the Civil Justice Reform Act[119] required each district court develop plans to more efficiently administer justice, limiting cost and cutting delays.

How then do the rules affect the judge's role? For the inquisitorial or "active judge" an established set of irrebuttable presumptions allow for evidentiary weight (and credibility) to be attributed to differing testimony. Lawyers engage in a careful procedural dance over a prolonged period, informing the court of the basis for any inquiry, well before any question is ever asked of the witness.[120] An adversarial or "passive judge" takes no active part in the solicitation or presentation of evidence. She must stand aside and allow the parties to engage in the "battle" of the proofs, through which, in theory, the truth will become evident. The rules are designed to address the demands of each system and thus uniquely address the roles of the judge and counsel within the given jurisprudential context.

What if one were to "mix and match"—such that an "active" inquisitorial judge, were thrust into a system with an "active lawyer?" What rules then apply? *Table One* sets forth the paradigm:

Table One

	Active Lawyers	Passive Lawyers
Active Judge		Inquisitorial System
Passive Judge	Adversarial System	

118. *See* FED. R. CIV. P. 26(a) (1993).
119. *See* 28 U.S.C.A. §§ 471- 482 (1994).
120. *See* MERRYMAN, *supra* note 62, at 116.

An "active judge" coupled with a "passive lawyer" is descriptive of the Continental or "inquisitorial" system of justice. A "passive judge" part of a dynamic system with an "active lawyer" describes the adversarial system of justice.

What legal system does a "passive judge" coupled with a "passive lawyer" describe? *Table Two* illustrates the result.

Table Two

	Active Lawyers	Passive Lawyers
Active Judge		Inquisitorial System
Passive Judge	Adversarial System	No system of Justice

Given that "activity" describes the role of the party in the production and solicitation of evidence, it may be argued that a "passive judge," coupled with "passive counsel" results in no system of justice at all. Absent a party whose role is to solicit and produce evidence before the factfinder, the system operates only minimally, with no assurance of reliability or validity of decision making. The result is arbitrary decision making unrelated to factual circumstance.[121]

Inevitably, there remains the question of the system of justice described by the operation of an "active judge" and an "active lawyer"—both responsible for the solicitation and production of evidence.

121. Such a system might be akin to an absolute dictatorship or monarchy, where the whimsy of a single individual controls the outcomes of disputes; but such systems have historically proven flawed and short-lived.

Table Three is illustrative:

Table Three

	Active Lawyer	Passive Lawyer
Active Judge	Hybrid System (Combining Both Systems)	Inquisitorial System
Passive Judge	Adversarial System	No system of Justice

By definition, an adversarial system pits one active participant against the other, both striving to persuade a neutral, passive decision-maker. Conversely, an inquisitorial system places the burden of activity upon the decision-maker, with little, if any, activity undertaken by counsel.

In both cases, judge and lawyer have differing roles. What permutation occurs when both have the *same* role, as when both are active sources of evidentiary information from which the facts must be determined?

In a single party non-adversarial (inquisitorial) system, due process requires not only a theoretical opportunity to be heard, but an actual one. The danger in a single party system is that the decision-maker will define the nature and extent of the opportunity—and thus cannot be truly objective, much like an absolute monarchy, in which the king's or queen's determination governed without appeal. The problem is akin to that of human interaction without government, that is, the problem of one individual's coercion by another without a neutral authority to which she could appeal. "The strong individual could deprive the weak individual of his freedom with impunity, because he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it."[122]

> The cure . . . of course, [is] government; but not just any kind of government [will] do. An absolute monarchy, for instance, replicated the problems of a state of nature because it allowed one individual -- the monarch -- to serve as judge in his own case. What was required was a system of government in which all agreed to be bound equally with each other.[123]

122. Peters, *supra* note 74, at 325 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 316 (1690) (footnotes omitted)).

123. *Id.* Peters further notes: "in Kant's words, 'no-one can put anyone else under a legal obligation without submitting simultaneously to . . . be put under the same kind of obligation by the other person.' This system was democracy 'in which every citizen has an equal voice in determining what the laws will be.'" *Id.* (footnotes omitted).

In this way, there is not a monarch, apart from the people. The source of adjudicatory power equally binds all.

Can an argument then be made for rule-based "objective justice?" Specifically, in a non-adversarial system, and especially in a system driven by "high-technology," can fact finding be made less subject to bias or subjective interpretation? Can the subjective perspective of the fact-finder be supplanted by *objective rules* by which relevant facts are determined? The advent of computers, document scanners and vast databases make this a tempting solution. Such arguments, however, immediately founder on the shoals of Professor Fuller's observations regarding law and "legal fictions."

The meanings of words themselves deprive the fact-finder of objectivity. By deciding what the meaning of words are, the fact-finder is, by extension, imputing the meaning of concepts described by those very words. Even in a non-adversarial world, the decision-maker must operate according to a set of defined rules. Those rules necessarily embrace what Professor Fuller calls "useful concepts."[124] That is, a legal system operates about a series of defined concepts undergirded by assumptive meanings understood by its actors to constitute the adjudicative framework.[125] Put simply, it is the process of abstraction.[126] Succinctly, the basis for law lies in its conceptualization. Fuller, quoting Ihering, observes:

> I believe it is not too much to say that it was in the field of the law that the human mind was first compelled to mount to abstraction; the first rule of law, whatever it may have concerned, was the first onset of the mind to conscious generality of thought, the first occasion and the first attempt to lift itself above the sensuously obvious.[127]

The pure inquisitorial system has been criticized as being susceptible to decision-maker bias.[128] In Professor Fuller's words: "An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[129]

If the impartiality of the decision-maker is to be preserved, can her role as an active participant in the fact-finding process, when facing an equally active lawyer, be reconciled with her role as neutral decision-maker? Or, do the temptations of activity, to prejudge the case, with attendant choices in the nature and type of facts selected, override the attempt at impartiality?

More succinctly, is the inquisitorial jurist pushed into a *de facto* role as

---

124. LON FULLER, LEGAL FICTIONS 22 (1967).

125. *Id.* at 15. "All words expressive of immaterial conceptions are derived by metaphor from words expressive of sensible ideas." (footnote omitted). *Id.*

126. *See id.* at 132.

127. *Id.* (footnote omitted).

128. *See* Landsman, *supra* note 61, at wherein he observes: "Active inquiry has frequently been identified as a threat to neutrality."

129. Fuller, *supra* note 66, at 40.

"advocate" by reason of the advocacy of a single active lawyer? That is, will she be tempted to "counter-select" facts which "balance" those selected and advanced by the advocate, the possibility being that neither the lawyer nor the judge examines the totality of the facts, each polarized by the demands of the jurisprudential system in which they find themselves?

Troubling questions arise in contemplation of such a system. If the judge is an active participant in the fact-finding process and the lawyer is equally active, should procedural rules require discovery of the court? Should the judge be limited in her inquiry, or, in the interests of justice, should she be treated for purposes of examination, as counsel?[130] Who, then, judges the judge? Does the "active" judge participate in "trial stratagems" designed to "trip up" the lawyer? Danet and Bogoch list three strategies, common to adversarial dynamics: "(1) maximizing the options available within the rules; (2) breaking the rules and trying to get away with it; (3) getting the other side to break the rules."[131] Such notions strike the adversarial lawyer as foreign, and even distasteful, contrary to traditional notions of an impartial, unbiased, and passive decision-maker.

The inquiry necessarily focuses upon the type of system described (and the kinds of rules required) by a single party presentation where *both* judge and lawyer are active participants in the selection and presentation of evidence. In the adversarial model, the activity of the lawyers is nourished by the interests of their clients, who stand in opposing positions.[132] "[P]rofessor Murray Schwartz advanced that when acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."[133] Schwartz calls this "The Principle of Nonaccountability."[134] "The ethical support for this partisan view is the rationalization that 'the lawyer's morality is distinct from, and not implicated in, the client's.'"[135]

An adversarial lawyer is driven to select facts, present proofs and make arguments by the force of his client's interests, and in some quarters is viewed as morally bound to advance those interests under a "means justifies the end"

---

130. *See* Danet & Bogoch, *supra* note 45, at 42, who note, "Lawyers are not limited in any way regarding the number of questions they are allowed to ask, on either direct or cross examination. Thus one strategy is simply to *hold the floor*, to ask many questions."

131. *Id.*

132. *See e.g.*,Lasso, *supra* note 95, at 504-505:

> The adversary process is the primary model of dispute resolution in our Anglo-American legal system. Although the adversary process evolved over centuries, its origins include the Norman trial by battle. Trial by battle was a means of settling disputes through which the litigants (or their hired fighters) engaged in physical combat until one or the other surrendered or suffered defeat. Judicial officers, usually connected to the church, administered the litigants' combat, and both sides were required to swear under oath that their position (or their clients') was just. Presumably in deference to the adversary process' roots in the trial by battle, many lawyers today still perceive litigation as "war," discovery as "battle," and their adversaries as "enemies" to be given no quarter. Once litigation is accepted as a surrogate for war, discovery strategy necessarily becomes a "win-at-any-cost" battle (footnote omitted).

133. *Id.* at 504 n.120 (quoting Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978)).

134. *Id.*

135. *Id.* (quoting David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 84 (David Luban ed., 1984) (citing Schwartz' Principle of Nonaccountability)).

rationale.[136] Such approaches explain the various warlike confrontations so much a part of the adversarial system. These same concerns do not, however, drive an "active" trial participant who is charged, in a judicial role, to decide the case. The judge, not having a stake in the outcome *per se*, being *sans* client, is motivated by different reasons. "[T]he trial judge, like the appellate judge, remains in our system a central figure. He is surrounded with much formality, for he is a symbol of neutrality and fairness. The formality expresses a widely held conviction that the impartial administration of justice, by independent judges, is an essential function of government in a civilized community."[137] So, while the lawyer represents the individual interests of his client, the judge represents the higher ideals demanded of her role by society at large. As Professor Fuller aptly notes:

> The essence of the . . . system is . . . participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments. If the participation is to be meaningful it must take place within an orderly frame, and it is the duty of the judge to see to it that the trial does not degenerate into a disorderly contest in which the essential issues are lost from view.[138]

An "active" judge, charged with the duties of his or her role, can avoid the pitfalls of the inquisitorial form by application of a pervasive standard of neutrality to the factfinding process. If truth be the final measure of any dispute, then the role of the jurisprudentially active judge is that of a vehicle through which such objectives are achieved.

> [W]hen the party is given through his attorney an opportunity to present arguments, this opportunity loses its value if argument has to be directed into a vacuum. To argue his case effectively, the lawyer must have some idea of what is going on inside the judge's mind. A more active participation by the judge—assuming it stops short of a prejudgment of the case itself—can therefore enhance the meaning and effectiveness of . . . presentation.[139]

The task in this setting is not, however, the judge's alone. The potential for adversarial interaction between an active lawyer appearing before an equally active judge, particularly one trained in an adversarial system, is significant.[140]

---

136. *Id.*

137. JOHN P. DAWSON, *The Functions of the Judge*, in TALKS ON AMERICAN LAW 28 (H. Berman, ed. 1961).

138. FULLER, *supra* note 66, at 41.

139. *Id.* If the judge makes known her thought processes through the course of the proceeding, such revelation may guide counsel to a more effective evidentiary presentation, and hence, a more accurate result.

140. A judge who perceives a lawyer acting purely as an advocate may be tempted, as noted earlier, to "balance" the system, thus behaving himself as an advocate. For example, where the issue before the court is the validity of claim to entitlement, the lawyer, as an advocate, may be tempted to introduce only those facts and elicit only that testimony which supports the claim, thus affirmatively declining to present detrimental evidence. When faced with such advocacy the active judge may be tempted to "cross examine" the client, much as an opposing party would, ultimately attributing the lawyer's "adversarial presentation" to the client. The judge may thus be tempted, upon a "revealing cross-examination," to find that the client is "not credible." This all occurs as a result of a presentation which would, in the "adversarial venue" be within accepted bounds of adversarial interaction and evidentiary practice, with little or no credibility implications. Similarly,

A fundamental conceptual reorientation on the part of both judge and lawyer is required to counteract this result. In the presence of an active judge, the lawyer's presentation must be *non-adversarial.* Indeed, both judge and lawyer must engage in a factfinding and decision-making process which is *non-adversarial.* The system of which they are a part must be so defined.[141]

A non-adversarial single party system, in which the judge is an active participant in the solicitation and production of evidence is a hybrid—a blend of both the adversarial and inquisitorial systems of justice. The question is ultimately one of conception.[142] The adversarial lawyer, trained to oppose a competing view must abandon the adversarial concept in favor of a stance which is more akin to the neutrality of the adversarial judge. While he may be charged with the production and solicitation of evidence and testimony, he must do so in a manner calculated to reveal objective truth and not subjective interpretation.

Similarly, the judge trained in the adversarial system, who is now charged with an "active" role, must abandon the concept in favor of an approach more closely approximating the inquisitorial jurist. Ultimately, she too, must actively *seek* rather than *glean* obejctive truth from the parties' presentation.

Both lawyer and judge must assume the fundamental neutrality so clearly part of the role of the traditional adversarial decision-maker. Both are linked together in an objective pursuit. Unlike the adversarial model, the task of evidentiary presentation is not left solely to the parties. The pursuit of truth becomes a co-extensive process of mutual interaction, where fact finding is a non-competitive process through which objective reality is the goal. The decision-maker becomes, like the lawyer, an investigator,[143] unearthing factual informa-

---

if the active lawyer, acting as an advocate, produces only "favorable" evidence and the active judge independently finds evidence which contradicts that of the advocate, then the temptation on the part of the judge to attribute "lack of credibility" to the claimant is equally great. The discovery of evidence contrary to the claim may negatively affect the client's case to a proportionately greater degree than might have been otherwise the case—simply because it was the judge and not the lawyer who presented it. In other words, the judge may be tempted to ascribe greater weight to the evidence she submits, than to that which is otherwise in the record through the party's presentation. In essence, the *nature of the fact-finding process itself* creates substantive perceptions which may not accurately reflect that which is concluded. Objectively, the client may be entirely credible, but when viewed within the confines of a system in which the judicial actor is an active participant in the solicitation and production of evidence, the client may subjectively appear otherwise.

141. Consider Ota Weinberger's comments:

> It is in decisions about what to do or in evaluation of actions or in judgments about persons as agents that theories of justice find their application. Evaluation and decision-making are conceived of as always belonging to deliberations about acting which are governed by a system of ends comprising the *agent's* aspirations and desires.

NEIL MACCORMICK AND OTA WEINBERGER, AN INSTITUTIONAL THEORY OF LAW, NEW APPROACHES TO LEGAL POSITIVISM 159 (1986) (emphasis supplied).

142. In a single-party system, where the party acts as an advocate, and the decision-maker has the ability to independently solicit and adduce evidence and testimony, the "aspirations and desires" of the *adversarial* lawyer may necessarily demand a reciprocal response from the decision-maker—that is, a decision considered in light of an adversarial presentation. Theoretically, a non-adversarial system removes, such "aspirations and desires"—in theory setting aside the "win-at-all-costs" mentality, and the potential for the decision-maker to respond in like fashion.

143. *See Pastrana,* 917 F. Supp. at 107, where the court observed that U.S. Administrative Law Judges "wear the dual hats of investigator and adjudicator," with an "affirmative obligation to assist the claimant in developing the facts of his or her claim." *Id.*

tion, which, when added to that gathered by counsel, forms the factual basis for the decision finally entered.

The evolution in the role of each actor is best described as along a spectrum, defined by the intersection of two axis'. Each axis describes a spectrum of passivity/activity and predisposition/neutrality. *Figure One* illustrates the adversarial model. Counsel, as an "advocate" is shown as "predisposed" and "active," whereas the decision-maker is "neutral" and "passive." The two act at polar ends of the spectrum.

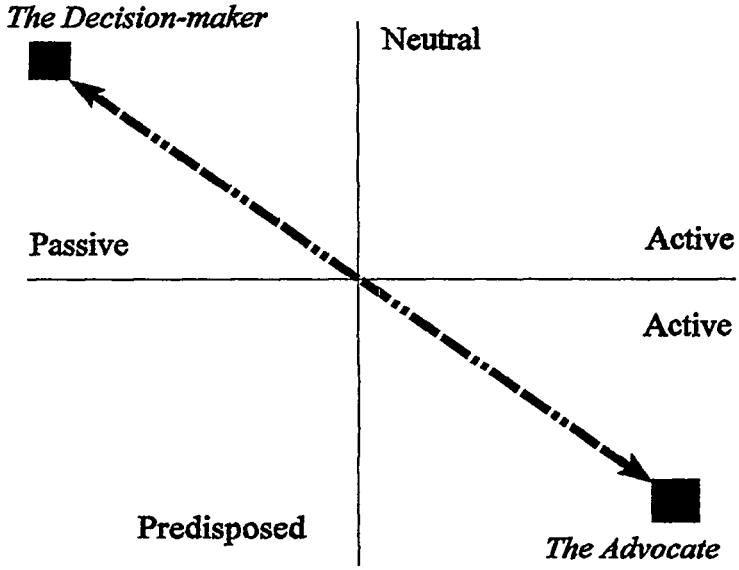

Figure One•The Adversarial Model

The inquisitorial model is shown in *Figure Two.*

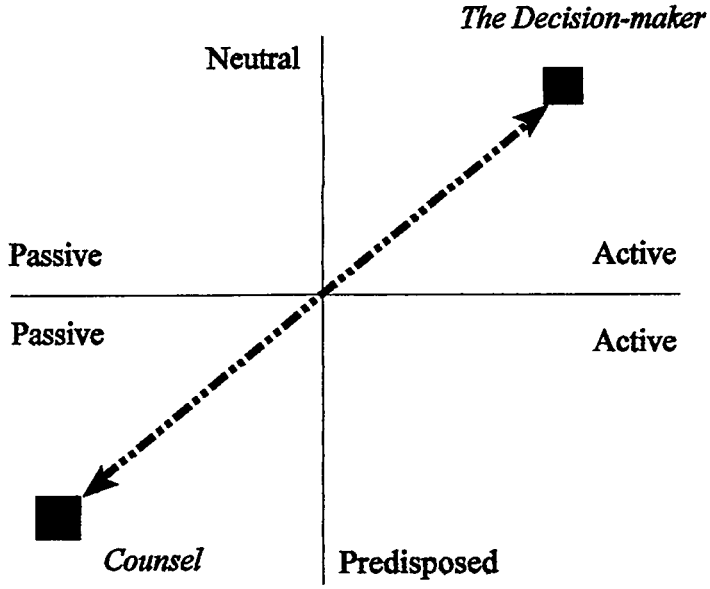

Figure Two•The Inquisitorial Model

Again, both act at polar ends of a spectrum. In the inquisitorial model, however, the decision-maker is "active," yet "neutral," while counsel is "predisposed" and "passive." The diagrammatic orientation of the inquisitorial spectrum is the graphic opposite of the adversarial model.[144] The decision maker is no less neutral in the inquisitorial model than in the adversarial model and counsel is no less "predisposed."[145] The critical difference lies in the reversal of the activity of each actor.

144. *Cf.* Figure One, *supra.*

145. It may also be argued that the "predisposition" of counsel is dependent, to some degree, upon his or her activity— the more "active," the more "predisposed." Thus, in the inquisitorial system, counsel, who has little role in the active solicitation and production of evidence, can be said to be less "biased" than his counterpart in the adversarial system. For example, the Anglo-American advocate operates under a dual duty to both the court and his client having an ethical responsibility to "zealously represent" his client's interests.

This is most clearly seen in the graphic representation of the hybrid model, set forth in *Figure Three.*

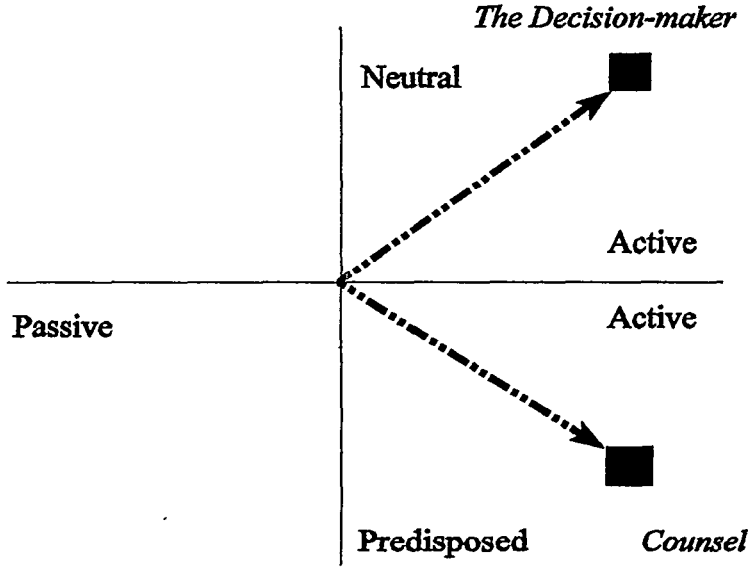

Figure Three•The Hybrid Model

The form of the inquisitorial system is maintained in the decision-maker, who continues to be "active." Similarly, a fundamental attribute of the adversarial system continues forward in counsel, who also remains "active." Most notable is the absence of passivity. Neither judge nor lawyer is passive. Implicit is a range of dynamic interaction between the two.[146]

146. As noted earlier, the terms "active" and "passive" refer to the role of the lawyer and decision-maker in the production and solicitation of evidence. The system, as a whole remains passive in the sense that it is the party who initiates a claim or issue for decision. Unlike the Soviet system, in which the *procurator* has the right to intervene in civil suits, it is not contemplated that the decision-maker should have the ability, absent the request of a party, to *ab initio* instigate the judicial process. *See* MARTIN SHAPIRO, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS 173 n.26 (1986) (citing J.R. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA 94 (1981).

Figure Four illustrates the interactive overlay between the activity of the lawyer and decision-maker.

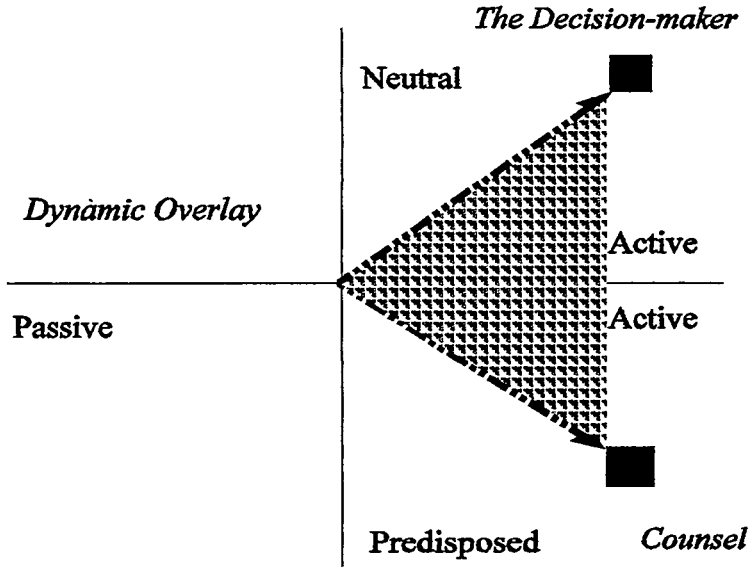

Figure Four•The Hybrid Model

The absence of passivity demands a non-adversarial decision-making process. To avoid arbitrary decisionmaking as a result of the activity of the primary actors, two fundamental substantive rules are required, broadly described as follows:

1. *The Lawyer.*

   The lawyer must produce all evidence bearing upon the question before the decision-maker. A necessary corollary is the requirement that he diligently endeavor to discover all relevant evidence.[147]

2. *The Decision-Maker.*

   The decision-maker must fully consider all relevant evidence bearing upon the issue before her for decision; this is to prevent singular focus upon those facts discovered and presented by the decision-maker.[148]

147. This is to prevent bias as a result of adversarial activity in a single party system.

148. This is especially significant in evaluating credibility. To prevent judicial disregard of evidence under the broad label of "not credible," substantive rules akin to the Federal Rules of Evidence are required to ensure against exclusion of facts as a result of prejudgment by the decision-maker.

Procedurally, the activity of lawyer and decision-maker should not be co-equal. As the moving party (claimant, through counsel) initiates the claim or issue for decision, the procedural system must proportionately balance the fact-finding roles of lawyer and decision-maker. Rendering them co-equal runs the risk that the judge will become "the lawyer," jeopardizing her fundamental neutrality. Equally important are considerations of judicial economy. Unnecessary production of evidence by the decision-maker burdens the system, and again increases the likelihood of pre-judgment.

To avoid these results, and still maintain the integrity of the decision-making process, the activity of both decision-maker and counsel should be interlocking, the activity of counsel triggering that of the decision-maker. Fundamentally, the burden of going forward lies with the single party.[149] Only upon critical assessment of the party's evidence should the decision-maker be permitted to go forward in the production and solicitation of evidence apart from that presented by the party.[150]

The procedural model should not, however, embrace the concept of "cross-examination." The activity of the decision-maker is *not* that of an opposing party engaged in an attempt to discredit an opponent. Instead, the decision-maker engages in a process of critical evaluation, assessing the question of whether the issue for decision may be decided in the manner advanced by the party within the bounds of governing law.

As a consequence, counsel should not have the opportunity to engage in yet another round of fact finding triggered by that of the decision-maker. As in adversarial trial proceedings, the party presents his case-in-chief. Unlike adversarial trial proceedings, however, no opposing case-in-chief is presented.

149. In a non-adversarial system there is no "burden of proof" *per se.* The question presented is an evidentiary one: does the evidence presented at the point of decision entitle the individual party to prevail? To require a "burden of proof" implies action by the decision-maker short of her activity. In administrative adjudication before the Office of Hearings and Appeals, however, there is no negative consequence for the party should he not meet a "burden of proof." The case may not be decided absent the decision-maker's solicitation and presentation of evidence where such activity is triggered by the actions, or, inaction, of the party.

150. It is not important that standards for evaluation of the party's evidence be discussed here. Such will vary depending upon the nature of the issue before the decision-maker. What is important is the concept of "staged interaction"—the decision-maker acts only after she has critically evaluated the evidence (the "facts found") by the party. It may not be necessary for the decision-maker to "go forward" because the party has presented sufficient facts under the law enabling the decision-maker to make a favorable determination at that juncture.

Figure Five graphically illustrates the process:

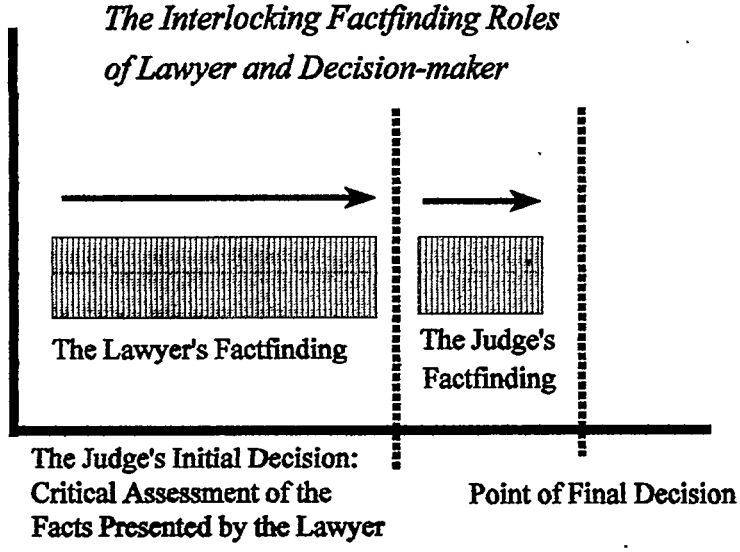

Figure Five

The role and activity of the decision-maker and the lawyer are *co-extensive*, embracing the whole of the issue presented.[151] They are not, however, *co-equal.* The decision-maker is able to proceed only if there remain questions of fact upon conclusion of counsel's presentation. To this extent, an objective, rule-based framework enhances the concept of single party adversarial decision making.

D. The Independent Decision-Maker

Ultimately the question of the efficacy of the system depends upon the independence of the decision-maker. Independence requires defining criteria: *A non-adversarial, active, single decision-maker, an active, adversarial lawyer.* Absent independence, the moving party is deprived of due process. Due process in a single party system necessarily differs from that required in the adversarial two party venue. Notice, for example, need not be as stringent. A party seeking administrative redress, or making a claim, knows, fundamentally, the basis for proceeding.[152] No other party is present to raise new issues; and no motions

151. The issue is whether the position of the single party can be supported by the facts as applied to the law. In the non-adversarial system, as described, both counsel *and* the decision-maker address the issue through their respective fact finding roles, hence, the description "co-extensive." As noted, however, the two should *not* be co-equal, in that counsel should have the initial opportunity to present the facts which he believes supports his client's position. Only then, should the decision-maker endeavor to solicit facts and evidence which address the questions remaining after counsel's presentation.

152. In disability proceedings, even a *pro se* litigant understands the basic question: *Am I disabled?* No

can pend before the decision-maker not raised by the single party.

The issue is not free from jurisprudential tension. In a single party system, the traditional judge from the adversarial system will resemble a "judicial wimp." As a passive actor, she is unable to engage in an affirmative fact-finding process; hence, his role is limited to a determination of evidentiary standards. Does the proffered evidence, submitted by a single party, without opposition, entitle the claimant to benefits? Given that the claimant is represented by *adversarial* counsel, the temptation is to submit only favorable evidence, particularly when one's fees are contingent upon a favorable determination.

Absent a requirement that counsel submit all evidence, favorable or otherwise, it is unlikely that the passive, adversarial judge will, within the confines of her role, be able to elicit cogent evidence to the contrary. Even assuming an ethical, if not regulatory basis for submission of all relevant evidence, it is unlikely that such standards could be enforced. The passive, adversarial judge thus takes on the appearance of a toothless bear—all growl and little bite. The adversarial lawyer, tempered in the fiery pits of the adversarial courts may have little compunction against "putting his client's best evidentiary foot forward." No opposing party is present to prevent such action, and an adversarial judge is not free to engage in fact finding independent of the claimant.

In effect, a single party adversarial system (where *both* judge and lawyer act in the adversarial tradition) creates a dichotomous relationship between decision-maker and fact-finder. At stake is an interlocking system of values and resulting actions. The system only works if the values held by each of the actors is oriented to the same end.

With this in mind, what are the judge's values in such a system? Do her values change, depending upon the jurisprudence of the system?

Ideally, the judge's objective values remain unchanged regardless of the system of which she is a part. Effective administration of justice embraces the parameters of due process in all its forms. Subjectively, judicial independence is contingent upon the judicial role required by the jurisprudence of the system. Where the decision-maker is passive, a single party evidentiary presentation is non-adversarial because of the lack of opposition. The reliability of fact finding is necessarily impaired. Absent such assurance, the passive decision-maker is likely to be *perceived* as subject to bias by definition. No other actor within the

---

other party is present to raise a different issue. Or, can it be argued that the judge, is, for purposes of notice, a "different party," should she, in her review of the case before hearing, determine the existence of yet another issue? In a two-party system, local, state and federal rules require exchange of documents between all parties prior to proceeding. When considering dispositive motions, such rules require notice and opportunity to be heard, resulting in an exchange of briefs, depositions, or submission of evidence, all part of the record finally considered. In the administrative context, the judge may, as a result of his or her review, determine the efficacy of the claim without ever voicing the basis for the analysis until the final written determination. No mechanism exists to test the state of the record prior to a final determination. Should the judge then be required to disclose her thinking prior to the taking of evidence, in order to give the claimant notice and opportunity to be heard? Could this otherwise be described as the essence of a "dispositive motion," made by the judge, to herself, yet not subject to comment by the claimant—indeed, virtually unknown to the claimant? Would such vocalization be then interpreted as "predisposition," subjecting the decision-maker to disqualification? Such questions necessarily impact the issue of judicial independence in the context of the administrative hearing.

jurisprudential paradigm is capable of countering the single party presentation.

"It is sometimes argued by supporters of the adversary system that the competitive presentation of evidence counteracts decision-maker bias and thus produces fairer and more accurate decisions than does inquisitorial investigation."[153] If the adversarial decision-maker is only receptive to evidence produced by a single party, she would then "naturally" be "biased" in that direction. No other choice is possible. The only question is whether the evidence submitted meets the standard required by the law. Such a system encourages "expected evidence." That is, each party strives to produce the result expected. Evidence to the contrary is anathema to the system.

In a single party system, there remains the danger of objective bias when the decision-maker acts as an inquisitorial judge.

> What generally occurs in practice [as evidence is heard] is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.
>
> . . . .
>
> *An adversary [system] seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not fully known.*[154]

In either paradigm, it is the judge who becomes the nexus of jurisprudential inquiry, for each system raises questions of judicial independence. The significance of this implication is evidenced in the historical and judicial evolution of the concept.

The insistence on judicial independence as an essential element in the conventional prototype of courts is largely derived from . . . impressions of what the English courts appeared to be like in the eighteenth and nineteenth centuries.[155] Its roots, however, range far deeper into history. Martin Shapiro notes:

> Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails

153. Thibaut, *supra* note 67, at 389-390 (footnotes omitted).
154. FULLER, *supra* note 66, at 39-40 (emphasis added)(quotations omitted).
155. *See* SHAPIRO, *supra* note 146, at 124.

> to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.[156]

Nevertheless, the third-party dispute resolution model or *triad* is far from perfect.

> The triad, however, involves a basic instability, paradox, or dialectic that accounts for a large proportion of the scholarly quarrels over the nature of courts and the political difficulties that courts encounter in the real world. At the moment the two disputants find their third, the social logic of the court device is preeminent. A moment later, when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. To the loser there is no social logic in two against one. There is only the brute fact of being outnumbered.[157]

To avoid the "brute fact" represented by a final decision, courts have strived to maintain the formal structure of the triad, by constructing a variety of "devices," not the least of which is the fiction of consent. In earlier times having selected the third party, the loser could not later complain, having *consented in advance.*[158] In modern times, the construct of the law is said to substitute for the particular consent of the parties.[159] The parties also substitute the office of the judge for the free choice of a particular third person to aid in the resolution of their dispute.[160] Thus the law and the office of the judge preserves the independence of the third-party decision-maker. If the parties choose to go to court, they must accept the judge as the decision-maker. She serves at the behest of the law, not appointed to the position as a result of the actions of the disputants.[161]

The decision of the judge, as the third party to the triad, is likewise removed from the purview of the participants. Absent consensual mediation, where both parties must agree to a final result, the parties are bound by the decision of the judge. The temptation of the losing party to perceive the judge as acting with his opponent is countered by a "dichotomous solution"[162] in which the judge denies discretion "by arguing that under the preexisting law one party was clearly right and the other clearly wrong."[163] In essence, the losing party must be convinced: 1) that the legal rule imposed upon him did not, *ab initio*, favor his opponent; and 2) having not *per se* consented to the

156. *Id.* at 1.
157. *Id.* at 2.
158. *See id.*
159. *See id.* at 5.
160. *See id.*
161. As noted earlier, Anglo-American judges are generally bound by rules of ethics, designed to preserve impartiality. Rules of procedure provide for formal motions by which a judge may be asked to recuse should one of the parties believe the judicial officer lacks the capability to render an independent judgment.
162. SHAPIRO, *supra* note 146, at 7 .
163. *Id.*

judge, that the judicial office itself ensures that the judge is not an ally of his opponent.[164]

It may be said that no dispute is as "cut-and-dried" as the final result would portend. Each dispute embraces a gradation of grays, it being the task of the judge to make the resolution *appear* to be a bright line *separating* a spectrum of possible solutions from those which are certain. Hence, the desire for, and creation of, a professional and independent judiciary, perceived as such by the parties who appear before it.[165]

The characteristics of a professional and independent judiciary are well accepted. The decision of the judge must be as objective and as free from bias as it possibly can.[166] To accomplish this the judge must be "free, impartial and independent as the lot of humanity will admit."[167] So saying, the judge must be excluded from any partisan role.[168] She "must have no strong emotional attachment to one of the interests involved, and . . . must not have a "blind spot" that may prevent [her] from getting the point of testimony or argument. Without this impartiality . . . the participation of the parties cannot be meaningful."[169] Phrased otherwise, the judge must have no direct or indirect interest (even emotional) in the outcome of the case.[170] These precepts are an integral part of American jurisprudence.

When handling a case, a judge should not give the impression that a particular view of the law prevents a careful consideration of the law and facts.[171] "Due process entitles an individual . . . to a fair hearing before an impartial tribunal."[172] In so proceeding, the judge must conduct the undertaking "in an orderly manner . . . to elicit the truth."[173] Where these elements have been found lacking, courts of appeal have not hesitated to remand the case for resolution before a neutral, unbiased decision-maker.[174]

Outright bias or prejudice, resulting in substantive denial of due process, is not, however, the only form of partiality to which judges are susceptible. Judicial independence embraces yet another aspect, that of *political independence.* A judge subordinated to the will of the executive becomes a mechanism of control, rather than adjudication. Shapiro notes:

When administrators hold courts, appeal becomes such a mechanism of

---

164. *See id.* at 8.
165. *See id.*
166. *See* Fuller, *supra* note 66, at 30.
167. *Id.* at 31 (quoting Mass. Const. Art. XXIX).
168. *See id.*
169. ROBERT S. SUMMERS, LON L. FULLER 92 (1984).
170. *See id.* at 93-94.
171. Parchman v. U. S. D. A., 852 F.2d 858, 866 (6th Cir. 1988).
172. Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1160 (10th Cir. 1986) (citing Roberts v. Morton, 549 F.2d 158,164 (10th Cir. 1976)).
173. *See id.*
174. *See, e.g.*, Sarchet v. Chater, 78 F.3d 305, 309 (7th Cir. 1996) ("If there is sufficient evidence of bias to entitle the claimant to review by a different administrative law judge, as in Ventura v. Shalala, 55 F.3d 900, 904-05 (3d Cir. 1995), then the transfer of the case to a different administrative law judge is an automatic consequence of reversal.").

> control. A "right" of appeal is a mechanism providing an independent flow of information to the top on the field performance of administrative subordinates . . . . [T]he administrative superior may impose some patterning by making it known what kinds of appeal are most likely to be successful.[175]

This principle is illustrated in the continental or inquisitorial form of jurisprudence, in which "judges are a bureaucratic corps of government servants, who are in a sense employees of the ministry of justice just as other civil servants are employees of the ministry of agriculture or the foreign ministry . . . [and] . . . have a great many ties of outlook and sympathy with other government executives."[176] Unlike their Anglo-American brethren, European judges are far more "likely to be closely attuned to the viewpoints of the civil servants who run the country."[177] They see themselves "as government officials who form one branch of a national higher civil service . . . attuned to the norms and styles of the higher civil services that do most of the day-to-day governing of European nations,"[178] essentially a branch of the civil service,[179] maintaining a facade of judicial independence[180] founded on the premise that such a system does not affect their day-to-day work.[181]

The jeopardy in such a system lies in the fact of political control. Under such a system the fortunes of the judicial officer "depend on their conformity to dominant political opinion and the legal views of the judicial superiors . . . [such that] . . . political control of transfers and promotion is . . . of tremendous importance."[182]

In contrast, the Anglo-American jurist is the beneficiary of a heritage of judicial independence, an inheritor of an office which exists apart from the civil service. With the rise of the English common law came "a complex body of traditional practices that no one pretended could be reduced to a set of rational principles comprehensible to those not steeped in the tradition."[183] The body of law became whole unto itself, existing apart from legislative intent or action. It consisted of "evasions of such law created by "conveyancers," that is, the body of specialized lawyers who drew up wills and land transfer documents . . . [becoming] so successful that soon only they understood the law they had made, and later no one, including them, understood the whole of it."[184] As the law grew more autonomous in its creation, so grew the autonomy of the English legal profession.[185] Judges became more closely linked with lawyers than

175. SHAPIRO, *supra* note 146, at 151.
176. *Id.*
177. *Id.*
178. *Id.* at 152.
179. *See id.*
180. *See id.*
181. *See id.* at 152.
182. *Id.*
183. *Id.* at 93.
184. *Id.* at 93-94.
185. *See id.*

to government.[186] "By the sixteenth century . . . judges were both officers of the crown and leaders of an independent profession that saw itself as the maker and guardian of the law—a law so complex that no nonlawyer could understand it."[187]

The evolutionary emergence of law as science, gave rise to the ideal of the rule of law.[188] The law was no longer the declaration of the ruler, subject to the arbitrary dictates of human whimsy. With the restriction of the powers of the king was born the life of the law, creating with it the potential for an independent judiciary.[189] "The constitutional authority of the king had been cut so far back that the judges were no longer . . . his servants. . . . The judges . . . not parliamentary leaders, ceased to participate in executive decision making. Thus the judges became separated from the executive institutions of government,"[190] and the primacy of the rule of law demanded "that judges not be subordinated to the day-to-day desires of the political executive."[191]

The concept of political independence is interwoven into the fabric of American judicial independence. Individual rights and liberties conceived as constitutional principles do not exist dependent upon the will of the executive. Instead, they are framed as "inalienable rights," not subject to arbitrary grant or denial. Neither do they exist wholly independent of any governance. Society demands the strictures of balance necessary to safeguard both individual and societal interests, with the magnitude of individual liberty subjected only to that of the collective liberties of society as a whole.[192]

The role of the courts, as defined under American law has been to give effect to these broad moral principles established by the Constitution, "that no person may be deprived of life, liberty or property without 'due process of law—a phrase which means to an American what the phrase 'natural law' has meant traditionally, [to a European] namely, equality, consistency, impartiality, justice, fairness."[193]

To conclude to the contrary, that judges are the "servants of the king," is fundamentally anathema to the broad moral principles circumscribed by the Constitution. "By requiring that all laws must conform to these moral principles, the Constitution has encouraged American judges to submit to the test of conscience not only legislation, but all legal rules and all governmental acts,

186. *See id.* at 94.
187. *Id.* at 95.
188. *See id.* at 104.
189. Shapiro observes: "In the seventeenth and eighteenth centuries judges were conceived of more and more as *servants of the law* rather than the king, particularly since the king was seen as having less and less independent governmental power." *Id.* at 103 (emphasis supplied).
190. *Id.* at 104.
191. *Id.*
192. While one may declare that it is the expression of *his* liberty to steal the property of another, society dictates that the rights of *all* persons be observed, thus balancing liberties among individual members of society.
193. Harold J. Berman, *Philosophical Aspects of American Law, in* TALKS ON AMERICAN LAW 221, 224 (Harold Berman ed., 1961).

including their own judicial decisions."[194] The concept of judicial review, the mechanism by which all governmental acts are ultimately measured against the principles of the Constitution, has, by its own pervasive influence within American society, defined the independence of the judiciary.[195]

Judicial independence rests, then, not upon a commitment to the day-to-day conformity to dominant political opinionbut to the higher ideal represented by a commitment to the moral principles of the law, apart from the mechanisms of government and human foibles, which ofttimes plague its outworking.[196]

IV. ANALYSIS

A. *Judicial Independence*

Far from being an academic exercise, the implications of the *non-adversarial, single party, single decision-maker* system are staggering. Its fundamental premises contravene principles of law fundamental to the Anglo-American system of jurisprudence.

Expressed simply, the judicial intern, observing her first administrative hearing, might wonder:

> *How can the judge, who's supposed to decide the case, be actively involved in deciding which questions to ask, and how to ask them? How can she be the judge, the questioner and an investigator? It doesn't make sense!*

In other words, is there a difference between deciding the case independently, and being an independent decision-maker? Is it possible for the inquisitorial judge in a single party system, regardless of the jurisprudential paradigm, to be truly neutral and seek out only those facts which, when applied to a legal standard, yields the correct answer, regardless of what it might be?

The answer is neither simple nor straightforward. Just as Fuller impugns the inquisitorial judge, suggesting she may be susceptible to subtle bias, equal potential lies within the single party system for the decision-maker to respond

---

194. *Id.* at 224-25.

195. "[T]he power of judicial review of the constitutionality of legislation has had a pervasive influence on the entire legal system, for lurking in the background of every case, civil or criminal or administrative, is the constitutional requirement of 'due process of law.'" *Id.* at 225.

196. It is important to note the following:

> If we limit the notion of independence very, very narrowly to the absence of direct outside interference in the outcome of a particular case, Western European courts are essentially independent. In a number of countries, however, and most particularly in France, the political regime actively controls the career opportunities of judges. In such countries judges who wish to succeed professionally are likely to give the regime the kinds of decisions it wants even though the politicians apply no direct pressure. Finally, in all Western European nations, the judiciary is a hierarchically organized civil service, more or less cut off from private practitioners, and with relatively close affinities and connections with the rest of the higher levels of the career government bureaucracy . . . . *From the point of view of the private citizen this alliance may be far more significant than sporadic political interference in cases with peculiar political significance. For it may systematically bias the judiciary in very broad ranges of cases that involve social and economic issues on which the "administration" has a firm national policy.*

SHAPIRO, *supra* note 146, at 156 (emphasis added).

"adversarially" to the single lawyer. What prevents the decision-maker from seeking to balance the claimant's presentation, sensing the inherent imbalance within a single party system?

The argument that the judge is endowed with a higher sense of purpose must be weighed against the reality of the circumstances. Notwithstanding the declared non-adversarial nature of the administrative system, it is virtually impossible for counsel not to advocate on behalf of his client, presenting the evidence most likely to result in a favorable determination. After all, if he does not prevail, he does not get paid. The only fee the lawyer collects under the Social Security Act is contingent.[197] Notwithstanding this "counter-pressure," does the lawyer have an obligation to ensure a complete ("fully developed") record independent of the judge? Does the claimant's burden at steps 1 through 4 of the sequential evaluation create, by inference, an independent obligation upon counsel to develop the record; or does it simply require that he meet his burden, regardless of the entirety of the potential record?

In the absence of a two party system, it seems plain that *someone* must have such an obligation. The adversary system *presupposes* full development of all facts (i.e., a "fully developed" record) as a natural consequence of the clash of competing proofs—that one party will not willingly default the field to the other and thereby lose the day. No such survival mechanism exists in a single party system.

If the judge has the burden of ensuring a fully developed record, is that very obligation not recognition of the fact that the lawyer *does not* have the burden? If the lawyer's only obligation is to carry a burden of proof to establish a *prima facie* case, who then, other than the judge, has the burden to fill the evidentiary gap? Given this evidentiary obligation, does it not weigh more heavily toward the conclusion that the decision-maker is likely to be predisposed to one view or another, in effect carrying, even unintentionally, the absent party's burden?

To create a system whereby a lawyer is paid only if he prevails is creation of a system of limited interest. If the lawyer is presenting evidence to make a *prima facie* case, leading the decision-maker to the conclusion that his client must prevail; and yet the decision-maker has a concomitant obligation to act to ensure a "fully developed record;" what other evidence, other than that which weighs *against* the claimant can the judge supply? An obligation placed upon the judge cannot, pragmatically, be viewed neutrally in light of the adversarial

197.

> At present, Title II of the Social Security Act contains two fee provisions, both of which are codified at 42 U.S.C. § 406. Subsection (a) authorizes the Secretary . . . to award fees to the attorney or other duly authorized individual who successfully represents a claimant before the agency. The attorney or representative may be awarded the lesser of 25 percent of the claimant's past-due benefits or $4,000. . . . The Secretary, not the court, has the sole authority to award fees for services rendered before the Social Security Administration. The Secretary's final fee determination is not subject to judicial review.

Alison M. MacDonald and Victor Williams, *In Whose Interests? Evaluating Attorneys' Fee Awards and Contingent-Fee Agreements in Social Security Disability Benefits Cases*, 47 ADMIN. L. REV. 115, 140-141 (1995) (footnotes omitted).

role of counsel. Given that counsel has only the obligation to establish a *prima facie* case, the judge is jurisprudentially placed in an opposing position. The system, as structured, even unintentionally, creates potential for such outcomes.

Even if the decision-maker foregoes the temptation to respond adversarily to the advocacy of claimant's counsel, is the judge's objectivity subtly influenced in the performance of roles which extend beyond that of neutral decision-maker? No easy answer is forthcoming.

1. *Richardson v. Perales*

The Supreme Court has only once considered the potential conflict jurisprudentially inherent in the multiple roles required of the Administrative Law Judge. In *Richarson v. Perales*, the judge's ability to remain objective when performing the multiple duties required of her, was challenged and squarely ducked.[198] A brief discussion of this issue is important.

The judge's multiple roles have been described metaphorically as wearing multiple "hats." One commentator has noted that "the [Social Security] Hearing Examiner [now, Administrative Law Judge] often wears more than three hats. . . . The Examiner is potentially investigator, counselor, advocate, father confessor, judge, jury and defendant. Unlike Hearing Examiners in other agencies, he not only hears testimony and examines witnesses; he must decide the case."[199]

The respondent's brief in *Richardson v. Perales* initially raised the issue of the Administrative Law Judge's impartiality. He argued that the judge functioned first as counsel for the Government, assimilating and presenting the Government's case, then, assumed the role of judge, issuing a neutral decision on a claim for disability benefits.[200] However, no discussion was raised as to the jurisprudential effect of such an undertaking, much less the effect in a *single party* system.

Having been denied benefits, Perales contended that because the judge wore the "hat" of counsel for the Government, she could *never* objectively view all of the evidence, including that provided by the claimant, and therefore could not provide essential due process.[201] Perales noted that, with:

> the responsibility of *gathering the evidence, deciding what evidence to present* and *making the Government's case as strong as possible* . . . [i]t would be the rare Hearing Examiner who . . . would sustain objections to the evidence he has gathered and presented *and who would not tend to lean,* even though he might try not to, toward a decision in favor of the evidence he had gathered.[202]

In his reply brief, petitioner Richardson argued on behalf of the Social

198. 402 U.S. 389 (1971).
199. Viles, *supra* note 39, at 42.
200. *See* Brief for Respondent at 25, Richardson v. Perales, 402 U.S. 389 (1971) (No. 108).
201. *See id.*
202. *See id.* (emphasis added).

Security Administration that the judge does *not* act as counsel for the Government, but acts "to develop all the relevant evidence bearing the claimant's condition, whether favorable or unfavorable, so that all the facts are before" him when making his decision.[203] As "proof" of "fairness"[204] of judges in the system, Richardson pointed to the then 44.2 percent reversal rate of denial decisions by the state disability determination agencies.[205]

Richardson also argued administrative economy, in effect, asserting that an economic rather than due process rationale governed. A truly independent judge, lacking the ability to gather evidence, he noted, would necessitate the addition of government counsel to perform that function.[206] Richardson argued that opposing counsel would be detrimental to claimants, many of whom were unrepresented at the hearing, thereby increasing administrative costs to the benefit trust fund.[207] He also argued that the addition of government counsel would complicate the otherwise "simple procedures" envisioned by Congress when enacting the Social Security Act.[208]

In the end, the Supreme Court's decision in *Perales* took little notice of Perales' contention that the "multiple hats" worn by supposed neutral decision-makers affected their judicial objectivity. The Court noted that "the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary."[209] In a short paragraph, the Court adopted wholesale the reasoning of the Social Security Administration:

> Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and grow-

---

203. *See* Brief for Petitioner at 5, Richardson v. Perales, 402 U.S. 389 (1971) (No. 108).

204. *Id.* Richardson's emphasis on "fairness" is a subtle, but distinctive departure from "neutrality." The standard mandated as integral to due process, is *not* simply fairness, but *unbiased neutrality* leading to fairness.

205. *Id.* at 6. It is interesting to note that the Supreme Court accepted, without comment, the "proof," entertaining and then adopting what amounts to a circular argument: If the system appears to work (with a statistically significant reversal rate), then due process may be so inferred. The fallacy of such finding is immediately apparent. During this same period would a different reversal rate have resulted from a system of jurisprudence constructed within the bounds of the Anglo-American system otherwise the norm within American society? Simply because a selected number existed during this time frame, is not *per se* determinative of the Government's assertion of "fairness."

206. *See id.* at 6 n. 2. Even here, Richardson's argument fails to appreciate the fact that the role of government counsel is not simply to perform the function of gathering evidence. Government counsel is far more than a mere functionary whose role may be embraced by the otherwise mandated neutral decision-maker. Just as a prosecutor is not called upon to simply win the case, but to do justice; government counsel in the disability venue must similarly "do justice." Richardson's argument completely misapprehends the role of counsel, and particularly so for the government.

207. More than 1000 pages of regulations comprise the regulatory scheme underlying the disability claims process. A lay person cannot be expected to navigate its complex waters; and, indeed, in more than 80% of hearings before U.S. Administrative Law Judges, they do not. How opposing counsel can be detrimental to the claimant is beyond reason if the fundamental premise for the Anglo-American system of jurisprudence is accepted at its core. In making such argument Richardson again seems to rest upon an economic, not jurisprudential base. It is unfortunate that the Supreme Court seemed to agree, in the 1971 Term.

208. *Id.* at 6 n.2. Addition of government counsel would not change the already extant complex regulatory scheme. If government counsel were true to their call to public service, the benefit to the system is apparent. Fewer, not more, hearings would be required, thus *saving* money.

209. *Perales*, 402 U.S. at 403.

> ing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2 % reversal rate for all federal disability hearings in cases where the state agency does not grant benefits . . . attests to the fairness of the system and refutes the implication of impropriety.[210]

In failing to more closely examine the "multiple hats" worn by the Administrative Law Judge, the Supreme Court avoided reconciling the implication of multiple functions with the Administrative Procedure Act ("APA"), or with its own decisions construing the Act. While commenting on the receipt of hearsay evidence in disability hearings, the Court stated that "[w]e need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act."[211]

Although the opportunity was presented in *Richardson v. Perales*, the Supreme Court declined to explore the due process implications of the multiple roles undertaken by the hearing examiner (Administrative Law Judge) in light of the APA. The Court left untouched a system of jurisprudence essentially unique in Anglo-American adjudication. Given the increasing number[212] and growing legal complexity of disability claims, despite the fact that more than eighty percent of all claimants are represented, the decision avoided in 1971 remains worthy of reconsideration twenty-seven years later.

2. The Administrative Procedure Act

The APA was enacted to ensure a separation of function within executive branch agencies, so that adjudication was not undertaken by personnel within the very agency who were at once interested in the outcome. "According to the Supreme Court, a 'fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. . . . '"[213] Pre-APA adjudication often combined the functions of investigator, prosecutor and adjudicator, leaving the litigant feeling that, "in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere."[214]

Enactment of the APA was intended to redress the co-mingling of function by ensuring "internal separation by separating those in the agency who investigate and prosecute from those who hear and decide."[215] Thus, in all agencies, with the exception of one, adjudicative procedures take on a form closely ap-

---

210. *Id.* at 410.
211. *Id.* at 409.
212. *See* THE OHA STORY, *supra* note 4, at 4. In fiscal year 1975, the number of pending cases was less than 140,000; in the first quarter of 1997, the number of pending cases exceeded 500,000. *Id.*
213. Schwartz, *supra* note 3, at 207 (1996) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 41, 46 (1950)).
214. *Id.* (quoting *Report of the Attorney General's Committee on Administrative Procedure* 44 (1941)).
215. *Id.*

proximating trial before the judiciary—a neutral, disinterested decision-maker, presiding over a contested proceeding litigated by two opposing parties.[216] The Supreme Court described such proceedings in *Butz v. Economou*, characterizing "the role of the modern . . . administrative law judge [as] functionally comparable to that of a judge."[217] Professor Schwartz notes:

> The APA turns around "the one who decides must hear" principle by vesting the one who hears with the power to decide. The ALJs—the administrative judiciary set up under the APA—have not only been given the judicial title; they have also been vested with most of the decision-making power of trial judges . . . . The result, in the vast majority of federal agency cases, is to have an initial decision by the judge who presided at the hearing.[218]

Notwithstanding the otherwise plain mandate of the APA, hearings before Social Security's Office of Hearings and Appeals remain unaffected by its protections. Similarities between proceedings before the traditional judiciary of Anglo-American jurisprudence and those conducted before the administrative judiciary in the Office of Hearings and Appeals are scant. Unlike administrative proceedings before virtually every other executive branch agency, hearings before the Office of Hearings and Appeals are described as being *non-adversarial.*[219]

B. A Unique Jurisprudence

The description of the proceedings as "non-adversarial" appears to consider the absence of an opposing government counsel as controlling. As Christine Moore observes: "Only claimants are represented, and this is the case at all levels of administrative adjudication."[220] The system, of course, is not so easily described, nor the jurisprudential implications so simply addressed. For example, a purely objective decision-maker is beyond the realm of possibility, especially in a system of subjective factual interpretation. Pre-hearing review of the evidence[221] potentially pre-disposes the decision-maker to pre-judgment.[222]

---

216. *See* Administrative Procedure Act, 5 U.S.C. § 554 (1994).

217. 438 U.S. 478, 513 (1978).

218. Schwartz, *supra* note 3, at 214 (footnotes omitted).

219. *See, e.g.*, Christine Moore, *SSA Disability Adjudication in Crisis!*, 33 JUDGES J. 2, 40 (1994). Judge Moore observes: "One must be mindful that this system continues to be non-adversarial and the Secretary [Commissioner] unrepresented, despite the changing nature of the law and practice at the administrative law judge level." *Id.*

220. *Id.*

221. The regulatory scheme provides for obtaining additional medical evidence both *before* and *after* the administrative hearing. The *Administrative Record* is before the Administrative Law Judge well before the actual hearing. Indeed, it is she who decides what additional medical evidence, if any, (termed "pre-hearing development"), should be garnered before the hearing. The Administrative Law Judge also determines the number and type of additional witnesses who will be present, including *vocational experts* and *medical experts*, who are paid by the Social Security Administration. Nothing prevents counsel from making such a request, but the reality is such that few do.

222. *See* JERRY MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 70 (1978), wherein Mashaw observes: "Finally, with respect to many of the cases observed, we came away uncertain as to whether the

Thus, unlike the adversarial judge in a two party system, who may require trial briefs from the parties prior to actual trial but who otherwise has only been privy to evidentiary snippets, the Administrative Law Judge has full view of the overwhelming majority of documentary evidence (the medical and related records) well in advance of the commencement of the administrative hearing.[223]

However, the alternative is equally uncertain. The adversarial judge, jurisprudentially passive with respect to evidentiary development is, in a single party system, virtually at the mercy of claimant's lawyer. "Opposing" evidence is only that introduced by counsel. The judge lacks a duty of inquiry beyond that of an advocate. The evidentiary proceeding is conducted at the behest of the lawyer, with the adversarial (passive) judge a virtual figurehead in the absence of opposing counsel. Therefore, in a single party system where the lawyer is active, the judge must also be active.

The danger in such a circumstance lies in pre-judgment and fact selection tailored to predisposition.[224] The absence of rules governing the admissibility and weight of the evidence exacerbates the issue. Thus, no structure exists within which to avoid pre-judgement. This is, to all appearances, equivalent to predisposition.

Within the bounds of the hearing, both judge and counsel have the ability to engage in a co-extensive inquiry. Each may address all issues, without limit. This type of an an evidentiary exchange creates potential for an adversarial response from the decision-maker, akin to that of opposing counsel within the adversarial system. Because the judge is jurisprudentially active, she may be tempted to act, or may be perceived as acting in answer to the advocacy of the lawyer who seeks to zealously represent his client. Both circumstances affect the appearance, if not the actuality of independence.

Where the active lawyer, acting as an advocate, produces only "favorable" evidence, and the active judge, independently finds evidence which contradicts that of the advocate, the temptation on the part of the judge to attribute "lack of credibility" to the claimant is great. The discovery of evidence contrary to the claim may negatively affect the client's case to a proportionately greater degree than might have been otherwise the circumstance—*simply because it was the judge and not the lawyer who presented it.* In other words, the judge may be tempted to ascribe greater weight to the evidence she submits, than to that which is otherwise in the record through the party's presentation.

In essence, the *nature of the fact-finding process itself* creates substantive perceptions which may not accurately reflect that which is concluded. Objec-

---

case should be decided at all on the record as developed. There were simply too many loose ends in the evidence that had not been pursued . . . ." *Id.*

223.

> The first great federal regulatory statute, the Interstate Commerce Act of 1887, made sparing use of the term 'hearing,' noting that the term appeared (for the first and only time in the Act) 'in §17 disqualifying a Commissioner from participating 'in any hearing or proceeding' in which he had a pecuniary interest. . . . Scores of later federal statutes adopted the 'hearing' language . . . .

Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1267 n.17 and 1272 (1975).

224. *See* MASHAW, *supra* note 222, at 70.

tively, the client may be entirely credible, but when viewed within the confines of a system in which the judicial actor is an active participant in the solicitation and production of evidence, the client may subjectively appear otherwise.

An obvious solution is to return the system to its Anglo-American roots—to the traditional adversarial system, where the judge returns to a passive role, deferring the production of the evidence to the lawyers. Such action, it has been argued, will increase delay.[225] The addition of government counsel will, arguably, complicate the process, giving rise to legislation such as the *Civil Justice Reform Act*,[226] whose purpose was to reduce cost and delay in the federal courts.[227] In lay terms, there is a perception that lawyers bicker and are wont to engage in cross-examination detrimental to the interests of persons who are potentially ill and unable to withstand the rigors of an adversarial undertaking.[228]

However, in both the criminal and civil courts the overwhelming majority of cases are resolved prior to trial. Pre-hearing review procedures, or case management rules, akin to those which govern case management conferences in the federal courts are readily implemented.[229] Implementation of such procedures would enable the Administrative Law Judge to exercise pre-hearing case management authority over individual cases. Pre-hearing development or discovery would occur at a supervised pace. Involvement in the case would be required of parties at an early stage. Discussion and resolution of the questions posed would occur *before* a formal hearing. Put simply, if 90% of all cases in the adversarial system are disposed of between counsel prior to trial, leaving only 10% for trial, there is little reason to believe the same statistics will not obtain in the disability claims venue.

Of note is the Office of Hearing and Appeal's reversal rate. In fiscal year 1991, as in previous years, 68.9% of the initial decisions that were appealed were later reversed by Administrative Law Judges.[230] A significant number of those cases would likely resolve between counsel absent hearing, or with a hearing posing narrowly drawn issues for decision, saving significant judicial time and effort. With the advent of government counsel, negotiated disposition of a significant numbers of cases is more likely, thus increasing the total number of case dispositions.[231]

---

225. *See supra* note 204, at 5.

226. *See* 28 U.S.C.A. §§ 471- 482 (1994).

227. *See id.*

228. A popular perception of lawyers, essentially derived from the adversarial nature of the Anglo-American dispute resolution system is that they never agree, prolonging the "fight" for the sake of fees. As a practical matter, far more disputes are resolved by counsel than by the courts. It is anecdotally of interest to observe that more than 90% of all matters are resolved *before* trial in the federal courts; while just the reverse is true of administrative proceedings before the Office of Hearings and Appeals.

229. *See, e.g.*, FED. R. CIV. P. 16.

230. Carrow, *supra* note 1, at 298.

231. Note should be made of the following: 20 C.F.R. § 404.932 speaks to "parties" in the plural, providing that "any other person may be made a party to the hearing if his or her rights may be adversely affected by the decision. . . . " The term "person" has been held to encompass legal entities, including the federal government. Does this regulation, in effect, authorize the addition of the government to the administrative hearing, provided the government's interest "may be adversely affected?" The answer would seem to be self-

The addition of a second party is not substantively different from the demands of the present system. The *Commissioner* must carry the burden at step 5 of the sequential evaluation. However, in the absence of counsel for the Government, *the judge* is doing the job *for the Commissioner*. No matter how the activity of the judge is characterized, she is still acting on behalf of the Commissioner. In a sense there never was a single party system. The same examination, both of experts and of claimants, by the Administrative Law Judge, is functionally equivalent to that of opposing counsel. The presence of governmental counsel, however, relieves the judge of the "multiple-hat" burden, further relieving her of the appearance of predisposition—a critical factor now plaguing the administrative undertaking.

If the present "single party" system is maintained, there must be a fundamental change in procedure. In the presence of one adversarial lawyer, the judge must assume an active role. The question thus becomes one of limits. The actors in both the adversarial and inquisitorial systems embrace concepts of *activity* and *passivity*. Similarly, the actors in a single party system as represented by the Office of Hearings and Appeals, must be subject to the same *active/passive* dynamic.

In maintaining the single party system, the claimant has the burden of going forward and proving disability that prevents substantial gainful work activity.[232] But the judge still "has an affirmative obligation to assist the claimant in developing the facts of his or her claim . . . ."[233] This requirement alone, founded upon the concept that the judge has "a duty to develop a full and fair record in social security cases"[234] virtually eliminates passivity on the part of the judge. Similarly, the lawyer's obligation mirrors that of the judge—to carry forward his client's burden of proof. Neither is passive.

It is nevertheless essential in a single party system that the decision maker not be drawn into the fray with counsel. The creation of a perception of advocacy, when found in a judge, is often interpreted as judicial predisposition.[235] To insure against prejudgment, each party's roles must be limited by requiring, at some stage of the proceeding, they become passive with respect to the role of the other.

In effect, passivity must be grafted onto the otherwise active roles now played by both counsel and the Administrative Law Judge.

This is achieved by parsing the respective burdens of the parties, and limiting the ability of the judge to act, both in developing the record (i.e., producing evidence) and in assisting the claimant. Specifically, imposition of objective

---

evident, that the payment of monies is an adverse consequence. Note one writer's perception of the role of government, expressive of the very problem at issue in this article: "The Secretary's role is, indeed, curious: once an adversary of the claimant, the Secretary [once disability has been favorably determined] often becomes the claimant's advocate, protecting the claimant from having her benefits award depleted by attorneys' fees." MacDonald and Williams, *supra* note 197, at 143.

232. *See* Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

233. Pastrana v. Chater, 917 F. Supp. 103, 107 (D.P.R. 1996).

234. *See* Ventura v. Shalala, 55 F.3d 900, 902 (3d. Cir. 1995).

235. See, for example, *supra* note 48 for a discussion of this issue.

rules, which more narrowly define the roles of the participants, based upon their respective burdens will reduce the perception of judicial bias. Such rules will also reduce the temptation to pre-judge, which might otherwise result in the selection of only those facts supportive of the judge's pre-conceived opinion.

The presentation of evidence in an administrative hearing is jurisprudentially haphazard. At times the Administrative Law Judge makes the initial inquiry of the claimant, followed by counsel; and at times the reverse is true.[236] Under formal rules, a claimant's lawyer would bear the initial burden of proof, requiring him to go forward initially with his or her case-in-chief.[237] At the conclusion of the claimant's case-in-chief, the Administrative Law Judge would be permitted to inquire, but only as to those areas which were not proved by a preponderance of the evidence by the claimant.

Under such procedural rules, if the Administrative Law Judge chooses to inquire, she would first be required to state, on the record, the basis for the inquiry, be it perceived lack of credibility or lack of substantive testimony with regard to the first four (4) steps in the sequential evaluation. If the claimant has carried his burden of proof, the Administrative Law Judge is then foreclosed from further inquiry.

In a declared "non-adversarial" venue, once the claimant has met his "burden" there should be no general "right" of examination by the decision-maker, *but only a structured inquiry where she finds the claimant has not met his burden* as to one or more of the first four (4) steps in the required sequential evaluation. Judicial inquiry, beyond those areas where the lawyer (claimant) has not met his burden, for the sake of questioning itself, should be foreclosed. That is, the inquiry should be related to the ultimate purpose of the proceeding.

Where the Administrative Law Judge finds the claimant has *not* met his burden, she may ground her decision at one of the first four (4) steps; or, in an abundance of caution, may proceed to take testimony as to step five (5). Where the Administrative Law Judge determines that the claimant has met his burden, she must then continue forward to step five (5) in the process;[238] thereafter affording counsel the opportunity of inquiry.

Where a medical witness has been deemed necessary to a determination of the case, such testimony should be taken by the Administrative Law Judge only after the claimant's case-in-chief. In other words, the role of the Administrative Law Judge should be limited, initially deferring to the claimant in a structured procedural setting, thereby preserving the perceived independence of the decision-maker.

---

236. *See* MASHAW, *supra* note 222, at 71-74, for a discussion of the pros and cons of the "open practice" which now pervades the administrative hearing. According to the Office of the Chief Administrative Law Judge, roughly 50% of administrative law judges initiate the inquiry; while the other half defers initially to counsel. The Honorable Charles Boyer, *Address at the National Workshop for U.S. Magistrate Judges* (July 1997).

237. Where the claimant is unrepresented, and chooses to proceed without representation, a modified form of the following procedure would be necessary, requiring initial judicial inquiry.

238. Generally, this includes the taking of testimony from a vocational expert.

In *Figure Four* the roles of counsel and decision-maker are shown as overlapping—each co-extensive with the other in terms of jurisprudential activity. The proposed procedural limits result in the following diagrammatic changes illustrated in *Figure Six*:

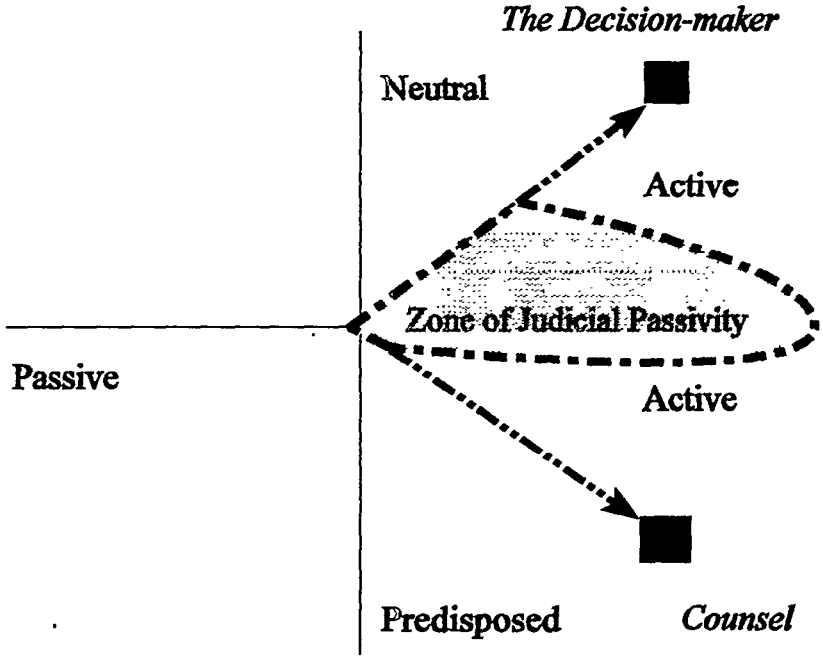

Figure Six•The Hybrid Model
Procedurally Limited Judicial Activity

There is now an area circumscribed between the activity of the judge and that of the lawyer, a so-called *Zone of Judicial Passivity*. This zone represents an area of inquiry foreclosed to the judge, provided she finds that claimant has met her burden with respect to those areas. It may be that certain areas are yet open to inquiry, while others are not.[239] Expressed differently, counsel has the opportunity to prove his client's case free from inquiry by the judge, provided the judge is required to determine, as a matter of law, that counsel has met his burden with respect to one or more steps in the sequential evaluation process.

239. Pragmatically, such a demarcation may result in the submission by counsel of a proposed stipulation, by which the Administrative Law Judge may accept all or some of the first four (4) steps as satisfied, thereby limiting the inquiry to the remaining areas.

Figure Seven is equally illustrative. As shown, the judge's *Zone of Passivity* is co-extensive with the lawyer's active inquiry. Only when counsel fails to meet his burden, may the judge extend her activity to this area. At present, both participants have the capacity to inquire as to all areas; such that there is no enforced passivity on the part of the judge.

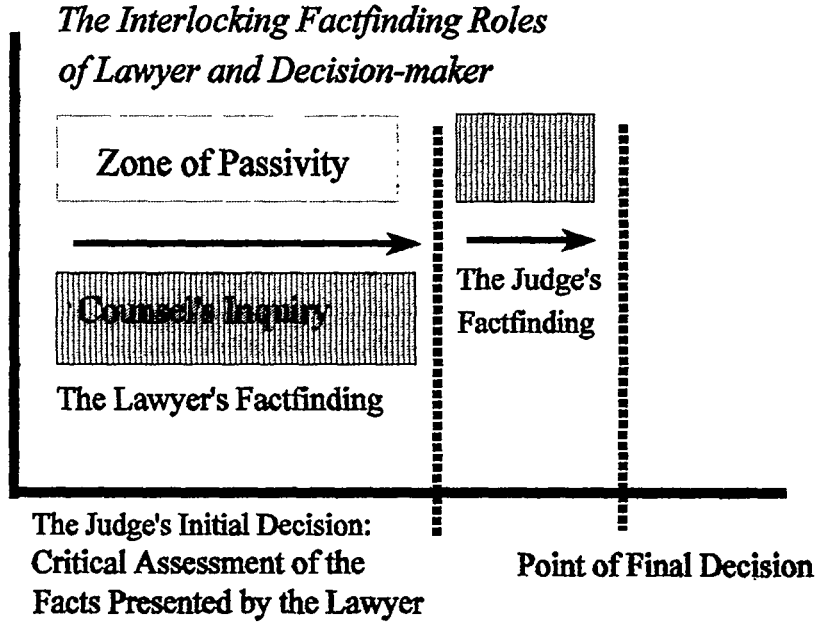

Figure Seven

Enforced passivity jurisprudentially distances the judge and sets her apart from counsels. He is thereby returned to her traditional adversarial role of determining the sufficiency of the evidence before her; and only if she finds it insufficient, may she then inquire.

Not only must procedural rules exist to limit the activity of the judge, but substantive rules are necessary to ensure a complete record. Two basic rules, having the effect of implementing mandatory disclosure in the administrative system are important. Akin to the new Rule 26(a) of the Federal Rules of Civil Procedure, the concept of mandatory disclosure, as in the federal courts, ensures a system of open discovery. Careful reading of the *Comments to the Federal Rules of Civil Procedure* reveals a commitment to reduce "paper disputes," or the "Paper War" of pre-trial discovery. These "paper disputes" have resulted in escalation of costs and delay in resolution of disputes. While such disputes are not part of the administrative system, an equivalent problem exists in a single party dispute resolution system. *How does the decision-maker assure herself that she has all the records before her when deciding the case, absent the pres-*

sure of a two party contest, in which each seeks to know the other's case before trial?

Grappling with the question of the totality of the record results, most notably, in delay. The *Administrative Record* itself may reveal a simple gap in records, such that it ends in 1996 while the hearing is held in 1997. Or, a more subtle omission may occur. It may be that the lawyer, lacking the check-and-balance of an opposing party, will fail to include all the evidentiary records, either assuming them to be legally irrelevant; or, perhaps, adversarially, including only those which most favorably impact his client's case.[240]

Delay occurs when the judge, in questioning the claimant, discovers the existence of other medical records not otherwise available at the time of the hearing. To make an effective decision, she may, after the hearing has begun, require the submission of additional records, particularly if they directly bear upon the issue presented. Note, however that the evidentiary record remains open even after the Administrative Law Judge's decision. Thus, the record *per se*, is never closed, with potential for evidentiary submissions on appeal.[241] Such procedures cause delay, essentially equivalent to the delay in an adversarial system victimized by the so-called "Paper War" of pre-trial discovery.

Implementation of substantive rules can potentially reduce such delay:

1. *The Lawyer.*

   The lawyer is required to produce all evidence bearing upon the question before the decision maker. A necessary corollary is the requirement that he diligently endeavor to discover all relevant evidence.

2. *The Decision Maker.*

   The decision maker must embrace a measure of passivity as to those issues proved by claimant, and in so determining, must fully consider and give equal weight to all relevant evidence then before her.[242]

A corollary third rule is the requirement that the *Administrative Record* be closed to further adversial activity prior to appeal. As noted, claimant may

240. Anecdotally, lawyers have stated that in many cases they will *not* produce evidence at lower level disability determinations, assuming that either it will not be considered; or, that it will be lost. They point to those occasions where they have produced such evidence, only to *not* find it part of the record when the case is appealed to the Administrative Law Judge. Similarly, many attorneys have stated that they often decline to produce evidence well in advance of a scheduled hearing for the same reasons. This results in evidence being produced at the hearing which, of course, means that the Administrative Law Judge has not had the opportunity for pre-hearing review of a complete record, resulting in further delay. These issues are not raised in a two party system, where *opposing counsel* seeks and is the recipient of "discovery;" and the production of evidence before the decision-maker generally occurs only at the time of trial.

241. *See* 20 C.F.R. § 404.976 (b)(2):

> If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights.

242. This is to ensure against a singular focus upon those facts discovered and presented by the decision-maker.

submit new evidence even through appeal to the Appeals Council. This creates potential for an incomplete record at trial. At no other point in Anglo-American jurisprudence is the moving party able to preserve a "right of ambush" on appeal, in effect, maintaining an open evidentiary door in the event of an adverse decision. A measure of passivity must be enforced on the moving party, limiting the record prior to a final decision.

3. The Record.

> *The record must be closed prior to issuance of a final decision by the Administrative Law Judge thereby enforcing a degree of passivity upon the lawyer consistent with appellate tenets of Anglo-American jurisprudence.*

V. CONCLUSION

The incorporation within the Social Security Administration's Office of Hearings and Appeals of the adversarial and inquisitorial systems of justice pose unique questions for those concerned with the jurisprudence of the resulting system. Where, as here, the hybrid brings together the active participant in the adversarial system (the advocate), with his counterpart in the inquisitorial system (the judge), and further limits the scope of inquiry in the form of a single party system, questions necessarily arise as to the jurisprudence of the system so created.

Is due process within such a system equivalent to that within the traditional adversarial system of justice?[243] In a single party system, as described, how does the decision-maker ensure she has a complete record on which to base a decision?[244] More important, how does the judge, in endeavoring to achieve a complete record through active inquiry avoid the *perception* of predisposition or lack of independence? Such questions are particularly cogent where, as here, a burden is placed upon the non-present party (here, the government) to show the existence of significant numbers of jobs within the national or regional economies before the judge can deny benefits. How does the judge fulfill her dual obligation to the claimant of independence, and of conducting a full and fair hearing, while at the same time soliciting evidence potentially detrimental to this same claimant? The question is not that such endeavor is *not* possible, for clearly it is—but rather whether careful thought needs be given the jurisprudential structure of the system at this stage in its evolutionary life?

This is particularly true given a system of single party, non-adversarial decision making which is then subject to ever-increasing appellate review by

243. "A claim of entitlement to social security benefits triggers due process protections . . . . There is a significant property interest in the fair adjudication of a claimant's eligibility to receive disability benefits." Rooney v. Shalala, 879 F.Supp. 252, 255 (E.D.N.Y. 1995) (citations omitted).

244. *See, e.g.*, Kendrick v. Shalala, 998 F.2d 455 (7th Cir. 1993) (acknowledging that the formulation of a "complete record" is subject to differing opinions).

traditional Anglo-American adversarial courts. It is entirely likely that appellate review by a judge steeped in the adversarial tradition, which necessarily regards the *passive jurist* as the normative standard, will unduly focus upon the conduct of the active judge, regarding the otherwise mandated activity as beyond the scope of the judge's authority. The court in *Kendrick v. Shalala*[245] succinctly expressed the issue:

> Administrative law judges, members of the Appeals Council, and three tiers of federal judicial officers (magistrate judges, district judges and circuit judges) bring different perspectives to the inquiry. Sequential review, with each tier able to reverse the prior one, means that to be safe the ALJ must develop the record as fully as the most demanding reviewer prefers. Because these reviewers are selected at random from a large pool, to be *really* safe the ALJ must please the most demanding federal judge in the jurisdiction. Yet this portends extended hearings and corresponding delay for the many claimants waiting for an ALJ to reach their case in a long queue. "Social Security disability cases . . . reveal a judiciary impaled on the horns of a now familiar dilemma. It can recognize the complexity and subtlety of the administrative system and exercise a restrained review having little or no statistical impact or precedential significance; or it can wade in with the tools at its disposal, producing sometimes unanticipated and negative dynamic effects on quality, sometimes formal but insubstantial obedience, and sometimes a simple transformation of administrative into judicial process."[246]

Adversarial courts sitting in review of those acting within the unique paradigm of the administrative judiciary may be tempted to judge too quickly, either attributing negative consequences to judicial activity, or, conversely, having accepted the "active" role of the administrative law judge, criticize unduly a perceived lack of sufficient activity.

> Judicial review of administrative decisions is deferential. A decision supported by substantial evidence must be enforced. When conducting trials in their own courtrooms, judges may indulge a preference for "more"—although most do not, recognizing that cumulative evidence rarely repays the costs of gathering and presenting it. When reviewing proceedings conducted by others, district judges must respect the authority of administrative officials to decide how much is enough.[247]

The unqiue jurisprudence of the single party, non-adversarial dispute resolution system demands a paradigm shift. An adversarial court, sitting in review of a non-adversarial system, is ultimately charged with review within the context of the decision made; not according to adversarial standards.

However, the Administrative Law Judge must also engage in a paradigm shift. How does the judge, trained and experienced in the adversarial system of justice, perceive her active role? How does she maintain the requisite jurisprudential distance necessary to independent decision making when required to

245. 998 F.2d 455 (7th Cir. 1993).
246. *Id.* at 457 (emphasis added) (citation omitted).
247. *Id.* at 458.

respond to an adversarial lawyer, unchecked by an opposing party? Is she likely to perceive herself as *required* to engage in a role which is somehow perceived as less independent than her adversarial colleague, as a means of ensuring fairness—that is, in an attempt to balance the activity of the lawyer? Is the judge likely to develop an unintended perception of herself which *is* adversarial as regards the claimant? More importantly, is she likely, as Professor Fuller so eloquently suggests,[248] to unintentionally prejudge the case, selecting only those facts which counter-balance the lawyer's presentation, again, in the interest of perceived fairness?

No ready answers exist.

A simple solution to both concerns rests in returning the system to its adversarial roots; that is, in returning the judge to her jurisprudentially passive role, removing the burden of *de facto* presentation of evidence on behalf of a non-present party. Alternately, a measure of enforced passivity can be grafted onto the judge's role, foreclosing active examination upon a legal determination of evidentiary sufficiency, to the effect that claimant has or has not met the burden required of him in steps 1 through 4 of the mandated sequential evaluation. This, together with mandatory disclosure and closure of the evidentiary record at trial, creates a significant degree of jurisprudential distance. Such measures reduce the potential for cognitive dissonance within the decision-maker, and increase the perception of a fair proceeding consistent with "traditional notions of fair play and substantial justice."[249]

Ultimately, the melding of the adversarial and inquisitorial systems raises issues which are unique within Anglo-American jurisprudence. Eliminating the presence of one party from the system seems to require an active judge. Yet, as shown, that solution heralds its own unique concerns.

The size and scope of the disability adjudicatory system cannot be ignored. Its workings affect hundreds of thousands of persons yearly, each of whom are entitled to due process of law in the highest traditions of American jurisprudence. The significance of the issues raised is self-evident; hence, deserving of careful thought.

Too much is at stake for too many, to do otherwise.

248. *See* Fuller, *supra* note 66, at 43.

249. *See* International Shoe, Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).