

**BACKGROUND REPORT FOR RECOMMENDATION 86-7**

**MODEL FOR CASE MANAGEMENT: THE GRANT APPEALS BOARD**

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**Report to the Administrative Conference of the United States**

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## I. RESEARCH GOALS

This project was inspired by a trio of articles which came to my attention in 1985. In that year I was ending two decades of teaching and practicing civil and administrative litigation. Over this span I had become increasingly disillusioned about the condition of our litigation systems. For me the "modern" Federal Rules of Civil Procedure had been amended into a hopeless and often meaningless series of pratfalls and pitfalls totally divorced from their opening hope, by now ironic, for the "just, speedy and inexpensive determination of every action." [1]. Indeed, this opening rule is one of the very few which by 1985 had not been amended into frustrating complexity.

I had come over the years to think of the Federal Rules as a productive fee factory for downtown lawyers and an esoteric playground for government and public interest lawyers. My extended travels in federal case law [2] strongly confirmed my sad impression that the Federal Rules, and their technical kin like standing, mootness and ripeness, were advancing the cause of gamesmanship with little public benefit besides challenging the intellects of some federal court lawyers and judges. The event of the states' unreflective adoption of the Federal Rules and of their by now biennial amendments exacerbated my concern [3]. No amount of "happy talk" from rule reformers [4] or the bench [5] could allay my concerns. My perception of reality had become quite different from theirs.

The domain of administrative procedure hardly offered a comforting refuge. The Administrative Procedure Act of 1946 is as unfathomable today as four decades ago, perhaps even more so given the innumerable judicial glosses [6]. Any one with a contrary view is cordially invited to teach my students, in one class period, the meaning and application of any one of the following, which are merely illustrative: "rule"; "substantial evidence"; "administrative record"; "ex parte contact"; or "clear error of judgment."

To be sure, thoughtful people were aware of the widespread and deep deficiencies in our procedural systems and began devising and testing alternatives long ago. Two of my mentors at Columbia Law School, Professors Maurice Rosenberg [7] and Walter Gellhorn [8], were at the forefront of reform efforts. Professor Mashaw offered a new, management-oriented view of adjudicatory "fairness" for the enormous administrative task of processing social welfare entitlements [9]. But those efforts, opposed by the natural conservatism and ingrained practices of bench and bar, had led to no more than tinkering [10] and substantial procedural reform seemed to be dying in the last ten years, possibly another victim of the national "status quo" thinking which swept our country after Watergate and Vietnam.

In 1985 Judge Jon Newman of the Second Circuit chose to analyze our civil litigation system in the Cardozo lecture he delivered to the Bar of the City of New York. In reading the

version printed in the Yale Law Journal[11] I could hardly believe my eyes. Here they were, validated, the critiques, sometimes outbursts, I had been visiting upon my students for years! At last someone from above was yanking at the blindfolds of Lady Justice.

I felt similar exhilaration when reading President Bok's piece which was published earlier, though it was not widely publicized until 1985, and may have inspired Judge Newman [12]. Bok's analysis of the defects in our legal system was brilliant.. But his piece did not have the focus and analytic power of Newman's. Bok gave me faint pulse but Newman set my still heart pounding.

Fittingly, the third inspiration came from another once-upon-a-time mentor at Columbia Law School: Professor Marvin Frankel. Always a scholar, he could not step from the trial bench into private practice without sharing his experiences with the legal world [13]. His explosive critique of our adversarial system, to him more aimed at hiding than revealing truth, further validated my thinking about the fundamental flaws in our adjudicatory way of life.

My opportunities to contribute to this marvelous movement were narrow, though my enthusiasm and energy boundless. I could join the exploding "Alternatives" movement by teaching Alternative Dispute Resolution ("ADR"), which I started to do in the spring of 1986. I could also take some information from my arcane specialty -- federal grant law -- and put it to use. While constructing the "law of federal grants," I came into close contact with an administrative court in the U.S. Department of Health and Human Services ("DHHS," "HHS," or "Department") called the Grant Appeals Board ("GAB" or "Board"). This Board was deciding cases, ranging in size from 29 dollars to over one hundred million dollars, with what seemed to me remarkable speed and accuracy. In 1981 the Board adopted a set of procedures aimed at processing cases in an efficient yet fair way. Here, perhaps, was an object of study, in a field where I possessed some expertise, which might offer valuable insights and information for the new wave of reformers.

Judge Newman and others had called for empirical studies[14]. While the Board was not an experiment but, rather, an ongoing adjudicatory system, and while scientific controls were absent [15], there had to be ways of gathering empirical data from Board cases which would enable me to make a systematic, fact-based appraisal whether the expectations underlying the 1981 procedural reform were being realized. With great help from the Board's leadership and from empiricists around the country, I designed a fact-based study of the Board's effectiveness and efficiency. Appendix B describes our project methodology.

Before plunging into the results of this study, I should try to place it in a broader context. Where does it fit amidst the court improvement efforts sweeping the country from coast to coast?

In general, the Board is an example of an adjudicatory system [16]. At the outset of each case, the Board offers litigants a mediation alternative. Once the parties reject the mediation alternative, as they normally do [17], the dispute gets resolved in the traditional adjudicatory manner. Facts are found in "on the record" proceedings, law is ascertained through briefs and argument, and a written, reasoned decision is rendered by a panel of three Board judges ("Member"). Relief is spelled "B O A R D" for grantees suffering financial disallowances or penalties; hence, the system does not have the voluntary choice characteristics of negotiation, arbitration and mediation. The Board is an imposed third-party intervenor with exclusive decisional power; consequently, the process differs from mediation and arbitration where parties pick the third person facilitator and decisionmaker, respectively. Nor do parties choose their own rules for deciding a grant dispute at GAB, or determine whether the Board decision will be final, which further distinguishes the Board's mode from arbitration, negotiation, mediation, or combinations thereof.

It is now clear that the Board has the classic characteristics of a court. And despite its "appeal," it is essentially a trial court which creates a factual record and decides thereon, the one exception being when it reviews small cases coming from other boards in HHS on a clearly erroneous standard [18]. GAB applies federal statutes, regulations and case law to disputed facts ascertained in a formal proceeding governed by a Board-fixed set of procedures. It has been vested with the exclusive power to make final decisions, reasoned in the judicial style, in certain categories of disputes arising under financial agreements between the Department and its customers.

Where the Board does distinguish itself from the typical court or administrative board is in the planned use of special procedures aimed at enhancing both efficiency and accuracy in the decisional process. These special procedures will be fully described and measured in later pages. For now it is enough to know that the Board uses a simplified process falling somewhere between the informality of small claims courts [19] and the formality of federal and state court practice. Its action-forcing deadlines, combined with firm judges firmly managed, keep cases moving swiftly towards resolution, although flexibility is retained to afford the process necessary for the correct decision of complex cases. While it will hear witnesses when necessary, the Board emphasizes documentary evidence over live witnesses, which partakes of the growing administrative practice of substituting depositions and affidavits for oral testimony whenever possible, an idea which has been proposed for mid-sized civil claims [20]. In its promptness of adjudication and simplicity of process the Board's dispute resolution strongly resembles court-ordered arbitration [21], but its tailoring of process to meet the varying complexity and stakes of its caseload weakens this comparison. Because the Board judges the distribution between public and quasi-public bodies of "public"

dollars, one might be tempted to see in it a form of ombudsman [22]. But while the ombudsman merely recommends, the Board decides and, interestingly, the disputants before the Board fight as fiercely for "their" dollars as any corporate counsel in federal court. Finally, in the tight management of a case by the board member chosen to preside ("Presiding Member"), the Board resembles federal district judges and magistrates effectively using their pre-trial management powers under Federal Rule of Civil Procedure 16. This is the perspective we have chosen to emphasize and elucidate herein.

Judge Newman has called for empirical studies of fundamental ways to improve the administration of justice. This project is a small, humble answer to that call. In the tiny Grant Appeals Board, buried somewhere within a colossus Department and but a speck in America's justice machinery, may be found clues to help in the refashioning of our civil justice system.

## II. DELAY AND INACCESSIBILITY: PROBLEMS OF AMERICAN CIVIL LITIGATION

Professor Geoffrey Hazard has constructed an ingenious argument which concludes, most surprisingly, that our American civil litigation system "can be considered very efficient." [23] That certainly is important news for court watchers. Given the large and ever-increasing volume of outcries from bench, bar, and the academy about the troubles of our court systems [24], Professor Hazard's is a lonely voice.

A tricky argument takes him to his surprising conclusion. First, he sees American civil litigation to be mostly "compulsory bargaining," which he characterizes as a positive implementation of the American value of individual autonomy and the American anti-authority ethos [25]. The problem is, of course, that court steps bargaining is a forced regimen, forced by the costs, delays, and uncertainties of the dreaded trial list. Where is free choice in any of this? [26] Are these legitimate outcomes? [27] And is there "efficiency" in a system where, after interminable positioning, posturing, threatening, and "discovering," the lawyers settle in a rush before entering the courtroom [28]?

Second, for those cases which reach bargaining impasse, Professor Hazard sees the American ideal of the rule of law and the achievement of justice being implemented inside the courtroom [29]. But which courtrooms? Certainly not those where most private citizens in America intersect with legal machinery. Not in major urban areas where the quest for justice is quixotic and often terrifying [30].

The flaws in Professor Hazard's reasoning are illustrated by the following. We could achieve the same result by imposing a high, arbitrary courthouse fee for the privilege of having an officer, vested with the court's authority, flip a coin and declare a winner. That too would force private bargaining and produce the same psychic satisfactions [31] currently offered by American civil courts, without the agonizing tribulations of trial. What is needed, of course, is a system of civil justice where, when invoked, the rule of law truly reigns and where parties are glad to enter as a true alternative to bargaining, mediation, arbitration, self-help, or claim abandonment.

Derisively labeling the literature concerning court overutilization as "hyperlexology," [32] and challenging the data of the hyperlexologists as "naive speculation and undocumented assertion," [33], Professor Marc Galanter challenges the idea that there is too much law and litigation, the value judgment underlying hyperlexology ( "floods," "explosions," etc.). Yet it is important to understand that his point is not that our court systems are healthy; indeed, he says nothing about that. Rather, his data indicate that while litigation rates have not increased appreciably over time, the type of litigation has changed [34], bringing, in combination

with legal developments, an increase in pre-trial, trial, and post-trial complexity [35]. Professor Galanter sees the types of litigation and the changes in substantive and procedural law for judging and processing them as simply reflecting the new American community -- "multiple, partial, ... emergent ... urban." [36]

Thus, there is congruence between Galanter's data and the crescendo of voices warning of a "crisis in the courts." Most of the "crisis" literature is based upon personal experience. But what the writers may lack in empiricism they fulfill with reputation and experience. Accounts of unnecessary delays, costs, and access barriers, and of a decreasing quality of justice, have been voiced by renowned federal judges at all levels. Back in the Sputnik era Chief Justice Warren spoke of the "interminable" and "unjustifiable" delays in our courts [37]. Years later Chief Justice Burger characterized civil judgments, even when acceptable in result, as being "drained of much of [their] value because of the time lapse, the expense, and the emotional stress." [38]. In what will undoubtedly be an important platform in the legal reform agenda for the coming decades, Judge Newman of the Second Circuit used the prestigious Cardozo lectures to call for a fundamental "rethinking" of the American civil litigation process [39]. He scolded the reformers for "bemoan[ing] the delays and costs of courtroom encounters while working mightily to refine the system in ways that make it even slower and more expensive." [40]. According to Judge Newman, we must abandon our customized procedural systems aimed at achieving an unattainable (because unknowable) fairness and move toward some type of efficient mass processing which will attain a higher quantity of justice from a global perspective.

Predictably, the strongest laments have come from the trenches: the trial bench. Judge Marvin Frankel stepped away from the federal bench, after a decade of trying cases, with many doubts about the validity of adversary procedures which often seemed to shroud rather than reveal truth: "But the play alone cannot be sufficient when the question is the doing of justice in real life." [41]. Other respected federal district judges have noted the adverse impact which lawyer control of litigation -- the hallmark of adversary systems -- has, not only on achieving correct outcomes, but also on the achievement of efficiency in civil court [42]. The state trial bar has spoken too. In a moving account of the systemic injustices she observed in her years as a trial judge in the Philadelphia Court of Common Pleas, Judge Lois Forer sadly concluded that the key to "justice" was money. Only the rich could afford a decent trial of their cause. [43]

National attention on the "crisis in the courts" theme was achieved by a widely publicized writing from the academy. The prestige of the university was thrown into the fray when the President of Harvard University, formerly dean of their law school, attacked the fundamental flaws in our legal system which looked "grossly inequitable and inefficient" in offering "far too

much law for those who can afford it and far too little for those who cannot." [44].

The experiential data of the judges, lawyers, and academics are being broadened now by empirical studies conducted by organizations like the National Center for State Courts, the Federal Judicial Center, and the Rand Institute for Civil Justice. Thus far, this research has focused primarily on the problems of delay and congestion [45]. We have learned for sure that there are many very slow and congested courts and that we are, indeed, in a worse position than in the past. This research is beginning to create necessary definitions, to understand the phenomena of court process, and to identify the determinants of delay and congestion. For example, research has uncovered the powerful role played by bench and bar attitudes -- the "local legal culture"--in producing delay and in resisting change [46]. It has taught us that action-forcing, enforced procedures have had positive results in some courts [47], that the individual calendar system offers considerably faster paced litigation than the master calendar system [48], and that the desire of some trial judges to advance the law through scholarly opinion-writing has conflicted with their duty to decide cases promptly [49]. This research is also casting doubt on some traditional explanations of court delay, such as court size [50] and caseload [51], as well as on the effectiveness of traditional cures, like settlement-prodding [52], adding judges [53], and restricting continuances [54].

## III. CASE MANAGEMENT AS A SOLUTION

Perhaps three decades ago a "relatively new concept" [55] emerged as a means of unclogging courts and speeding up civil litigation: aggressive case management by judges. Judge Kaufman of the Second Circuit, then a trial judge on the Southern District of New York, offered the following rationale for this departure from the traditional view leaving case management in the hands of the lawyers:

Primarily we seek means of ensuring justice and it has been the conclusion of all who have studied the problem that the best means to this end is an able and active judiciary. Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. ...[J]udicial intervention into the pre-trial preparatory procedures is built into the rules themselves and as such is now a recognized and accepted part of our legal traditions. Thus our "adversary system" is not pure adversity. To call it an "adversary system" alone is to misstate. It is an "adversary judicial system"; the Judge too has a function.[56]

Judge Kaufman perceived an "inexorable progress towards greater and greater judicial supervision" as the solution to the "crush" of litigation [57].

The federal bench produced many converts and zealots [58]. While new management techniques varied in details from courthouse to courthouse, an interventionist custom began to build up in certain chambers [59]. Judges started intervening of their own volition as managers of cases assigned to them under the federal "individual calendar system." [60]. They intervened early in the litigation and periodically thereafter, either in person or, increasingly, by means of telephone conferences [61]. They informed themselves about a case by studying its file and by questioning the lawyers. Their goal was to interject their informed judgment and experience to move a case along as quickly as was consistent with justice. They intervened with the following objectives in mind, each of which was backed, actually or potentially, with rulings: forcing early attorney preparation [62]; identifying areas of factual and legal agreement; sharpening of issues and elimination of doubtful claims and defenses; curtailment of unnecessary discovery or unreasonable blocking of legitimate discovery; discouraging futile motions and focusing legitimate ones; encouraging and guiding settlement discussions; and careful preparation for trial of those disputes which reached negotiation impasse.

The above is not to imply that strong judicial intervention is the invariable rule in federal court, only that some pioneering judges have seized upon this alternative as their way of coping, if not with the "crisis in the courts," at least with the one in their own courtrooms. Interviews with federal judges

indicated strong disagreements about the degree to which it was appropriate for judges to manage a case [63]. For every activist, interventionist district judge, one could find another who preferred the patient germination of a case at the lawyers' discretion, or who perceived the attorneys as knowing far better than the judge how to try "their" case, or who thought cases, like wine, had to mature to settlement, or who thought pushy judges had a negative effect on settlement possibilities, or who thought his job was simply to try cases. These differing views were reflected in empirical studies which showed a wide variation among federal districts in case processing time and productivity. [64]

It is also important to note that active judicial management, either in person or through clerks and magistrates, must be combined with automatic, action-forcing procedures for optimum management results. It is intervention in the entire civil docket in a systematic way which decongests and speeds case flow, not impromptu management. Indeed, the Federal Judicial Center has concluded that it is the automatic action-forcing procedures which are the key producers of efficiency [65]. On the other hand, Judge Rubin believes that courts cannot rely on procedures alone. He states:

Some highly productive courts set time schedules without conferences in each case. However, the conference procedure is more flexible, permits greater allowance for the needs of counsel in each case and requires little more court time [66].

#### IV. THE GRANT APPEALS BOARD

##### A. THE NATURE OF GRANT DISPUTES

We have warned elsewhere that the legal nature of the federal "grant" or "grant-in-aid" defies easy characterization, whether as a contract, as a trust, as a partnership, or as a gift [67]. For the purpose of identifying the nature of legal disputes which arise under grants, however, the most appropriate analogy is the enforceable agreement. The United States offers financial aid for defined purposes and under detailed conditions to states, local governments, universities, and non-profit organizations. The ultimate goal of grants is to support or stimulate these subnational and quasi-public units in the provision of a wide range of public services. In formally accepting such financial aid the recipient becomes a "grantee" and commits itself to honor all conditions of the grant, while the United States becomes obliged to pay the amounts promised in the way promised [68].

The United States Supreme Court has recently emphasized the quid pro quo nature of the federal grant in holding that only its direct recipient can normally be held responsible to honor the conditions of aid and not those who might indirectly benefit from an aided project [69]. The high court earlier had announced a doctrine of strict construction, against the United States, of the statutory terms of aid [70]. The Administrative Conference of

the United States concurs in emphasizing the contractual nature of grants. In Recommendation 82-2, "Resolving Disputes Under Federal Grant Programs," the Conference asserted that "grants represent an understanding on the part of the federal government and the grantee that is in the nature of a contractual commitment." [71]

Most federal grants carry with them a vast array of "strings": conditions which must be met by the grantee. In another work we have characterized these conditions either as "programmatic," or "primary cross-cut," or "secondary cross-cut." [72]. We shall offer brief explanations of these technicalities because such definitions may help us understand the types of disputes which arise under grants and make their way to the Grant Appeals Board.

Each federal "program" has its unique set of rules defining how the particular aid may be spent. These are "program specific" or, more concisely, "programmatic" conditions. All grants but revenue-sharing are "categorical" -- available only for defined types of programs and projects -- and rules are needed to establish the parameters of the categories. This is accomplished by statements of purpose in grant statutes and regulations along with detailed specifications of ways in which the money may be spent.

Typically, the rules will define the categories of persons who may be helped by the program receiving federal aid. These will be the "eligible beneficiaries." For example, the United States asserted without success in a recent case at the Board that Louisiana had improperly used federal funds by serving 931 children in foster care who, the federal government claimed, were ineligible because OHDS had not given prior or simultaneous authorization of such care. [73] Grant rules will further specify the types of services which may be provided to the beneficiaries. These will be the "eligible services." To illustrate, does a child support program authorize the expense of sending sheriffs to bring non-supporting parents to court? The Board thought not in a case whose reasoning we have criticized [74]. Similarly, grant rules will define the operational activities which are supportable with federal aid. As an illustration, the United States would pay for efforts to collect money from third parties liable to provide for people who were medicaid-supported, but not for people who received medical care in programs wholly funded by the state. [75]

Dozens of additional programmatic conditions will serve to establish a program operation which accomplishes the objectives of the particular grant program. States and other recipients, for example, usually must have a "state plan" which is sometimes a boilerplate recital of assurance of compliance with assorted program conditions. One of these assurances might involve the development of a case plan for each beneficiary and periodic review of the individual's progress. Auditors would then use sampling techniques to determine the grantee's rate of

compliance in the thousands of individual cases on its roles. This type of condition was involved in GAB Decision No. 706 in which the Board reviewed several specific cases in the sample and ruled that the State of Maryland had satisfied program conditions in three of eight contested cases. [76]

A "primary cross-cut" is a type of grant condition which serves to achieve a program's primary objective but which is found in many other programs. It is a "cross cut" because the condition cuts across many programs.

The financial rules attending federal grants are good examples of primary cross-cuts. One is the condition that the grantee share with the United States the financial burden of running the program. This is the "matching" rule, expressed in many programs as a percentage of "Federal financial participation" ("FFP"). Congress often uses variable matching rates to induce grantees toward certain activities by offering a higher FFP rate. States will then claim reimbursement under the higher rate for activities which are close to the line, leading to disputes which end up at the Grant Appeals Board. Some cases will illustrate. In one case Congress reimbursed ordinary administrative costs in the medicaid program at a 50% rate but then tried to get states to adopt computerized management systems by offering to pay three-fourths of the cost "attributable to the operation of" a Medicaid Management Information System. HCFA challenged New Jersey's allocation of certain indirect costs to MMIS and the state brought a winning appeal to the Board. [77] In a second case, also involving the medicaid program, Congress sought to induce "skilled professional medical personnel" into the program's management by increasing matching for their salaries from 50% to 75%. New York claimed the higher reimbursement rate for its health care fiscal analysts and auditors, who set compensation standards for medicaid providers, performed desk audits of claims, and did field investigations for rate appeals. The case was close, but the Board upheld HCFA's disallowance. [78] A third case involved a question "purely ... of documentation": In how many of 66 cases the California Department of Health Services had proved that abortions were for family planning, as opposed to miscarriages and medical necessity, thereby qualifying for 90% instead of 50% federal reimbursement. [79]

Disputes over matching, like those above, require the Board to ascertain the types of activities performed by the grantee and the types of personnel performing them and then to determine whether such people and activities "fit" under the statutory reimbursement standards. This is a typical kind of Board adjudication, as are disputes about whether the grantee in fact incurred claimed expenses, about whether outlays were countable as matching, and about other such budget matters. A great number of cases before the Board involve, in whole or part, review of the grantee's documentation of claimed expenses to determine whether the grantee has met its burden of proving its right to reimbursement.

Another set of primary cross-cuts is the cost principles. These are vast, detailed, and complex accounting standards which probably produce more disputes which reach the Board than any other type of grant condition [80]. The cost principles are too technical to be reviewed here, but some simple examples might help the reader understand the nature of a "cost principle" and the types of disputes arising under them.

For an outlay to be federally compensated, the grantee must demonstrate not only that it was actually made [81], but also that it helped achieve the purposes of the grant-aided program. In the language of cost accounting, the expense must be "allocable" to the program. Many cases at the Board involve fights about whether or not particular outlays carried out a program's objective. A clear example of an impermissible use is where a grantee "loaned" part of its Head Start grant funds to its other programs. [82]

Over the years the United States has developed dozens of detailed rules of "allowability" for categories of costs. Disputes involving these "selected items of cost" frequently make their way to the Board. [83]

Often the cost principle involved is whether a grantee's outlay was reasonable in amount. A humorous instance involved the purchase of 620 trash receptacles for \$527 each by the Head Start Program in Puerto Rico, with no demonstration of what was wrong with the \$55 model [84]. A dramatic dispute involving the reasonableness of cost arose from New York's retroactive adjustment of the fee schedule for certain medicaid providers. The state reexamined its reimbursement levels for 1974-1978, determined they were below true costs, recalculated them, and claimed \$123 million in additional federal financial participation for the period. The HHS Grant Appeals Board rejected the argument of the United States that the original fee schedules were nonadjustable. Assuming that the final costs were reasonable, it held that the relevant statutes and regulations did not prevent a retroactive fee schedule adjustment. [85]

Should an aided program have certain income or rebates, such as tax refunds [86] or federal overpayments [87] or interest on undistributed collections [88], the question becomes one of allocating "credits" between the financial partners. Similarly, interest earned on advanced grant funds must normally be returned to the United States, except if the grantee is a state. This rule has been the subject of a number of disallowances appealed to the Board. [89]

GAB also has jurisdiction over indirect cost disputes. Most grantees are now able to develop and negotiate with the United States a "cost allocation plan." This is a master plan for the measurement of indirect costs and their distribution among different programs run by the grantee. When the "cognizant" federal agency disagrees with elements of a cost plan, the

dispute is properly brought to the Board. [90]

The third class of program conditions is the "secondary cross cut." These are grant rules which are usually attached to all or many grant programs and which have ends in themselves, ends which are sometimes in conflict with a program's primary purposes. Examples would be the nondiscrimination rules which cross-cutting statutes tag onto all "federal financial assistance." These prohibit discrimination in aided programs on the basis of race[91], handicap[92], sex[93], or age[94]. The Board does not enforce such secondary cross-cuts; jurisdiction lies in other offices such as the Office of Civil Rights in the various departments.

The Agency decision which will typically come to the Board is a fiscal disallowance.[95] An audit will have revealed, in the Agency's eyes, "unallowable" expenditures claimed by the grantee and reimbursed by the United States. The government will deduct the sum from the grantee's next payment or, if no future grants are in sight, demand repayment. The fiscal disallowance is usually finalized at the regional level after negotiations with the grantee. Regional directors have discretion whether to convert audit recommendations into fiscal disallowances, although they are under pressure from the Office of Management and Budget and the Comptroller General to recover misspent grant funds [96] and Congress has begun to withdraw such discretion by imposing mandatory fiscal penalties for certain grantee noncompliances.[97] The converse of a penalty is an "incentive" payment which Congress occasionally offers to lure grantees into certain activities. [98] Of course, withdrawal of an "incentive" payment when a state is found to have violated the incentive's conditions is functionally equivalent to a "penalty" or "disallowance."

The two remaining fiscal sanctions for violation of grant conditions are termination of the grant or voiding it. Termination may follow an Agency finding of substantial noncompliance [99], and a voiding may occur when the Agency discovers material misrepresentation in getting the grant. We found only three termination cases and one voiding action in our sample of 274 cases.

In summary, the decision which reaches the Board is normally a fiscal sanction, whether a disallowance, a penalty, a recoupment for grant ineligibility, a termination for noncompliance, a withdrawal of an incentive payment, or a voiding for misrepresentation. There will be a precise amount either to be repaid by the grantee or to be withheld from future allotments. Sometimes the Agency will lump together several fiscal sanctions, as when several distinct disallowances are recommended in a periodic audit. The questions before the Board involve reconstructing what the appellant-grantee did with grant funds, using documentation produced in the normal course of grant administration sometimes supplemented by testimony of program officials. After determining the grantee's conduct, the

Board judges whether such was authorized and reimburseable under relevant grant norms and, if not, whether the fiscal sanction imposed was correct in amount.

The dispute reaches the Board in a partially crystallized state. Typically, a regular [100] or special [101] audit will produce a report (and background documents) recommending certain fiscal action. After discussing the problem with the grantee and giving it an opportunity to submit rebuttal documentation, the regional director determines which disallowances or other adverse action he will take as the final agency decision. Important to our study is an understanding that grant disputes do not arrive at the Board in a raw, undeveloped state but, on the contrary, have already been processed for months, sometimes years, at the Agency level. While the extent to which grantees have had an opportunity to contest at the regional level will vary from case to case, it is safe to say that the grantee will have had some opportunities to be heard at that level before appealing to the Board.

## B. ROLE OF GRANT APPEALS BOARD

## Origin of Board

The Grant Appeals Board was created in the Office of the Secretary in 1973 [102], a year when the "E" still belonged to HEW [103] and when the vast outpouring of domestic assistance programs of the Great Society had reached its zenith [104]. Tens of thousands of small grants were being awarded annually at the discretion of agencies like the Office of Economic Opportunity, the National Science Foundation, the Manpower Administration in the Department of Labor, and the Law Enforcement Administration in Justice [105]. The undoubted queen of the discretionary grant was Health, Education, and Welfare. Through its Office of Education, HEW ran 29 distinct education programs; its Public Health Service awarded health research and training grants under 90 distinct statutory authorizations; and the Social and Rehabilitation Service operated 13 welfare related discretionary grant programs [106].

Grantees were pressing for a "greater measure of due process" [107] in the award and administration of these funds, and HEW responded by creating a mechanism in its highest office:

[A] Departmental Grant Appeals Board from which Grant Appeals Panels would be selected for the purpose of reviewing and providing hearings upon post-award disputes which may arise in the administration of certain grant programs by constituent agencies of the Department of Health, Education and Welfare. [108]

The goal was to provide "fair or impartial review or reconsideration" of disputes between grantees and officials administering the Department's grant funds. [109]

It was a tentative, modest first step. The Board's originators totally lacked "any feel for the prospective size and complexity of the Board's caseload." [110] Against this backdrop of uncertainty, the Board's subject matter jurisdiction, as well as its authority, was sharply limited at the outset. The Board was given power with respect to programs making "direct, discretionary project grants." These programs were large in number but small in dollar outlay. Any other type of program -- for example, a "state plan, formula program" [111]--had to be specially designated for Board jurisdiction by the Secretary and the head of the operating division.

Nor could the Board decide any dispute within the covered programs. For example, apart from the narrow category of noncompeting continuation awards, the Board could not, and still cannot, review the fundamental decisions whether to award a grant or how much to award. [112] The types of disputes which could be brought to the Board were:

1. noncompliance terminations of grants, in whole or

part;

2. disallowances based upon unallowable expenditure or inadequate documentation;
3. disapproval of a request to incur an expenditure [113];
4. voiding of a grant; [114]
5. decisions concerning indirect cost rates and certain other rate determinations. [115]

The power of the Board was limited in two additional ways. First, the Board's decisions were essentially advisory. If the head of the operating division ("Constituent Agency" or "Agency") was displeased with the result, he could reverse or modify it, though it was hoped that a "reasons requirement" [116] would curtail arbitrary action. [117] It also looked like the Secretary himself could reverse or modify the Board without offering any reasons. [118]

Second, the Board could not hold Department rules nor statutes to violate the Constitution. This was accomplished by a clause in the original Board charter which stated that "[t]he Panel shall be bound by all applicable laws and regulations." [119] This did not stop the Board, of course, from interpreting its way around possible conflicts. And it is still an open question, according to one Member, whether the Board may void a regulation in plain conflict with an applicable statute.

Neither the original charter nor the 1975 revision [120], which added "Subpart B --Practice and Procedure" -- contained much in the way of procedural innovation. On the contrary, the authors explicitly chose their model from the Federal Administrative Procedure Act of 1946:

This decision and review structure follows procedures customarily used by Federal agencies for review of hearing decisions under the Administrative Procedure Act and is designed to afford to aggrieved grantees maximum due process and to the heads of the constituent agencies the benefit of a full record before a final decision is made in disputes between grantees and employees or officers of the agency. [121]

The power of the panels to judge that no material facts were in dispute and to proceed thereafter by means of an informal conference [122] were already respected facets of the administrative process. [123]

#### Growth of the Board

Possibly the most significant event in the Board's history was the extension of its jurisdiction, starting in 1978, to

disallowances within formula grant programs. [124] Most of DHHS's large, state plan-formula programs are now included, medicaid and public assistance being the most significant.[125] This converted GAB into a major league player. From an anonymous board handling "nickle and dime" disputes, the Board began fielding multi-million dollar claims, many of which involved public law issues of great national importance. To the Board also came new players: the litigating offices of the great state health and welfare agencies like the Departments of Social Services of New York and California. Table 4A illustrates this caseload growth:

TABLE 4A: BOARD APPEALS AND WRITTEN DECISIONS: 1973-1985

<u>Year</u>	<u>No. Appeals*</u>	<u>Dollars Appealed</u>	<u>Written Decisions</u>
1973	15	\$ 286,839	20
1974	23	\$ 1,305,537	
1975	21	\$ 12,315,506	16
1976	19	\$ 484,911	15
1977	24	\$ 681,465	17
1978	163	\$ 69,742,235	84
1979	243	\$ 511,284	104
1980	189	\$ 918,667	109
1981	221	\$ not available	135
1982	254	\$ not available	127
1983	288	\$ not available	161
1984	257	\$ 569,667,443	150
1985	275	\$ 588,563,015	n/a

\* Slightly overstated because requests for reconsideration are docketed as separate appeals.

A second significant development was the vesting of final decisional authority in the Board in 1981. [126] This was probably more of a psychological than a substantive boost. No Board decision had ever been overturned by the head of a Constituent Agency or the Secretary between 1973 and 1981. [127] Still, the Departmental power had loomed above the Board, and litigators had the uneasy feeling that their winning advocacy could be obliterated by a stroke of the pen. [128]

The vesting of final decisional authority in the Board acquired even greater significance when the Southern District of New York held in 1980 that disallowance disputes had to be processed through the Board before being brought into federal court. [129] Thus, at the beginning of this decade not only was the Board "the only game in town," but it was also a game which had to be played! Before seeking judicial review in federal court under the Administrative Procedure Act, 5 U.S.C. §702, a DHHS grantee must first process its complaint through the Board.

## C. BOARD PROCEDURES

## Procedural Reform

The Board's "charter" was considerably revised in 1981 for the purpose of creating a modern procedural system [130]. The hope was to design a quick, fair, flexible, and easy-to-understand set of procedures. The drafters sought to imbue their procedures with the following attributes: a "fast" decision, measured against normal court or bureaucratic processing time; a "final" decision -- final at least at the agency level; an "expert" decision; a decision produced with less than ordinary cost and time consumption; decisions less likely to be litigated further -- meaning, presumably, high grantee satisfaction with the process and the results, regardless of outcome; a better administrative record for sound judicial action on review; a process resistant to the pressure of political intervention; and a process which offered a healthy forum to expose, analyze, and resolve specific grantor-grantee problems of a serious, recurring nature [131]. In the following paragraphs we outline the new procedures which were in fact adopted in 1981 and are currently in force.

## Regular Process

Three distinct methods of dispute resolution were instituted by the Board, which we can call "simple," "regular," and "complex," but most cases are assigned to the regular process. We shall describe the regular process in some detail, then compare and contrast the alternative procedures. Cases are channeled into expedited or regular process by the Presiding Member in the letter acknowledging the appeal. Parties occasionally try to convince the Board that their controversy deserves a higher level process, such as a formal evidentiary hearing, and have had some success.

Two factors, revealed on the face of the notice of appeal, determine the appropriate process: amount-in-controversy and fact or issue complexity. The Board retains flexibility to "enhance" its review by allowing oral hearings under special circumstances, and in our case sample exercised this option 17 times. On four occasions the Board rejected an appellant's claim that material facts could only be established by the witness examination, cross-examination and confrontation which a traditional trial format affords. While the Board vigorously pursues its goal of efficiency by officially posturing against requests for slower, more costly procedure, it in fact grants more complex process upon an appropriate showing.

All cases start with an appeal from an Agency decision. The Department has formalized by regulation the process its operating components use to notify and finalize their decisions in grant disputes [132]. Such official notice, a "final written decision" ("agency decision"), is to contain a complete statement of the background and basis of the decision, including references

to applicable laws, and enough information to enable the affected party and potential reviewers to understand the issues and the Agency position on them. This format was imposed as an important part of the 1981 procedural reform, and the Board has not hesitated to police this regulation by returning nonconforming notices to the Agency with instructions to cure the defects identified by the Board. These rules aim to impose more "discipline" on the operational arms of DHHS by requiring them to identify issues in dispute clearly, make sincere efforts to resolve them, and, in cases of impasse, create a document "containing a complete and concise factual and legal basis for the agency's action." [133] At a minimum such a decisional process would provide a firm foundation for an appeal, and it might even produce better decisions, thereby eliminating such appeals [134].

After receiving the agency decision, a grantee has 30 days to bring the dispute to GAB by means of a "notice of appeal" ("notice"). The Board has not issued a special form, but requires simply that the notice contain: a copy of the agency decision, an indication of the amount the grantee claims is in dispute, and a "brief statement of why the decision is wrong." The Board liberally allows appellants to correct defects in the notice, such as not including the agency decision, as long as the appeal appears to be timely. We found wide variety in the notices, from simple one paragraph pleas to 20 page technical legal arguments. A fair number of such notices are filed by non-attorneys who are not versed in standard legal formats.

Ten or fewer days later, the Board sends an acknowledgement of the appeal ("acknowledgement"). This, we shall see, is a surprisingly important event. In addition to their perfunctory tasks of sending appellant a copy of Board procedures, notifying the Agency ("respondent") of the dispute, offering the parties a mediator, and informing the parties of what's next -- usually the submission of a brief and appeal file by appellant -- acknowledgements often begin the case management process. In many instances the Presiding Member has before him or her, in the notice and agency decision, considerable information about the dispute. He or she can begin to identify the legal issues, see which facts are agreed to and which are in dispute, and sense the types of documentation which are likely to be available. A fair number of the Board controls we discuss in Section VI are interjected in the acknowledgement [135]. Here we also find the tentative assignment of a case to a procedural track.

In the regular process the next event in the preparatory phase of the case is the creation of an appeal file, with accompanying arguments. The Board perceives its "basic process" as "review of a written record (which both parties are given ample opportunity to develop) consisting of relevant documents and statements submitted by both parties." [136] Thirty days after the acknowledgement, appellant submits both its appellant's brief and an appeal file [137]. In practice, the appeal file is typically an appendix to the brief and is used as a source of

fact citations in the brief. The Agency then has 30 days to submit a respondent's brief and a supplemental appeal file [138], the latter usually being in the form of an appendix to the respondent's brief.

This is obviously an important case management phase. Here, not only do most material facts surface, but legal and fact issues begin to crystallize. Not surprisingly, the Presiding Member will often intercede with information demands. Parties will be instructed to answer, either in the appellant's reply or in special submissions, multiple questions to clarify their positions, as well as being pressured to make fact and legal admissions which seem reasonable from the face of the documents and arguments submitted [139]. It is important for the Board to have, at this phase, as complete a documentary file as possible. The Board recognized, while planning the procedural innovations in 1981, the central role to be played by the appeal file:

While in the past the accumulation of documents submitted to the board over time effectively became an appeal file, the procedures now would make it clear that there is a responsibility early in the process for both parties to properly organize and submit relevant documents, and that the appeal file is the documentary heart of the record reviewed by the Board [140].

Of the cases we studied, 140 reached the stage when an initial appeal file is submitted by appellants. Pages in these files totalled 12,326, for an average of 88 and a median of 51. In these 140 cases, either the Agency or the appellant, or both submitted supplemental documents for the appeal file 109 times. Such supplemental submissions totalled 10,609 pages, with an average of 97 pages and a median of 49. All together, 140 cases produced a total of 22,935 pages of documentary evidence, for an average per file of 164 pages.

Once briefs and documents are submitted and the Presiding Member's questions answered, many cases on the regular track are in fact ready for disposition. When the parties agree, the case is then decided on the written submissions -- either finally or semi-finally by means of an Order to Show Cause which gives the party targeted for defeat a last gasp argument [141]. According to one Member, the device of a show cause order or tentative decision is less frequently employed at present than in the early years under the new procedures. We counted 55 instances in our 1981-1985 sample of 274 cases [142].

When the "informal conference" ("conference") is the next stage of the preparatory process, the Presiding Member takes firm command [143]. The rules, indeed, plainly recognize this authoritative role: "The informal conference primarily involves questioning of the participants by a presiding Board member." [144] Typically, he or she issues a series of questions to be addressed seriatim by the parties, either by their lawyers or by their technical experts or by both [145]. When conducted in

person, these conferences resemble more a roundtable discussion than a trial. Their purposes are:

To give the parties an opportunity to make an oral presentation and the Board an opportunity to clarify issues and question both parties about matters which the Board may not yet fully understand from the record [146].

While appellant usually starts the response to each question and the Agency then talks, there are frequent interruptions by Board questions, comments, and clarifications. After formal responses to the planned inventory of queries, a free flow conversation takes place among all present, including individuals who are program experts. The Members call these people "participants" instead of "witnesses" because they provide information not related to disputed facts but rather background material which helps explain a party's position. Ever increasingly, the Board has come to rely upon audio-taped telephonic instead of in-person conferences [147]. We recorded whether conferences and hearings were conducted by telephone or in person and found an 80% use of the telephone. The conference call phone system simply substitutes for the table, the free-wheeling format being essentially the same.

The normal case then moves directly to decision. The Presiding Member may ask for proposed findings and conclusions [148], but we noted no instances of this in the case files. More typically, the Board will send a "tentative decision" to the parties for their comments. Also, an occasional post-conference query was posed to one or both parties when a review of the conference transcript [149] revealed a fact lacuna or legal ambiguity.

#### Simple Process

For small stakes cases, \$25,000 or less, an even simpler, faster process exists. If an HHS Agency has already conducted a formal review process by a board or other relatively independent reviewing authority, which resulted in an on-the-record decision, this record is forwarded to the Board for what is, essentially, appellate review under a "clearly erroneous" standard. After receiving the acknowledgement, the Agency sends the Board the record below, the appellant submits a statement why the decision below was clearly erroneous, and the Agency may, if it wishes, submit a statement defending the decision below. These submissions are all to be made within 30 days of the acknowledgement. These cases are, therefore, prepared for decision within 40 days of the notice of appeal, unless the Board exercises its discretion to "allow or require the parties to present further arguments or information." [150] One Member said in an interview that when she sees that new matters are raised in the notice of appeal, she will require the Agency to respond to them, thereby adding an unprogrammed step to the process.

The other category of simple process is comprised of cases worth \$25,000 or less which have not had a formal [151] prior review. In these cases each party has 30 days from the acknowledgement to submit short arguments -- ten pages or less -- and relevant background documents. Each party then gets to respond orally to the other's submission in a telephone conference arranged by the Presiding Member. Assuming further proceedings, briefs, or submissions are not allowed, these cases are ready for decision in less than two months.

We thought we would encounter requests for conferences or hearings in "expedited" cases under the authority of 45 C.F.R. §16.12(b) but were mistaken. We coded for requested conferences but only found five requests for a prehearing conference (all granted) in cases scheduled for a hearing on the merits. In the 26 cases in our sample processed on the "expedited" track, no appellant sought a live hearing or conference. This seems to confirm the Board's judgment that the amounts involved in such cases do not justify complex litigation methods.

### Complex Process

The rules provide a formal hearing process in which witnesses may be cross-examined and rules of evidence applied. This process applies to cases in which (1) complex issues or disputed material facts are found and (2) the Board believes an adversary, evidentiary format would assist its decisionmaking. The Board explicitly discourages requests for oral hearings because of their expense and time-consumption [152]. Although this conclusion is based on an express statement in the Board's charter, Members emphasized in interviews that they discourage evidentiary hearings only when they believe them unnecessary after studying the case file.

In our case sample we located 20 instances in which a party filed a written request for a formal fact hearing. The most common disposition (n.9) was for the Board to convince the party that a telephone conference would serve its needs, with the party then withdrawing its request. Parties typically make an immediate request for a hearing to preserve their options, then quickly recede when it becomes clear that an evidentiary hearing will not advance their cause. On six occasions the party's request for a fact hearing was granted, while four times it was denied. In the remaining case the appeal was withdrawn before the Board acted on the request.

The above data suggest that a persistent party stands a reasonable chance in getting a formal evidentiary hearing before the Board, though the instances are too few to be definitive. In an interview, the Board Chair stated that a party's non-frivolous request for an evidentiary hearing will be granted, although the Presiding Member may try to steer the parties toward a different process.

In eleven other cases the Board and the parties agreed,

without a formal written request, that a fact hearing was necessary. All together, then, only 17 of 137 dockets which were fully adjudicated used a formal, evidentiary hearing. Apparently, the Board and its litigants agree that traditional trial arts add little to the decisional process in most cases. In a later section we discuss the types of issues presented in Board cases and how they rarely involve strong fact conflicts and credibility problems, thus lessening the need for cross-examination of witnesses.

#### Mixing, Matching, and Inventing

In practice the boundaries between the three procedures are not as clearcut as would appear from the face of the Board's rules. The Members have, not surprisingly, tailored procedures to the exigencies of each case without overly worrying about the "track" to which the case has formally been assigned in the acknowledgement. For example, we found widespread use (n.19) of a "hybrid" conference: One in which the parties are permitted to have witnesses testify and be "cross-examined" within the structure of an informal, telephonic conference. Indeed, it was sometimes the case where a conference scheduled for the answering of questions posed by the Presiding Member to the parties served to build the fact record by way of new evidence presented orally. This frequent use of a hybrid mixture of "hearing" and "conference" possibly explains why the pure trial-type format is employed so infrequently. The hybrid serves as an alternative method, presumably perceived as superior by Members, of getting to facts which did not appear in the documentary appeal file. It also minimizes the Members' need to be precise about the process chosen.

Similarly, the rules led us to expect to find in-person conferences [153], with the prior planning being done by telephone. Instead, we found that the substantial majority of conferences, 80%, were both planned and conducted by telephone. Apparently, the Members have been so satisfied with the telephone hearing that it has become the standard "trial" format at the Board. We also encountered in many cases "summaries" of telephone conferences (n.38), as opposed to the verbatim transcripts one would otherwise expect (n.21). This cost-saver seemed to provoke little opposition, presumably because the summaries accurately portrayed the substance of the testimony and arguments at the conference. Because 70% of the conferences involved only legal arguments based upon uncontroverted facts of record, the "summaries" were typically of legal analysis rather than factual testimony and, therefore, unlikely to provoke dispute or demand precise attention to detail. In the balance of cases conducted by telephone conference, the Board does nothing beyond sending the audio-tape to the parties on request.

Members are not shy about using their broad procedural powers to create the procedures necessary for circumstances unforeseen in the rules. A good example is the "summary decision." When an identical disallowance question surfaces again

for a different audit period, the appellant knows the Board will follow its precedent and simply wants a quick decision so it can demonstrate "exhaustion of administrative remedies" to the court in which it seeks judicial review. The practice of the Board now is to grant such summary adverse decisions upon request. We found eight such requests, all of which were granted.

#### Board Members

Proceedings are directed by the Member chosen by the Board's Executive Secretary. GAB's efficiency, effectiveness, and reputation were considerably enhanced by the switch over time from part-timers, trying to handle Board cases in the cracks within their normal work schedules, to five Members whose exclusive work is that of the Board [154]. The Member has the typical catchall authority of an administrative hearing officer "to take any other action necessary to resolve disputes in accordance with the objectives of [Board] procedures." [155] His or her specific powers include: issuing orders; examining witnesses; taking the steps necessary to conduct an orderly hearing; ruling on motions; staying cases; giving justified time extensions; using the dismissal sanction to enforce deadlines, orders, and rules [156]; ordering or assisting the parties to submit relevant information; remanding to the Agency for further, specified action; and waiving or modifying procedures in a specific case upon prior notice to the parties.

Cases are decided by panels of three [157], unless the case is summarily disposed of before the remaining two panel members are named. The panel is assigned at a time when the Presiding Member needs consultations about the merits, management problems, or procedural rulings. This may be early or late, depending on case needs. The panel needs to be constituted before an evidentiary hearing so that the additional Members can attend should they so choose. Members feel free to solicit ideas with each other whether or not the consulted Member is on a panel.

When the case is ready for decision there is lively interaction between panel members. While on site visits, we observed animated discussions between panel members on points of law and fact. It is true that the Members rarely issue concurring or dissenting opinions [158], but one should not be misled into thinking that the first and second signatures [159] on panel opinions are merely rubber stamps. Even though consensus on the result and reasoning may have been ultimately achieved, considerable "give and take" and "bending" likely preceded it.

#### Staff

Professional staff attorneys are assigned to cases by the Executive Secretary and typically play an active role in case preparation and management.[160] They do file review, document drafting, and conference arrangements. As is the case in judge-clerk relations, the extent to which a Member depends upon his or her assigned staffer depends upon the particular

personalities.

The professional excellence of GAB staff attorneys is proved by the high opinions of the attorneys with whom they deal. Our questionnaire respondents rated the staffers an average of 7.1 on a 1 to 10 scale, with a median score of 7.4. Of 117 respondents, only eight attorneys rated GAB staff lawyers below average.

D. PORTRAIT OF BOARD'S WORK

At the close of business on December 31, 1985, in its thirteenth year of existence, GAB had received 1,992 appeals. This was an average of only 153 per year, less than one every other day. But the yearly caseload average after 1977, when the Board began adjudicating disallowances within formula grant programs [161], was 236 per year, compared to 20 per year in the first five years of GAB's existence, 1973-1977. Also, our study showed that the average dollar value per case was \$1,169,000, meaning that every year from 1978 to date, the Board adjudicated rights to an average of \$275,884,000, more than one-quarter of a billion dollars annually [162].

In the following table we see the range of dollar values in the 274 cases which comprised our 1981-1985 sample. For the sample, the total dollars appealed were \$313,195,000, with a mean of \$1,169,000 and a median of \$125,500. The table clarifies that the average case value is pushed considerably above the median by several controversies involving tens of millions of dollars.

Table 4B: DOLLAR VALUES OF CASES

<u>Dollars</u> (000's)	<u>No. of Cases</u>
0-25	72
26-50	18
51-75	22
76-100	13
101-200	25
201-300	15
301-400	14
401-500	5
501-1,000	28
1,001-10,000	45
10,001-28,117	6

There were fourteen cases with a "0" dollar value. These would involve issues which had not yet translated into monetary amounts, such as rejection of a grantee plan for the reimbursement of future indirect costs.

We see in Table 4C that the bulk of the litigation at GAB is between the United States and state agencies over dollars granted in the large formula programs such as medicaid and AFDC.

Table 4C: AVERAGE CASE VALUES PER PROGRAM

<u>Program</u>	<u>Statute</u>	<u>Total Dollars</u>	<u>Average Per Case</u>	<u>Cases</u>
medicaid	SSA, 19	212,282,000	1,814,000	117
AFDC	SSA, 4-A	36,806,000	1,937,000	19
social services	SSA, 20	11,509,000	1,644,000	7
child welfare	SSA, 4-B	1,985,000	661,000	3
child support	SSA, 4-D	1,858,000	103,000	18
supplemental security income	SSA, 16	13,938,000	13,938,000	1
Headstart	Headstart Act	8,102,000	172,000	47
Low-income energy aid	LIEEA	381,000	63,500	6

A significant percentage of cases and appealed dollars are resolved by dispositions short of full-cycle Board adjudication. [163] Table 4D below shows the breakdowns. "Jurisdiction" means dismissal for lack of Board authority over the appeal. "Appeal withdrawn" means the grantee chose not to pursue the case. "Settlement" means a voluntary resolution between grantee and Agency. "Dismissal with prejudice" means the grantee gave up its claim or lost because of procedural noncompliance, while "dismissal without prejudice" is a withdrawal that permits later reinstatement of the appeal. The latter is a technique used to permit settlement discussions or the resolution of key issues in similar cases without having the appeal clog the Board's docket. "Other" is a miscellany comprised of decisions based on reasons like ripeness, lack of a valid cause of action, and Agency withdrawals of the disallowance.

Type	Table 4D: SUMMARY DISPOSITIONS			
	Count	% Sample	\$ Appealed (000's)	Mean (000's)
Jurisdiction	11	4.0%	6,292	572
Appeal Withdrawn	37	13.5%	10,321	279
Settlement	60	21.9%	64,174	1,069
Dismissal w/Prejudice	8	2.9%	1,309	164
Dism. w/o Prejudice	16	5.8%	18,631	1,164
Other	5	1.8%	740	148
TOTAL	137	49.9%	101,467	741

Two important conclusions can be derived from Table 4D. First, the summary disposition cases comprise half of the Board's workload, and, therefore, are sure to have an important impact on the Board's "efficiency" quotient. We shall later analyze the time and effort necessary to resolve these "summary" cases and compare this data with full-cycle adjudication. [164] Second, while the number of such resolutions is large, the total dollars resolved by such shortcuts--\$101,467,000--was about one-third of the total dollars in dispute in the case sample (\$313,195,000). This is a simple reflection of the fact that the mean value of shortcut cases (\$741,000) was almost one-half of the mean value of full-cycle cases (\$1,506,000) [165] and two-thirds of the mean value of all cases in the sample. The interesting revelation here is not that the stakes in truncated cases are smaller: that is a normal litigation pattern. What is important is that the gap between dollars resolved summarily and those fully adjudicated is as small as is shown.

The percentage of full settlements, 21.9%, is not impressive considering the comparable federal and state court settlement rates. The dollars settled figure, \$64,174,000, is also about one-fifth (20.5%) of the total dollars appealed. Later we will speculate why Board cases are more prone to be adjudicated on the merits than to "settle out"--a stark comparison with normal state and federal civil litigation. [166] In contrast, 66.8% of the appealed dollars (\$209,177,000) were awarded by full-cycle Board decision. The unsettled balance was decided summarily through jurisdictional, ripeness, and procedural dismissals, abandonment of the appeal, nonprejudicial dismissal, and Agency withdrawal of the disallowance.

We tracked the "process" used for each case: special expedited; expedited; written submission; conference; hybrid conference; and hearing. [167] Table 4E below reports the results.

Table 4E: UTILIZATION OF PROCESS

<u>Process</u>	<u>#</u>	<u>%</u>	<u>\$ Appealed: Mean</u> (000)
Special Expedited	7	5%	9
Expedited	19	13%	19
Written Submission	45	30%	824
Conference	44	29%	1,753
Hybrid Conference	19	13%	
Hearing	17	11%	4,172

The data confirm the procedural theory that the most valuable cases will be assigned to the most complex processes. The first column lists the process in order of increasing complexity. We would expect the dollar value of cases to increase in the same direction, and the right hand column in Table 4E soundly confirms our expectation.

We also recorded whether conferences and hearings were conducted by telephone or in person. We found an 80% use of the telephone. Seventeen in-person hearings or conferences were held in the 274 sample cases; only 6.2% of the docketed appeals. When a case's issues are few and not factually or legally complex, the Members appear to steer the parties towards a telephone conference.

Who wins Board-adjudicated dollars: United States or grantees? We entered for each case the distribution of awards between the U.S. and its grantees and discovered that of 184 disallowances adjudicated by the Board, the United States won 171 times, in whole or in part, for a value of \$151,450,000, while grantees won 74 times, in whole or in part, for a total value of \$31,118,000. In short, the United States won five of every six dollars adjudicated by the Board. The average federal victory was \$1,515,000, while the grantee average was \$421,000. The median federal victory was \$127,000, while grantees had a \$65,000 median. In 37 cases the Board remanded for further proceedings at the agency level. These were normally determinations, following the Board's instructions, of the precise amounts owed by one side to the other. Most of these remands never returned to the Board, making it infeasible for us to trace these dollars. The "balance," however, is small:

Adjudicated U.S.	:	\$151,450,000
Adjudicated Grantee	:	\$ 31,118,000
Remanded Dollars	:	\$ 26,609,000

We went back to our original data sheets to confirm the above data. We found that case results did, indeed, heavily favor the United States. In cases which went full cycle to a Board adjudication, the United States won 86 disallowances and 17 "split" decisions --with the amount awarded to the grantee usually being minor. On the other side, the grantees won only 18 disallowances outright, and 5 "split" decisions. This is a 105 to 23 "win" ratio favoring the United States, just about the same ratio as "dollars adjudicated." This corroborates an earlier report which found that the United States won three of every four cases in the period from 1973 through 1980 [168].

When we toss in the results of cases which short-circuited against the grantee, for example jurisdictional dismissals and withdrawals of the appeal, the scorecard is even bleaker for the grantee community. In our case sample there were 55 of these results, which bolsters the win-loss ratio in favor of the United States to 160 to 23.

Grantees were able, however, to achieve a favorable settlement in a significant number of cases. In 40 cases, settlement terms favored the grantee, while in five cases the terms were more favorable to the United States. These cases were typically of small dollar value, rarely reaching six figures.

The typical case litigated at the Board is a medicaid disallowance of significant size disputed by one of the major state social service agencies. The average value of a state agency appeal is \$1,564,000. The list of appellants is headed by the New York State Department of Social Services with 33 appeals in our sample, followed by New Jersey (15), Ohio (13), Pennsylvania (13), and Illinois (10). California's Departments of Health Services and Social Services brought only seven disputes to the Board in this period, making us wonder whether geography discourages some appeals. One Member thinks not. In an interview she stated that fewer appeals may be filed by these California agencies because they involve themselves aggressively in the audit process, thereby making Board appeals unnecessary by achieving favorable resolution at the earlier stage.

For every multiple user, there is a "one shot" appellant: 103 of the appeals were brought by parties who appealed no other case. As shown by the following table of types of organizations appealing, many of these "one shot" users are non-profit organizations.

Table 4F: CATEGORIES OF APPELLANT ORGANIZATIONS

<u>Category</u>	<u># Appeals</u>	<u>%</u>	<u>Total \$</u>	<u>Average \$</u>
state agency	196	72%	305,027,000	1,564,000
non-profit	58	21%	4,924,000	86,000
local govt.	12	4%	2,240,000	249,000
university	5	2%	911,000	228,000
Indian tribe	3	1%	93,000	31,000

On the other side of the "v." we find only five entities within HHS doing substantial defense work at the Board. The Health Care Financing Administration ("HCFA") defended 119 medicaid cases, 43% of those in the sample. The Office of Human Development Services ("OHDS") was respondent in 79 cases (29%) under four different programs: AFDC (19), Social Services Program (7), Headstart (50), and Child Welfare (3). The Office of Child Support Enforcement litigated 20 appeals (7%) under Title IV-D, Social Security Act. The Public Health Service responded in 19 cases (7%) and the Social Security Administration in 18 cases (7%), both defending disallowances under assorted statutes. A variety of entities within DHHS handle the balance of appeals.

The great bulk of the appeals, 251 of 274, involved fiscal disallowances. While the Board has jurisdiction over several other types of disputes [169], only a handful of appeals, 8%, involved such other disputes.

With numerous different grantees appealing cases, many only once in the 43 months covered by our sample, and only a few responding agencies, one would expect the United States to have the upper hand in litigation experience which, in turn, might partially explain the federal government's five-to-one win ratio. We recorded each attorney's name for each case, allowing us to determine the litigation experience of each for the cases in the sample. Based on the data in Table 4G below, we quickly see that the United States infrequently defends its allowances with inexperienced lawyers. Indeed, in 147 cases of the 232 in which the U.S. was represented by a lawyer, the U.S. attorney had at least one prior case before the Board, and in 107 Board cases out of 232 (47%), the legal representative of the United States had already litigated three or more cases before the Board. On the other hand, the grantees had such veteran lawyers with three or more prior experiences in only 48 out of 208 cases (23%) and had "one time" litigators in 100 cases, almost half of the cases in which grantees were represented by a lawyer.

Table 4G: NUMBER OF CASES PER LAWYER

<u>Frequency</u>	<u>No. U.S. Lawyers</u>	<u>No. Grantee Lawyers</u>
1 case	38	100
2 cases	18	19
3 cases	11	4
4 cases	6	4
5 cases	3	1
6 cases	2	1
7 cases	1	2
8 cases	1	1
9 cases	2	1
12 cases	1	0
14 cases	1	0
15 cases	1	0

While the grantee community frequently used lawyers with little or no GAB experience, it more often used lawyer teams, though the data here do not distinguish between pro forma signatures and real participation. In 34 cases it used two lawyers to prosecute the appeal, compared with only 13 such instances for the United States. And it used teams of three twelve times, compared to four such instances for its adversary.

In 82 cases grantees chose to litigate pro se--without the benefit of an attorney. Our study of the case files suggested these were cases of relatively small economic value. The data confirm an average pro se value of \$307,000, or almost one-fourth of the average value of all cases of \$1,169,000. Similarly, the 25 cases in which the United States had no lawyer had a mean value of \$159,000, almost one-eighth the universal mean. Typically the pro se case is brought by a non-profit organization litigating an average disallowance of \$86,000.

The drafting, discussing, and finalizing of written decisions is an important part of the Board's work. Half of the Board's cases run full-cycle, meaning the Board must adjudicate entitlement to the appealed dollars. Between 1973 and 1985 the Board issued 714 written opinions in mimeographed form [170], almost a three foot stack.

## V. THE PACE OF LITIGATION

## A. OVERALL RECORD

We have segregated data into two clusters: 1) cases which have completed the entire litigation process at GAB, called "full-cycle" cases; and 2) cases which have ended prior to the Board's reaching the merits, called "summary" adjudications. For both, their "disposition time" starts on the day GAB stamps "received" on the notice of appeal [171]. Full-cycle cases end with the date of issuance of a written Board decision on the merits. Summary cases end with an earlier closing of the file for one of various reasons: dismissal for lack of Board jurisdiction or for non-prosecution; withdrawal of the appeal with or without prejudice; or settlement. Our sample happened to divide exactly into two: 137 full-cycle cases and 137 summary dispositions.

Disposition time for full-cycle cases at GAB averaged 198 days (6.6 months) with a 179 day median (6.0 months). The average time for summary dispositions was 108 days (3.6 months), with a median of 77 days (2.6 months). For all cases on the docket, the average disposition time was 153 days, or five months.

Table 5A presents disposition times for all cases by quarter-years.

TABLE 5A: DISPOSITION TIME BY QUARTER-YEARS

	<u>No. Full-Cycle</u>	<u>No. Summary</u>	<u>Total</u>	<u>%</u>
0-3 mos.	21	73	94	35.9%
4-6 mos.	45	37	82	31.3%
7-9 mos.	39	12	51	19.5%
10-12 mos.	13	6	19	6.9%
> 12 mos.	13	3	16	6.1%
	<u>131</u>	<u>131</u>	<u>262</u>	<u>99.7%</u>

Several conclusions can be derived from Table 5A. First, we see that the Board clears from its docket a remarkable two-thirds of the filed cases (n.176) within six months of filing, 38% of these (n.66) by a full-cycle adjudication. Second, only 13% of the entire docket lingers more than nine months. Some of these "older" cases were stayed pending settlement discussions or resolution of key issues in parallel cases [172]. Third, the typical full-cycle case is on the docket sometime between four and nine months, while the life span of the typical summary adjudication is six months or less.

In federal district court in 1982, 1983, and 1984, the median disposition time for non-jury trials was 13 months [173], meaning that full-cycle GAB cases (median 6.0 months) are resolved more than twice as quickly. The federal disposition data measures from time of "issue"-- the last answer or response-- through trial. Joining issue in federal court takes at least two months [174], so the GAB full-cycle case is resolved at least 2.5 times faster than a federal court case: six versus fifteen months. Comparing the whole docket of each system, the gap narrows between U.S. district court and GAB to two months, seven versus five. [175] The reason is that the great bulk of cases in federal district court, 95%, terminate before trial, while only half of GAB cases do so.

Comparison between GAB and state court produces even more dramatic contrasts. The middle case at GAB is off the docket in 153 days, compared to 811 days for the median tort case in Boston, 788 days in Detroit, 654 days in Newark, 594 days in Houston, 583 days in Pittsburgh, and 574 days in San Diego [176]. Even "fast court" cities like New Orleans, Fort Lauderdale, and Phoenix are twice as slow as GAB [177]. Similar comparisons can be made for disposition time of cases of all types. GAB is six times as fast as Bronx County, five times as fast as Philadelphia and Minneapolis, and three times as fast as Seattle and St. Paul [178]. In Los Angeles Superior Court it takes 41.5 months to reach trial [179], while at GAB an appellant in 6.6 months has reached trial, has been tried, and has received a final written decision accompanied by an opinion.

## B. PACE, PROCESS AND OTHER CORRELATIONS

In section IV-C, supra, we discussed the "procedural tracks" instituted at GAB to differentiate cases, for processing purposes, by amount in controversy and by degree of issue difficulty. The five tracks are, in increasing order of complexity: special expedited; expedited; written submission; conference; and hearing. Because each more complex process involves greater opportunities to be heard to the parties as well as more time to prepare, one would naturally expect processing time to correlate directly with the type process employed. Our data confirm this expectation:

TABLE 5B: DISPOSITION TIME BY TYPE PROCESS (FULL-CYCLE CASES)

<u>Process</u>	<u>Mean Days</u>	<u>No. Cases</u>
special expedited	151	5
expedited	155	8
written submission	201	40
conference/hearing	241	62

The Board has set goals of three months for expedited cases, six months for cases on a written submission, and nine months for cases involving a hearing [180]. Looking at the averages in Table 4B we might think the Board is lagging behind its goals in the first two categories. But the Board starts counting days from the "first submission after the notice of appeal." [181]. On the average of all cases it takes appellants 80 days (median 56 days) to submit their briefs and appeal files after the appeal is received [182]. Roughly speaking, therefore, the Board is close to target on its time goals.

We thought other factors besides the "track" used might impact upon disposition time. Obviously stays and time extensions have a direct effect, and these are studied separately below. In addition, the dollar value of cases might correlate positively, on the theory that GAB and the parties would invest time and energy in direct proportion to the dollar sums at stake. In general, this correlation proved out as demonstrated in Table 5C below.

TABLE 5C: DISPOSITION TIME OF FULL-CYCLE CASES BY DOLLAR VALUE

<u>Dollar Values</u> (000)	<u>Mean Days</u>	<u>No. Cases</u>
0-25	169	25
25-100	209	26
100-500	180	28
500-1000	211	19
1000-10,000	216	29
10,000+	237	4
<hr/> All	<hr/> 198	<hr/> 131

We wondered whether who the appellant was might impact upon case disposition time, thinking, for example, that a major state agency with many Board cases might have a "bagful of tricks" which would delay proceedings. We were pleasantly surprised to learn that, with one exception, veteran litigators take less time at the Board than others.

TABLE 5D: DISPOSITION TIME OF FULL CYCLE CASES BY PARTICULAR STATE AGENCIES

<u>Agency</u>	<u>Mean Days</u>	<u>No. Cases</u>	<u>Days Below Average</u> (198)
Illinois Dep't Public Aid	296	8	-98
N.J. Dep't Human Services	118	10	80
N.Y. State Dep't Social Services	168	14	30
Ohio Dep't Public Welfare	162	9	36
Pa. Dep't Public Welfare	108	8	90

Interestingly, we found that nonprofit organizations averaged 212 days in the 20 full cycle cases appearing in our sample with nonprofits as appellant. While the statistics are too few to be more than suggestive, it may be that experience in litigating at the Board produces greater efficiencies in that appellants learn to move their cases quickly through the process, being fully cognizant of the Board's determination to move cases along as expeditiously as possible.

It appears that the Member who presides may have an important influence on case disposition time. Member "A" seems to shepherd cases through almost twice as fast as Member "E". The breakdown for 130 full cycle cases is:

TABLE 5E: DISPOSITION TIME OF FULL CYCLE CASES BY PRESIDING MEMBER

<u>Presiding Member</u>	<u>Mean</u>	<u>No. Cases</u>
Member "A"	147	42
Member "B"	178	26
Member "C"	202	11
Member "D"	223	22
Member "E"	264	29

Because the Board has "action forcing" procedures, meaning constant next steps with deadlines, as well as personnel management procedures which pressure Members to meet such deadlines [183], we must ask how disposition times can vary significantly from Member to Member.

We should first explore the factors which may make one full-cycle case take significantly more time to resolve than another. The type of process utilized is one factor, of course. Table 5B, supra, shows that cases with conferences and hearings require almost 40 more days than cases submitted on briefs and almost 100 more days than cases on an expedited track. Also involved is the "litigiousness" of the attorneys: some litigators are infamous for the barrage of motions they file at GAB. As Table 5C, supra, demonstrates, this "litigiousness" may be caused by the high dollar stakes involved, there generally being a direct correlation between time of disposition and amounts in controversy. Another factor may be consolidation practice. When a case is linked to a later appeal ("main case"), it typically has a longer processing time because it must await processing of the main case. Stays may be rightly entered in one case but not another, as discussed in Section V-E infra. The final significant factor is a case's special need for extra attention. The GAB procedures have enough flexibility to permit the process needed to decide a case correctly. If more facts or more law or more issues or more analysis is needed, the Presiding Member can always issue more questions, convoke more conferences, and order more briefs. Such flexibility, however, is constantly colliding with the pressure from personnel managers to get cases decided within allotted times.

Is it possible for one Member to be assigned more "extra attention" cases than another? The answer is that such assignments are possible and even probable. The reason is that cases are assigned on the basis of the Members' particular skills and experiences. A Member who has special strengths in the minute examination of factually complex records will be assigned that type of case, while another, strong in legal analysis, will be assigned the tough legal issues. The former will then have cases that are typically slower to bring to decision than the latter. Similarly, the practice of assigning appeals involving issues identical with or similar to those in decided cases to the Member who presided over the earlier appeal will "batch" appeals in ways leading to different disposition times. One batch may involve fast dispositions on legal grounds, while another might

require slow, painstaking development of the fact record of each appeal.

Still, even if cases were assigned on a purely random basis, we would expect some variation in processing time among Members. Each factor which leads to different disposition times is controlled to some extent by the Presiding Member. Some Members, for example, may be less willing to grant hearings, stays, and time extensions than others, or may suppress a lawyer's "papering" practices faster than another Member. Some Members will be more resistant to managerial pressure than another. And some Members are more willing than others to pursue factual and legal inquiries not raised by the parties but possibly important to correct resolution.

## C. THE PACE OF STEPS IN THE PROCESS

The first step in a GAB appeal is the filing of a notice of appeal within 30 days of "receiving" the Agency's final written decision disallowing costs or taking other adverse action. The Board considers the appeal "filed" on the date of mailing, as established by the postmarked date. It is empowered to dismiss cases for failure to meet the 30 day filing deadline [184] but will excuse late filings for "good cause" [185].

In many cases there is no easy way to ascertain when an appellant "received" an Agency's final written decision sent to it by ordinary mail. Many cases are filed without challenge several days beyond 30 days from the date appearing on the final written decision, presumably because of the time gap between Agency sending and appellant receiving. In our case sample, we encountered 73 cases in which appeals were filed between 32 and 40 days from the date appearing on the final written decision. Most of these were cases where the "excess" is explained by the later receipt date or the fact that the 31st day after receipt was a Saturday, Sunday, or holiday [186]. Still, a significant number of cases, 22, were filed on the 41st day or beyond. Three of the cases in our sample were dismissed for untimely filing, while in several the appellant demonstrated "good cause" after the Board chair issued an order to show cause why the case should not be dismissed as untimely filed. In the balance of cases, it appears that the Agency did not press the issue and the case was settled, or the appeal was voluntarily withdrawn, perhaps because of the jurisdictional problem [187].

In any event, the mean time which elapses between the date of filing and the date of the final written decision is 35 days, and the median is exactly 30 days.

The next step is for the appeal to reach the Board where it is date stamped on the day "received." This takes an average of eight days, with a median of five days. From the date of receipt, the Board promises to take no more than 10 days to acknowledge the appeal, notify the respondent, send a copy of the Board procedures to appellant, and tell appellant what to do next [188]. In most cases, 61% (141/233), the Board does meet this self-imposed deadline. A few acknowledgements (n.12; 5%) take place on the 11th or 12th day, perhaps because the prior day was a weekend or holiday, and some are just outside the deadline by a day or two (29/233; 12%). The number of cases in which the acknowledgement takes 15 or more days is 51, 22% of our case sample. The mean time taken for acknowledgements is 13 days, while the median is 10.

Next comes the briefing schedule and the submission of documents for the appeal file. In the regular process, appellant has 30 days to file a brief and appeal file, the respondent then has 30 days to file its brief and supplemental appeal file, and, finally, appellant may submit a short reply within the next 15 days. Theoretically, then, the briefing schedule in the regular

process is 75 days. In expedited cases, there is to be a simultaneously filing of briefs by both sides within 30 days of the acknowledgement.

We found considerable "slippage" in this time schedule, produced mostly by the ready award of time extensions, at least as to a party's initial requests [189]. We found a mean time of 67 days (median 46 days) between acknowledgments and appellants' briefs, a mean time of 52 days (median 41 days) between appellants' and respondents' briefs, and, from then, an average of 30 more days (median 21 days) for replies to be submitted. All together, briefing takes an average of 149 days, with a median of 108 days. The average is almost twice what one would expect from the face of the rules, though the median case is developed only about a month behind schedule.

When briefing is completed, the conference or hearing follows fairly rapidly. In the average case, the time between receipt of the appeal and the conference or hearing on the merits is 165 days, while the middle case gets heard within 153 days.

The step which follows a conference or hearing on the merits is a GAB final decision in the form of a reasoned opinion [190]. 126 different written opinions issued in cases which fell into our sample. In 60 cases the written decision was issued without the benefit of a hearing or conference on the merits, either because the case was in the expedited track or because the parties agreed to a decision based upon the appeal file and their briefs. The balance, 66, contains cases where the GAB three member panel had the benefit of a hearing or conference. Their deliberations and the writing of an opinion consumed an average of 62 days, with the median at 53 days.

We can construct a timetable for the mean and median case at GAB based upon the time spans discussed in the above paragraphs.

TABLE 5F: TIMETABLE FOR MEAN AND MEDIAN GAB CASE

<u>"Average" Case</u>		<u>"Middle" Case</u> # Cases	
Day 1	Final Written Decision	Day 1	274
Day 36	Appeal filed	Day 31	259
Day 44	Appeal received	Day 36	264
Day 57	Acknowledgment	Day 46	233
Day 124	Appellant's Brief & File	Day 92	141
Day 176	Respondent's Brief & File	Day 133	119
Day 206	Appellant's Reply	Day 154	65
Day 209	Conference/hearing	Day 189	82
Day 271	GAB Written Decision	Day 242	66

It turns out that these "average" and "middle" cases take slightly longer when constructed this way than when we simply take the mean (198 days) and median (179 days) disposition times of all full cycle Board cases. We must adjust to start at the same point -- "appeal received"-- by subtracting 43 days in the left-hand column (271-43=228) and 35 days in the right-hand

column of Table 5F (242-35=207). These are higher than the "all full cycle cases" calculation because the faster cases submitted on briefs without a hearing or conference are excluded in the latter stages from the cases underlying Table 5F.

## D. TIME EXTENSIONS

The Board's practices on granting more time, usually for the filing of briefs, has an important parallel in federal and state court practices concerning trial continuances. Generous continuance policy is often highlighted as a major cause of delay in judicial spheres, both civil and criminal [191], and "tightening up" is regularly a part of reform efforts [192].

The Presiding Member has power to "grant extensions of time for good reasons" [193]. Both grantee and Agency attorneys have not been hesitant to ask for more time, and rarely protest the other side's request [194]. The case files display the usual justifications: onerous workloads; unusual complexity in law or fact; conflicts with trials of other cases; large dollar stakes justifying extra concern; recent assignment to the case; and internal organizational problems.

Based on the data in our case sample, we can confidently conclude that, for the sake of fairness and good briefing, most excuses are deemed by Board members to be acceptable, at least the first time around. We encountered 160 requests for time extensions filed by appellants, of which the Board denied only three. There were 90 such requests from United States attorneys, none of which were denied. Therefore, in the cases in our sample only one per cent of all requests for more time are denied. The Board granted a total of 5,464 extra days for the 246 time extensions we found. The cases in our sample were on the Board's docket a total of 40,084 days, meaning that time extensions prolonged the Board's pace of disposition by 13.6% (5,464/40,084).

Not only does the Board very infrequently deny a party's request for more time, but it also pares them down only slightly -- overall, by one day. This may reflect a lawyer's paring down his requests to reasonable periods after having consulted with the staff attorney or Member beforehand. The next table compares the average time requested by parties to the average time granted by the Board.

TABLE 5G: BOARD ACTION ON REQUESTS FOR TIME EXTENSIONS

<u>Party</u>	<u>No. Requests</u>	<u>Ave. Days Asked</u>	<u>Ave. Days Given</u>
appellant:1st	106	27.2	25.8
appellant:2d	46	26.0	22.8
appellant:3d	8	16.4	16.3
respondent:1st	65	21.1	19.5
respondent:2d	19	17.9	16.4
respondent:3d	6	13.7	12.4
total	250	22.9	21.9

### E. STAYS

A "stay" is the suspension of the case, usually pending some important event like the outcome of settlement discussions or the resolution of key issues in a parallel case [195]. The stay is not for the benefit of the parties, as is a time extension, but for the benefit of the process because energy may be saved by case settlement or resolution of dispositive issues. The difference is reflected in the fact that most stays in our case sample were imposed by the Board itself or were requested jointly by the parties.

In our case sample, 34 stays were imposed. Total days stayed were 1,654, for an average of 44 days per stay. Combining stays and time extensions, we see that of 40,084 days our sample cases were on the GAB docket, 7,118 (17.8%) were "stayed" or "extended" days.

For a Board that prides itself on speed of disposition, these "stayed" days should not be counted as the Board's processing time. The Board's current policy is to dismiss such cases without prejudice to their reinstatement should negotiations break down. This may lead to the reverse "counting" problem: a single case being treated as two when it comes back with a new docket number.

## F. JOINT CONSIDERATION

In the same way that courts can jointly consider cases involving common questions of law or fact [196], the Board has developed a practice of "joint consideration" of cases involving identical questions. This procedure is particularly important in the field of federal financial assistance for two reasons. First, fiscal disallowances are typically taken only for a discrete accounting period, for example, a particular fiscal year or a particular quarter-year. The grantee may have engaged in the questioned practice for a number of years or quarters, and separate disallowances will be entered for each of these. Although identical legal and factual issues are involved, the disallowed dollars are different and the Board requires separate, timely appeals of each such disallowance [197]. Obvious economies will accrue by consolidating such appeals and having single briefs and hearings for all. Secondly, a number of states may engage in a practice which the Agency judges violates the terms of a particular grant program. Typically, a series of disallowances will issue against different states. While dollars, parties, and assistance agreements are technically different, the legal standards emanating from grant statute and implementing regulations will be the same, and each state's practices identical or similar enough to be legally indistinguishable. These cases too offer opportunities for procedural efficiencies by means of joint consideration.

To our sample of 274 cases were added 41 "consolidated" cases [198]. The total value of these cases, measured by dollars appealed, was \$116,840,000 [199]. What this means is that the 40,084 litigation days consumed by the 274 cases in our sample served to resolve disputes over not only the \$313,195,000 appealed in the main cases, but also the \$116,840,000 appealed in the consolidated cases, for a total of \$430,035,000. Main and consolidated cases numbered 315 in our sample, for an average case value of \$1,391,699. The median for the 41 jointly considered cases was \$386,000, and median for the 274 main cases was \$125,500.

Eighteen of the cases in our sample had additional ones consolidated with them. Usually the groupings were small, mostly pairs and several triplets. But major consolidations occurred twice: one joined twelve distinct appeals and another "mega" case jointly considered sixteen. The consolidations were made pursuant to Board directives. We encountered such an order in each sample case file where a joint consideration had occurred. We asked the attorneys who had been subjected to such a joint consideration Board directive whether they approved of the practice. 49 lawyers answered that they had litigated a consolidated case, and these gave the practice a hearty 4 points on a scale of 1 to 5 (median 4.1), voting as follows:

TABLE 5H: ATTORNEY OPINIONS ON JOINT CONSIDERATION PRACTICE

<u>Opinion</u>	<u>No.</u>
strongly approve	16
approve	22
neutral	8
disapprove	1
strongly disapprove	2

## VI. CASE MANAGEMENT AT THE BOARD

## A. INTRODUCTION

In the preceding section we displayed some remarkable data about the rapid processing of large dollar cases at the Grant Appeals Board. From beginning to end it takes the Board 198 days to adjudicate fully, including a detailed opinion, a case worth \$1,169,000. In Section VIII we will learn that the lawyers practicing at such a fast track court heartily approve of GAB's litigation system. This holds true for grantee lawyers even though they lose, as a group, 80% of their appeals. In this section we will describe the management techniques used by Board Members to process grant appeals.

We hope, of course, that our readers will draw the conclusion that the Board's speed of disposition is a result of these management practices. We cannot guarantee such a cause and effect relationship because our study is not a controlled experiment. It is possible that the same cases and parties would race as quickly and efficiently through federal district court, with its quite different procedure and practice. Common sense, however, makes us believe such a possibility is remote. Each of the management techniques described below is, on its face, quite likely to produce a faster, more efficient disposition than alternatives. The first one, for example, is the practice of trying cases with common issues together rather than separately. Logic tells us that when the same input produces two outputs rather than one, we have achieved greater efficiency and have conserved resources which can now be invested in securing other outputs. Similar straightforward logic produces a like conclusion for each of the Board's other management practices: they will more efficiently and more quickly produce an adjudication than the alternative.

By "alternative" we mean the traditional litigation mode. For each listed practice there is an implicit comparison with the traditional alternative. The old way of litigating includes the following practices. The case is litigated individually, despite the existence of common factual or legal issues with other lawsuits. The representatives of the parties are allowed to create the issues to be litigated and also to manage the presentation of proofs, relatively free of judicial intervention. Fact lacuna, poor briefs, and missing documents and witnesses are tolerated as party litigation choices, for better or worse. Little guidance comes from the bench about unacceptable litigation behavior, continuances are liberally granted, and parties are allowed to forgive each other their mutual failures to meet assorted deadlines. The judge may press settlement, depending on the state of his calendar, but does not ordinarily pressure parties to make partial concessions on unreasonable factual or legal stances. And the judge's convenience would most certainly determine trial dates, continuances, resolution of motions, conferences, and so forth.

We are not asserting that the case management techniques used by GAB are the "best" techniques, either individually or collectively. The quality of each device, possible improvements, and alternative techniques would make excellent subjects for another study but are beyond the scope of ours, which is simply descriptive and empirical.

Similarly, we do not claim that the "traditional" litigation style described above exists in all courtrooms and administrative boards. Many modern management techniques have been inserted in many chambers in response to the ever-increasing demand for court efficiency. Still, the "old ways" persist in whole or part in many adjudicatory systems. We know this from the studies cited in Section II and our own recent experiences.

## B. REVIEW OF BOARD MANAGEMENT TECHNIQUES

Besides standard case management methods, such as written procedures, deadlines, and sanctions, GAB Members actively issue management orders to the parties so as to move cases along efficiently and to insure that the factual record and applicable law are fully developed. Several of these management orders embody practices that are infrequently found in other judicial or administrative courts, while some, like "show cause" orders, are standard fare. Where we believe the Board is quite untypical is in its intensive and systematic use of the devices described herein. In this section we outline the management practices, provide illustrations, and quantify the use of each.

### 1. Joint Consideration (Consolidation).

We saw in Section V-F that the Board has achieved significant economies of scale by considering jointly appeals which have common questions of law or fact. When cases are piggy-backed on top of each other, a single set of briefs and a single hearing serve for all, and just one decision is needed to clear all cases from the docket. The Board has particularly inviting consolidation opportunities because of the nature of federal grant disallowances. Although the state agency may have engaged in the challenged practice for a considerable time, disallowances are taken on a quarterly basis. This leads to several appeals involving different disallowances but the same fact pattern and identical issues. Similarly, several states may receive the same type of disallowance, making advisable consolidation of several appeals by different states.

An example will illustrate the practice. The appeal of the Massachusetts Department of Public Welfare in Docket No. 83-246 was from a disallowance of \$6.8 million in medicaid reimbursement. The Agency, HCFA, asserted that Massachusetts had failed to file its reimbursement claim within one year of the fiscal year in which the expenditure occurred, in violation of the medicaid statute and regulations. After studying the notice of appeal, the Presiding Member said in the acknowledgement notice he sent to the parties that Massachusetts had appealed similar disallowances in Dockets 83-244 and 83-245 and that all three appeals involved the same time limit issue. He then consolidated the cases with the following order:

Unless there is an objection by either party, the Board will proceed to consider the cases jointly. This means that the cases will follow the same briefing schedule, that the parties' briefs should address all three cases, and that one appeal file should be developed for all three cases. Issues which are unique to a particular case should be addressed separately within the same brief. Joint consideration of these cases should expedite their consideration by the Board. At the conclusion of the proceedings, the Board will issue a single decision dealing with all three cases.

Cases can be partially consolidated. For example, the statute of limitations question discussed above produced joint consideration of 13 appeals filed by eight different states, all of which had suffered medicaid disallowances taken by HFCA on the ground of untimely filing of reimbursement claims. On April 4, 1984, a Member issued a letter entitled "Proposed Joint Consideration of Appeals." This responded to a motion from the Louisiana Department of Health and Human Services requesting such consolidation. He gave each affected state five days from the receipt of his letter to file objections to his consolidation. On April 27th, he issued an "Order for Joint Consideration of Appeals." This order limited the consolidation to the common legal question which the Member, not the parties, phrased as follows: "That question is whether any provisions of Pub.L. 97-276, 96-272, 97-92, 96-276, 97-51, 97-16, or 45 CFR Part 95 preclude the Agency from paying the various State claims for [federal financial participation] because of the time limits applicable to filing of the claims." While there would be joint consideration of the common legal question, the factual development and discussion of individual legal issues present in each appeal would proceed separately. Therefore, the Member issued stay orders only in those appeals where the time limit question was the only remaining issue.

To eighteen of the cases in our sample were joined 41 additional appeals. We registered 27 different orders necessary to accomplish these consolidations.

## 2. Procedural Directions.

When a particular event in a case is not regulated by the Board rules in Appendix A, or when details are missing, the Board will issue procedural directions to the parties under its general powers to control proceedings [200]. For example, the procedures for joint consideration of appeals are mostly improvised on an ad hoc basis. In the major consolidation discussed above, the Member established a special briefing schedule and allowed the eight appellants to respond to the one HCFA brief either jointly or individually. Later, he established a conference with an agenda and an order of presentations. He stated the purpose of the conference to be "to discuss the arguments made in the briefs, as well as whether [certain exceptions] carry over into the other statutes setting time limits for filing claims."

In another case a Member warned an appellant who had submitted a document improperly. The Member cited GAB rules which require an original and two copies to the Board, a certificate that a copy has been sent to the other side, and a reference to the appeal's docket number [201]. While the Member accepted the letter, he instructed the appellant to make all future submissions in accordance with the rules.

In the 274 cases comprising our sample, we encountered 66 separate instances of the Presiding Member creating special procedures and issuing appropriate instructions to the parties.

### 3. Questions to Clarify Party's Position.

If a party makes a statement in a notice of appeal or brief which the Presiding Member does not understand, or doubts, or wonders about its basis, he or she is likely to require the party to expand upon its position. The party's stance may be of a legal nature. An illustration is a case where a Member instructed appellant to "[p]lease explain the State's position" concerning the holding of a particular federal court precedent. The state had asserted a favorable reading of the precedent in its notice of appeal, and the Member inserted the clarification order in the acknowledgement of the appeal. Sometimes the question may seek a factual clarification or an explanation of the meaning of a document. In the acknowledgement of an appeal, one Member asked: "Is it the State's position that, under 45 CFR 95.13(d), expenditures . . . were not made until May 15, 1981? (Notice of Appeal, p. 3) Please explain."

The questioning technique is one of the most popular management tools of the Board. We counted 85 instances in which questions were issued requiring parties to expand upon their factual and legal statements and positions or to clarify ambiguities in documents.

#### 4. Order to Develop Record.

Similar to the above is the Board requirement that a party submit certain factual or legal information, often issued as a formal "Order to Develop Record." Sometimes the Agency will be asked to clarify its practices. In one case the Agency was asked to explain how it determines which congressional appropriation to use to pay a particular claim for federal financial participation. In several cases the Board asked the Agency to state its legal basis for the disallowance.

In the case files we encountered 94 instances in which orders to develop the record were entered and 68 instances when particular fact-seeking or law-seeking questions were posed to the parties. In the former category we placed the frequently used order to submit certain documentation missing from the appeal file.

#### 5. Written Questions for Conference or Hearing.

The questions discussed in paragraphs 3 and 4 above frequently form the agenda for a GAB conference or hearing on the merits. Unlike state and federal court where the parties typically determine and formulate the issues to be litigated and also determine what evidence and argument to direct to these issues, a normal case at GAB is managed by the Presiding Member as to issues, proof, and argument. Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the Member will ordinarily structure the conference or hearing as a forum for addressing these ambiguities. Each side will be asked to respond to a series of questions, with rebuttal time available for reactions to the other side's presentation.

In the case files we encountered 25 sets of written questions as the agenda for a conference or hearing. This technique, plus the preceding two, reveal the tremendous extent to which a Presiding Member at GAB takes charge of an appeal and orchestrates argument and proof.

#### 6. Issue Formation.

Sometimes in acknowledging the notice of appeal and sometimes in the letter setting the procedure for a conference or hearing the Presiding Member will formulate the issues being litigated. In most cases issue formulation is a not a matter of serious dispute. The final written decision of the Agency must state the legal and factual basis for the fiscal disallowance and, by this time, the parties will have been negotiating long enough to have agreed upon the issues. Nonetheless, we found the Presiding Member stating the issues in dispute sixteen times, and, in ten more cases, asking the parties to clarify them.

Observe how different this is from typical federal and state civil practice where elaborate efforts are made in pleadings,

motions, briefs and pre-trial conferences to formulate the exact questions for litigation and to carve away claims and defenses that lack substantial support in fact or law. Deciding what to decide is frequently a major determinant of civil court delay and cost.

Lawyers practicing at GAB are quite content with the issue formulation of the Members. When asked their opinion of "issue clarity" in their last litigated case, 55% of the respondents answered "very good" and 39% answered "good" [202]. This high opinion was held by both U.S. and grantee attorneys [203] and regardless of case result [204].

#### 7. Warnings.

In common with federal and state judges, Members often issue warnings to the parties about possible sanctions or adverse actions which may be levied in response to certain party behavior. We have seen that Presiding Members rarely deny time extensions [205]. It may well be that few denials are registered because the Board makes explicit, by warning, when the parties should stop asking. In one case, by way of illustration, a Member conceded a Massachusetts lawyer one more month to file the appellant's brief and appeal file. The lawyer had pleaded some of the usual excuses: recent assignment to the case; reorganization of his legal department; difficult legal issues; and large dollar stakes. While approving the motion, the Member warned: "Although your request for an extension is granted, please be advised that no further extensions will be granted absent extraordinary circumstances." Similarly, another Member gave a two-month extension to a lawyer with impending federal court trials but advised: "The appellant should note, however, that the Board does not usually grant extensions of such length as the one requested here. The Board will not be inclined to grant any further extensions without a showing of extreme hardship." And in Docket No. 83-272, a Member advised the Chicago Department of Human Services that, having given it five extra months to present certain documentation, his patience was coming to an end.

Warnings of impending disciplinary sanctions are also frequent. In more than one case, a party who was neglecting to certify that he had sent copies to the other side was told that the next failure would result in the exclusion of his offered proof from the record.

In the case files we counted 18 such warnings.

#### 8. Orders to Show Cause.

A popular management device at the Board is the "order to show cause" (or its close kin the "order to respond to tentative findings") 55 of which were found in the case files. This is a "last gasp" opportunity for a party to convince the Board not to take some adverse action, many times being an adverse decision on

the merits issued in "draft" form. The Board will lay out the findings of fact and legal analysis underlying its proposed decision and ask the "about to lose" party why the Board should not finalize its action. In one case the Ohio Department of Human Services submitted "Comments on Draft Decision" which convinced the Board to withdraw its tentative decision and reverse a \$1.25 million disallowance [206].

Show cause orders are also used for various sanctions. A typical illustration is when a Member issued an order for the appellant to show cause why the appeal should not be dismissed for being untimely by one month. In his proposed order the Member rejected as "insufficient justification of the substantial delay here" the change of management excuse previously offered by the new executive director of the nonprofit appellant [207]. In another case, a different Member "tentatively conclude[d]" that the Board should dismiss an appeal because the "time has passed for the City to present more documentation" of its claim. He gave the City a final 21 days to show cause why the City's appeal should not be dismissed.

#### 9. Seeking Party Concessions.

An order to show cause is an imposed decision. Different in kind is an effort to seek a factual or legal concession from a party because of the element of agreement. Much of what judges do at pre-trial conferences is to promote party agreement on issues, facts, and documents. This strategy enables the areas of true dispute to be narrowed, thereby augmenting litigation efficiency. It is an essential tool in all judicial kits.

According to one Member, promoting party agreement is "the kind of thing the Board is good at." [207] He sent us copies of correspondence between the Illinois Department of Public Aid and DHHS's Office of Human Development Services in which the latter withdrew \$4.2 million of a \$16 million disallowance because of "facts that emerged at and subsequent to the hearing before the GAB." In turn, the state withdrew its appeal of the balance of the disallowance. The Member summarized the bargaining process in the following words:

[The appeal] involved a long process before us (unfortunately) including a hearing, and a good many months of "stayed" status while OHDS mulled it over. The state conceded a big portion of the disallowance originally based on Board precedent. Then, after a long while and further development, the Board presented an extensive list of questions to OHDS which challenged OHDS to justify certain positions or face loss. In response to those questions, OHDS chose to withdraw the remaining disallowance. . . . Thus, I like to think the Board led the two adversary parties to decisions which they can justify to themselves, without our resolution in the form of a decision. [209]

In our sampled cases we found ten specific instances of the

Presiding Member pressuring a party towards a concession. In one case, a Member summarized a phone conversation as follows: "The Agency, however, was persuaded to agree to examine further documentation submitted within the next 45 days, after I cited the success in reducing the disallowance in [Docket No.] 82-130 and the problems the City noted in gathering the documentation." Presumably, the Agency could have taken the position that the grantee's documentation should have been offered during the audit negotiations and not belatedly before the Board, though the Board regularly allows post-audit submissions.

Concessions are often of a procedural nature. One example is when a party requests a fact hearing but withdraws the request when convinced by the Presiding Member that a hearing is not really necessary.

#### 10. Special Briefs.

If the Board wishes special input from the parties on difficult questions of statutory interpretation or the like, it may issue an "invitation to brief." This is particularly helpful to the Board when an important question of law affects several appeals and the combined research efforts of several parties may insure that no stone is left unturned. We encountered 21 such invitations to brief, many of which were quite comprehensive in detailing the issues and sub-issues to be discussed in the special briefs.

#### 11. Summary Decision.

The "summary decision" was instituted by the Board to make swift decisions on cases with foregone conclusions. Typically, a Board precedent is squarely on point because of the losing appeal of an earlier disallowance involving identical grounds. The appellant knows its new case is also a loser and wishes only to "exhaust" its administrative remedy at the Board as quickly as possible on its way to federal court. The Board is quite willing to accommodate this desire and will summarily enter an adverse decision in a one or two paragraph opinion which cites the governing precedent.

#### 12. Miscellaneous Orders.

The orders discussed in the preceding paragraphs, while being the heart of the Board's case management, do not exhaust the inventory. We also noted orders (n.2) setting a place of hearing outside the District of Columbia, orders (n.2) requiring the attendance of a designated person at a hearing or conference, orders (n.7) splitting appeals into separate dockets, orders (n.11) requiring parties to file status reports, and orders (n.10) that parties identify their witnesses and the substance of their testimony.

In Table 6A below, we rank the management techniques discussed above by frequency of use as discovered in the files of our sampled cases.



## C. ATTORNEYS' VIEWS OF CASE MANAGEMENT

We asked the attorneys who practice at GAB whether the Presiding Member had used "case management" techniques in the attorney's last case at the Board. We defined the quoted phrase as follows:

Techniques used by Board Members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, and GAB formulation of the issues in dispute.

98 respondents replied affirmatively. We asked these whether such management increased the efficiency of the proceeding. 58 said "yes," which is 78% of the total. Ten said "no" (10%) and the balance (n.12; 12%) did not know. All together, then, lawyers who "know" believe at a six-to-one ratio that court management improves efficiency, which we defined for them as "[r]eaching and deciding an issue with minimum investment of time and resources."

Almost the same six-to-one ratio approves of case management in general. Table 6B summarizes the answers to this questionnaire probe.

TABLE 6B: LAWYERS' OPINION OF CASE MANAGEMENT

<u>Opinion</u>	<u>No.</u>	<u>%</u>
STRONGLY APPROVE	15	12
APPROVE	66	53
NEUTRAL	29	23
DISAPPROVE	13	11
STRONGLY DISAPPROVE	1	1

The significant percentage of attorneys who were "neutral" worries us in that court efficiency should be a concern of every member of the legal profession. We also observe that the 12% figure for "strongly approve" is considerably below the 36% rate at which respondents gave the best rating over all our questions [210].

It is interesting to observe that while attorneys approve of case management both in general and in its specific application, they are considerably less sure that such management improves the quality of the final decision in a case. Less than half of the respondents thought that the case management practiced in their case "help[ed] achieve a correct result on the merits." The others thought it did not (n.22; 23%) or they did not know (n.29; 30%).

## VII. BOARD EFFECTIVENESS

How well does the Board produce its desired effects? As an adjudicatory body, the Board's overt goal is to produce "correct" adjudications, meaning the combination of: 1) accurate fact-finding; 2) appropriate selection of legal norms; 3) sound understanding of the content and meaning of those norms; and 4) precise syllogistic application of facts to law. Stated thus, "effectiveness" immediately shows its elusive character.

Having had a considerable prior experience in analyzing grant law in general and Board decisions in particular [211], we considered making personal judgments about the correctness of Board adjudications. For example, we have incorporated some 500 Board decisions into our three-volume treatise and, in the process, gained the impression that the Board correctly selected, understood, and applied the grant norms governing the disputes before it in a high percentage of cases. Still, this evaluation, even if sound, is only partially informed. We had no workable way of ascertaining whether the "facts" narrated in Board opinions coincided with reality in terms either of accuracy or completeness. Nor could we feasibly ascertain whether all relevant law was considered. Further, the softness of most legal norms, even those in the arid field of grants-in-aid, means that more than one and, many times, contradictory interpretations may be reasonable. Board opinions present and defend just one view, the one leading to the Board's result. We lacked, therefore, the other reasonable readings and applications which might cast doubt upon the validity of the Board's decision. As a consequence, like other researchers [212], we did not assay an independent judgment about how "just" or "correct" the Board's decisions are.

Instead of offering our personal judgments, we turned to the composite views of the attorneys who practice at the Board and to the federal courts which review its decisions. Even these sources are flawed: the former by the partiality infusing the adversary system, the latter by the narrow scope of judicial review of administrative action [213].

Before turning to the views of lawyers and federal judges, we will examine the Board's ability to promote settlements by negotiation or mediation. Agreed upon resolutions are not necessarily "correct" resolutions in that a party with a strong case on law and facts may have inappropriately bargained away his "lawful" dollars. But such is an overly academic view of civil adjudication. The bottom line is not abstractions but party satisfactions. If the disputants walk out of court pleased with the result, no one need look behind the settlement. For this reason, courts which promote (without forcing) settlements are generally considered effective. A division of disputed dollars which satisfies all parties is per se a "correct" resolution.

In 1981 the Board hoped to improve settlement rates by offering parties the services of trained mediators [214]. Each

acknowledgement of appeal contains a standard passage stating:

Although the appeal is now pending, the parties may negotiate to resolve the dispute informally. The Board will assist in any way appropriate, and can provide mediation services. See §16.18.

In the 274 cases comprising our case sample, the Board's mediation offer was accepted only four times, three in 1982 appeals and the fourth in 1983. Two of the four led to mediated resolutions of small amounts. The other two failed in mediation and came back into the adjudication process. Thus, less than one percent (.7%) of the Board's cases are resolved by mediation. In an interview, the Board Chair believed that a higher percentage of mediations was occurring recently, and he expressed continued interest in promoting the process.[215]

We considered the attorneys' rejection of mediation to be so absolute that probing in the questionnaire for their motivations was not justified. Based upon our experience, we offer several explanations. First is the general lack of familiarity with mediation in the profession [216]. Second, government lawyers sometimes perceive settlement to be an inappropriate disposition of public funds to which their agency is "entitled." [217] We shall see that even negotiated settlements at the Board are infrequent, which corroborates this thesis. Third, almost all attorneys practicing at the Board are salaried employees of government or quasi-public agencies. This means that the strong economic pressure on attorneys and parties which forces most civil litigation to settle is absent, though large caseloads in some instances may push in that direction. Fourth is the status of cases at the point they reach the Board. The Agency's final written disallowance will normally issue only after a lengthy series of negotiations beginning with the audit process. The cases which reach the Board may be those where the parties are "talked out," the lines of disagreement being clearly etched by then. When they appeal to the Board, further negotiation may seem senseless to the parties, even when the extra ingredient of a mediator is offered. Fifth, public officials may, for political reasons, prefer to have a decision imposed by the Board rather than being accused of abandoning a claim. Finally, the process of getting a settlement approved by superior officials may be more complicated and difficult than pursuing the Board appeal to completion.

After rejecting mediation, parties may still engage in direct settlement negotiations, a process which the Board encourages [218]. Sixty cases in our sample, 22% of the total, were fully settled. This compares to federal district court where 47.1% of filed civil cases terminate with no judicial action whatsoever and where all but 5% of the balance terminate without reaching trial.[219] . The total dollars settled at GAB, which includes both full and partial settlements [220], amounts to \$64,174,000, or 20% of the total amounts appealed.

We suspect that the low settlement rate may reflect the pre-appeal breakdown of negotiations which led, in the first place, to the final Agency disallowance and the appeal to the Board. It may also reflect the weakness of many grantee appeals. Grantees lose 83 percent of dollars appealed to the Board and adjudicated by it and 82 percent of all disallowances [218]. Grantees of course perceive that many of these Board decisions were incorrect -- one-quarter of the grantee attorneys thought their loss was "unfair" or "very unfair." [222]. Still, most U.S. attorneys believed the contrary -- that the final outcome in their case was "very fair" (42%) or "fair" (54%) [223] -- and it is the perception of the strength of one's case which determines settlement possibilities. Because U.S. attorneys are repeat litigators at the Board [224], they know of their high success rate, which can only solidify anti-settlement attitudes. In summary, whether or not the grantees bring weak appeals, and the data suggest this to be the case, the U.S. attorneys certainly perceive maximum chances to win an adjudication and, consequently, are not eager to settle.

We asked the lawyers "Overall, to what extent do you feel that the final outcome of the case was fair to all involved?" and let them answer "very fair," "fair," "unfair," or "very unfair." [225]. This was our "effectiveness" question, though we substituted the more familiar concept of fairness. The next Table 7A organizes the overall results [226].

TABLE 7A: ATTORNEY VIEWS ON BOARD EFFECTIVENESS

	No.	%
VERY FAIR CASE RESULT	31	24%
FAIR CASE RESULT	64	50%
UNFAIR CASE RESULT	27	21%
VERY UNFAIR CASE RESULT	5	4%

While most attorneys thought their case was correctly or fairly decided, a sizeable block, one-quarter, was dissatisfied. The next table ascertains whether the attorneys' success or failure in the case litigated colors their views as to Board effectiveness.

TABLE 7B: ATTORNEY VIEWS ON BOARD EFFECTIVENESS BY CASE RESULT[227]

	Winner		Loser	
	No.	%	No.	%
VERY FAIR CASE RESULT	21	43%	2	6%
FAIR CASE RESULT	26	53%	18	50%
UNFAIR CASE RESULT	2	4%	13	36%
VERY UNFAIR CASE RESULT	0	0%	3	8%

The results in Table 7B are not surprising. Case winners rarely believed their victories to be unfair, while losers thought at a 44% rate that their defeats were undeserved. In the adversary system it is natural for attorneys to become convinced, along the way, of the justice of their cause. However, it is surprising to note that 56% of the losers admitted the fairness of a loss. This may corroborate the theory of some Agency attorneys, one which our experience leads us to share, that grantee appeals are often very weak on law and fact. This theory would also explain why so few winners were willing to characterize their victories as unjustified, especially after having received a thorough, convincingly reasoned Board opinion.

The next table analyzes attorney views by party represented. This is, essentially, a rehash of Table 7B because Agency attorneys win such a high percentage of cases at the Board. In other words, the group of "winners" is comprised mostly of Agency attorneys, and grantee legal representatives make up the bulk of those reporting losses.

TABLE 7C: ATTORNEY VIEWS ON BOARD EFFECTIVENESS BY PARTY REPRESENTED [228]

	U.S.		Ge	
	No.	%	No.	%
VERY FAIR CASE RESULT	21	42%	10	13%
FAIR CASE RESULT	27	54%	37	49%
UNFAIR CASE RESULT	1	2%	25	33%
VERY UNFAIR CASE RESULT	1	2%	4	5%

GAB decisions have been appealed many times to federal court, thereby offering some evidence of the soundness of Board adjudications. One might readily assume that GAB's batting average on appeal would be a reliable indicator of Board effectiveness. This batting average at the time of writing is a hefty .888, a sure MVP pick. GAB has been affirmed 32 times on appeal [229], and reversed or remanded on only four occasions [230].

Yet our bets on this game have to be carefully hedged for many reasons. First, Board decisions which favor the grantee are not appealable into federal court because GAB action is the Secretary's final decision by delegation. This means that neither the Agency nor the grantee is adversely affected by the decision and no party has standing to appeal. As a consequence a number of GAB decisions are effectively insulated from review. Second, federal court review is limited by a narrow standard of review, whether "arbitrary and capricious" or "substantial evidence." This means that grantees have to convince the federal bench that the GAB decision was more than merely wrong. Pushing in the other direction is the third factor, that grantees choose which decisions to appeal and, presumably, invest their scarce resources only in best opportunities. Some fifty GAB decisions have been brought into federal court, only one out of every fifteen, meaning that a substantial winnowing takes place. Three of each fifteen are pro-grantee therefore unappealable results, leaving eleven grantee choices not to appeal. A fourth warning light is the appellate power to affirm a Board decision for reasons other than those articulated below and the advocates' propensity to invent new arguments and tactics on appeal [231]. Our scoring does not attempt the herculean task of determining when the grounds for affirmance advanced by district and appellate judges were arguably or clearly different from the grounds for decision stated by GAB.

Despite all these caveats, we believe the 89% Board win record on appeal strongly corroborates our impression that the Board decides cases not only efficiently but also well. The substantial bulk of federal court opinions adopt the Board's reasoning and would appear to be affirmances regardless of the scope of review. Further, the fact that losing grantees do not appeal eleven of every fifteen GAB decisions corroborates our questionnaire results which show high lawyer satisfaction with GAB both in practice and product. The decision to appeal, to be sure, is composed of many considerations. But the quality of the

Board decision and its supporting opinion are critical factors and a low appeal rate can be read as an affirmation of the soundness of both.

## VIII. PERCEPTIONS OF PROCESS

## A. ATTORNEY QUESTIONNAIRE

Empirical studies demonstrate that the effectiveness of case management techniques and court improvement initiatives is highly dependent on the cooperation of the bar practicing in the particular court system. One study labeled this the "local legal culture" and showed its strong impact on case processing times [232]. Court procedures aimed at moving cases along expeditiously may or may not succeed in the long run depending upon attitudes of the lawyers and judges subject to them. Where bench and bar believe in the appropriateness of and need for greater efficiency in case processing, procedural steps aimed at that goal will be productive. This is particularly true when attorneys can be made to see that efficiency serves their interests as well as the public's, as when rapid decisions help management run a better program or business. On the other hand, in districts where attorneys and judges believe that lawyers should control the pace and methods of litigation, with minimal judicial interference, efficiency-seeking measures will likely fail. Even if reforms are mandatory, lawyers, in collaboration with like-minded judges, will find ways to evade the new requirements and to continue to litigate in the style traditional to the district.

In light of the determinative influence of lawyer attitudes on the likelihood of success of procedural innovations, we had to ascertain the views of the lawyers practicing before GAB. Their views might provide important insights about the acceptability of GAB "heavy management" techniques to the bar and, consequently, the reception to be expected elsewhere. Lawyers from coast to coast practice before GAB; therefore, our findings would have a "national" flavor as opposed to a "local legal culture." This would enhance our findings, in the sense of making them representative of views likely to be held throughout the country. But it would also factor out the attitudes contrary to those in our sample which might be held in aberrational districts, regions, or agencies.

We sent the questionnaire in Appendix E to 290 attorneys whose names appeared in GAB case files. 131 responses were received from at least 31 different states. See Appendix B. Eighty respondents represented grantees before the Board and fifty represented the United States. We asked the lawyers to answer case-specific questions on the basis of the case they last litigated at GAB. One of our questions was whether they had won, lost, or split this last case. 50 reported victories, 38 defeats, 35 split decisions, and 8 did not respond. Throughout the report we use the phrase "United States attorney" not in a technical sense but meaning the representative of the United States' position. One Board Member objected to our putting the "United States" on the right-hand side of the "v.," saying:

I object to speaking as though the U.S. were a party.

The subagencies of the Department are parties. The process is set up by the Secretary of the Department. If the correct result is achieved, the U.S. "wins," even if the grantee retains the funds.

In summary, our responses reflected a good cross-section of the country, of the parties represented at GAB, and of case results there. Most respondents reported on recent results (1985,80; 1984,33; 1983,15; 1982,2; 1981,1), meaning that their perceptions were reasonably fresh. Of importance is the fact that those who responded had litigated more than 491 cases before the Board [233], almost one-fourth of the entire caseload of the Board over its thirteen year history.

Most of the respondents had moderate legal experience. Two-thirds said they had practiced law between 6 and 15 years. Only 11% (n.14) had 16 or more years in the practice of law, while 22% (n.28) had been lawyers five years or less. On an average they had represented government authorities for eight years; these responses spread over a range from one (n.4) to thirty-one (n.1) years, with most (n.86) in the 2 to 10 year range. Only 25 respondents, 19%, had appeared in just one case at GAB. 45 respondents (35%) had litigated six or more cases, and the average across all respondents was 3.8 cases. 84% said they had participated in a GAB conference or hearing in their last case.

All together, the respondents had considerable experience providing legal representation to government agencies both at GAB and in all regions of the United States. This profile encourages us to believe that the questionnaire answers were likely to reflect both considered and informed judgments.

Our questionnaire sought the following types of information [234]. First, we wanted some idea what these attorneys generally thought about court efficiency and case management -- the heart of this report. Second, we wanted their general impressions about the Board itself : its procedures, personnel, efficiency, and capacity to produce "correct" results. Third, we sought information about particular facets of GAB procedures, such as discovery, use of telephonic conferences, and deadlines. Finally, we scattered several questions aimed at ascertaining whether attorneys thought the Board to be partial, in the sense of being predisposed toward ruling in favor of or against the United States.

## B. COMPOSITE VIEWS OF ATTORNEYS [235]

We asked attorneys for their opinion of strong "case management" which we defined as follows:

Techniques used by Board members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, questions to clarify parties' legal and factual positions, and GAB formulation of the issues in dispute.

We assumed that attorneys, used to controlling the pace and procedures of litigation, would be generally antipathetic to heavy management of "their" case. We were pleasantly surprised to learn the contrary: overall, our attorneys approved such interventionism. On the extremes, 15 respondents strongly approved of such management, while only one vehemently disapproved. Toward the center, more than half of the respondents "approved" of court management (n.66), while only 13 respondents, 10.5%, "disapproved." A considerable number of respondents, 29 (23.4%), were "neutral" to the matter. This significant quantity of indifference may signal a worrisome attitude that court efficiency is not a lawyer's concern. In summary, the composite opinion about case management was:

APPROVE	81	65%
NEUTRAL	29	23%
DISAPPROVE	14	11%

This attorneys' predisposition in favor of active case management portended a rosy review of the Board, which is similarly inclined, both in theory and practice.

In fact, the attorneys' evaluation of the Board's efficiency, procedures, and personnel is even more positive than one could anticipate. Recall that grantees win only one of every six dollars and only one of every six disallowances adjudicated by the Board [236]. Since two-thirds of the respondents were grantee attorneys, we might expect a dismal opinion of the Board. But on all counts the Board received high grades.

Concerning the Board's efficiency, defined as "reaching and deciding an issue with minimum investment of time and resources," the lawyers gave the Board top rating ("very good") in 53 responses, 41% of the total. Most of the remainder (n.62; 48%) rated the Board's efficiency as "adequate." The mean and median scores for this rating were 3.3 out of 4.

Such efficiency did not, apparently, curtail the parties' opportunities to prove their cases, the price one might expect highly efficient court systems must pay. [237] From Table 8A, *infra*, we see that the Board was rated very high in terms of the opportunities it offered the parties to present their cases as to

facts (mean: 3.5/4), as to law (mean: 3.5/4), and as to "all of the evidence and arguments favoring your side of the case." (mean:3.3/4).

We used two ways of measuring the attorneys' general opinions about the Board's procedures. We asked attorneys to rate them directly on a scale of 1 to 10. The Board's procedures scored an impressive 7.01, above state court (6.58) and below federal court (7.49). A question for future research is what particular facets of state and federal court practice are considered unattractive and attractive, respectively. A second measure is the composite score on all questions. The respondents gave the Board the top score in 36% of the ratings (856/2379) and a score of "adequate," "fair," "approve," or "infrequent" (something undesirable) in half the cases (1194/2379). Thus, in a remarkable 85% of all evaluations the Board was graded as satisfactory or better. The mean and median score on all questions was 3.2 of 4. [238]

Board personnel received comparable ratings. On a scale of 1 to 10, Board Members were rated at 7.02 and Board staff attorneys at 7.09. When asked directly about the "competence" of the Board Member who presided over their cases, the lawyers gave top grades ("very good") in 60 instances (46%), while rating the judge as inadequate or worse only nine times (7%). The mean score on the "competence" question was a solid 3.38 of 4.

We gave the attorneys an opportunity to tell us about GAB in their own words. 38 respondents volunteered comments. Their tenor coincided with the positive pattern of the scores, whether offered by United States or grantee representatives. The lawyers who were favorably impressed with the Board's operations said:

"[T]he judge cuts through all the rhetoric and gets down to the issues very quickly." (Respondent #5. U.S. Winner)

"GAB is ... first rate on substance, creativity in procedures, and fairness." (Respondent #18. Ge. Loser)

"What impressed me most about the GAB procedure was the creation of the 'file' whereby we were able to submit all pertinent evidence... ." (Respondent #19. Ge. Loser)

"[T]he best administrative tribunal I've ever worked with in terms of case development. The presiding officials and staff attorneys are particularly good at questioning to develop facts. ... [T]he decisions are very, very thorough." (Respondent #26. U.S. Winner)

"In every respect I have found the Board and its staff to be an outstanding professional body." (Respondent #51. U.S. Splitter)

"[T]he GAB's procedures are fair and expeditious."

(Respondent #57. U.S. Splitter)

"I specialize in GAB practice because I like it. It is fast, fair, and no one gets away with sloppy work."  
(Respondent #63. Ge. Winner).

"The GAB works well because of the excellent quality of staff ... ." (Respondent #82. Ge. Splitter)

"I have been uniformly impressed with the Board, particularly as to ... [the] clarity and excellence of the written decisions." (Respondent #92. U.S. Splitter)

"I am generally impressed with the informal and usually fair way the Board handles individual cases ... ." (Respondent #99. Ge. Winner)

"I found that body to be very thorough in assessing the facts submitted and in making a ruling on those facts... ." (Respondent #108. Ge. Winner)

"GAB is a good, fairly quick and less expensive alternative to litigation." (Respondent #122. Ge. Loser)

"On the whole I have not had any trouble in cases before the GAB. I am satisfied with the procedures." (Respondent #127. U.S. Winner)

Seventeen representatives of the grantee community commented negatively. The most common criticism was that the Board, despite its appearance of neutrality, was at bottom an arm of the United States which strongly favored DHHS actions and interpretations. Strong feelings are evident in the following epithets: "a slick, efficient operation which ends up quickly reviewing and approving most of DHHS' proposed adverse actions;" "a kangaroo court that rubber stamps the wishes of the U.S.;" "their role is simply to implement departmental policy and give it a gloss of legality and impartiality"; "[t]he GAB seems to view their function as upholding DHHS disallowances"; "[t]he gross partiality of the GAB for its employer, DHHS, makes it an obscenity in the 'justice' system"; and "[t]hey are clearly fearful of showing any more than the smallest amount of independence from DHHS positions." GAB's adherence to "technical" federal requirements is frequently perceived by the grantee community as antithetical to the "big picture," which is the ultimate goal of the programs: to provide health and welfare services to needy individuals.

On the other side of the "v.", federal attorneys frequently perceived the exact opposite: the Board bending over backwards to help grantees. Five U.S. attorneys complained about the Board's pro-grantee attitude. But there is a subtle difference in the complaints of each side. The U.S. attorneys saw litigation favoritism, such as interjecting issues favorable to the grantee-appellant, making grantees' arguments for them, and liberally conceding them time concessions. In contrast, the

grantee attorneys worried more about the Board's uncritical acceptance of federal policies underlying fiscal disallowances --more a question of rulings on the merits. Two U.S. attorneys anticipated this criticism from the grantee group and rejoined that if grantees frequently lost at the Board, this was simply a result of their cases generally being weak on the merits and not any pro-United States bias on the part of the Board.

This perception that GAB is wedded to federal substantive policy, whether realistic or not, seems to be the grantees' main bone of contention. Twenty lawyers bothered to write that GAB's authority should be increased in this regard. The Board should have the power, according to the write-in's, to set aside DHHS policy (whether in the form of regulations, lesser issuances, or "interpretations") as contrary to statute, as arbitrary and capricious, or as procedurally flawed. One senses that these lawyers lost cases at the Board because of an unfavorable DHHS rule which made no sense to them but which the Board honored nonetheless. This also underlies the several comments that GAB should offer "more fairness, less rules," or should correct inequities caused by DHHS actions and policies, or should avoid "technicalities."

Several particular aspects of Board procedure provoked significant discontent. 66 attorneys (52%) were unhappy with the accessibility of GAB precedents which are issued in mimeographed form, mailed only to those who know to ask, and roughly indexed. Thirteen respondents commented that GAB should index, publish, and widely disseminate its opinions. A significant number of grantee attorneys, 28, rated their discovery opportunities as inadequate or very poor. The recommendations for broader discovery powers were the second favorite write-in comment. Many lawyers also mentioned the Board as needing subpoena power, although it was not clear whether they meant subpoenas to compel attendance at a deposition, at a hearing, or both. Significant numbers of attorneys (n.20; 16%) thought Board members did not wisely utilize their discretion and most (n.76; 60%) thought such exercises of discretion were merely adequate. This is not surprising given that acts of discretion, such as granting or withholding time extensions, frequently involve delicate and debatable balances of equity. A final "soft spot" was the Board's reception of redundant evidence, thought to be "frequent" or "very frequent" by 28% of the respondents.

On all other counts -- notices, deadlines, issue clarity, evidence gaps, surprise witnesses, evidentiary rulings, and use of telephone conferences -- the Board scored well.

The discovery issue has plagued the Board for several years. Discovery is not mentioned in the Board rules, but the Board will grant discovery if a litigant can show a strong need. [239] Several lawyers are unhappy about having to make such a showing, preferring to have free access to depositions and interrogatories as in federal and state court. One Member thought these were just a handful of disgruntled lawyers, but data in Table 8A,

infra, show it to be a sizeable minority.

Without doubt, should the Board adopt free discovery as in federal court it would invite the delays and abuses which provoked the 1983 amendments to the Federal Rules of Civil Procedure [240]. A change toward free discovery would not bring many compensating benefits, because cases at the Board do not ordinarily involve the type of fact issues for which discovery is most needed [241], and would certainly not be generally required as a due process right under the balancing test of Mathews v. Eldridge [242]. Should the Board decide to offer discovery it probably has the legal wherewithal to do so, though it cannot directly issue subpoenas or contempt orders. It will take negative evidentiary inferences should a party fail to produce a witness or a document as ordered [243], and can take a hint from the Supreme Court and, under its power to control proceedings, impose sanctions against parties who disobey discovery directives [244]. But a serious question remains whether more discovery would be an advisable reform.

The Board should disseminate more widely its opinions and the key word and citation index prepared by its staff. Board decisions are authoritative precedents and for the sake of fairness should be as widely available to the first time litigator as the veteran. While efforts to convince private companies to publish and disseminate Board opinions have foundered on economic reefs, the Board itself could expand and improve its distribution list, as by automatically sending its opinions and their indices to first time litigators.

We were puzzled by a significant aberration in the data: Despite the high scores given by both sides to Board procedures and personnel, a significant percentage of attorneys, one quarter, thought the final outcome in their cases was "unfair" or "very unfair." These were overwhelmingly grantee attorneys: 29 of 31 who thought the outcome unfair. See Table 8B, infra. Good people applying good procedures should normally, one would imagine, produce good results.

We first looked, of course, at the correlation between an attorney's opinion on the fairness of a case's outcome and how well the attorney did in the case: win, lose, or split. See Table 8C, infra. As expected, substantial numbers of losers thought the case result was "very unfair" (n.3; 8%) or "unfair" (n.13; 36%). We were surprised to learn that those who reported split victories also groused about the outcome in almost equal numbers (n.13; 37%). The reason for discontent in those who reported partial wins is likely the quality of the victory. Not infrequently the Board or the Agency will make a minor financial concession to the grantee while preserving the bulk of the fiscal disallowance. Consequently, the grantee can report a "split" result while remaining dissatisfied with the outcome.

It is pleasing to note that a large percentage of those who

reported having lost at the Board were able to characterize that result as "fair" (n.18; 50%), though only in two cases did the loser describe the result as "very fair." Curiously, the converse did not happen frequently. No winners thought their victory to be "very unfair" and only two judged their win to be "unfair." This is consistent with the data which show that the United States usually wins and the write-in comments of its attorneys to the effect that grantee appeals are often quite unsound in law and fact.

The puzzle --satisfaction with the Board but dissatisfaction with case results--may have a second, more subtle key. It may be that attorneys from the grantee community believe that the "pro-U.S." bias of the Board, a view often mentioned in the write-in comments, leads to unsound results even though the Board's procedures are generally perceived to be satisfactory and its personnel to be competent. We asked the attorneys whether Board members and staff treated parties impartially. In 28 cases (21%) lawyers reported partiality, 21 viewing the United States as being favored and 7 seeing the grantee as the favorite. A lesser number (n.20; 15%) reported the procedures as being biased [245], most thinking the United States to be the beneficiary of the bias (n.14). Part of the perception of bias may stem from the belief in the grantee community that the United States has superior resources in litigating before the Board. Forty percent of the respondents so believed. On their face the Board procedures offered equal and quite full participatory opportunities --79% of the respondents thought "participatory opportunities" to be equal. Yet superior United States resources and a pro-U.S. disposition led to numbers of unfair results in the eyes of a significant minority of grantee lawyers.

Cutting in the other direction, the grantee lawyers did not harshly judge the Board Member presiding over their particular cases. He or she was seen as very impartial in 22 cases (28%), as impartial in 41 (51%), and as biased 17 times (22%). See Table 8B, *infra*. The mean score on this question, 3.2 of 4, was the same as the mean result for all questions. See Table 8A, *infra*. And the percentage of grantee lawyers answering negatively on this question --22%--was not greatly higher than the negative answers on all questions: 16%. See Table 8B, *infra*. We may conclude, therefore, that the Board Member is perceived as a competent judge with personal integrity operating under efficient, well-conceived procedures yet, in the eyes of a substantial minority, systematically biased in favor of the United States because of the Board's status as a United States agency. Many respondents suggested that GAB be made "independent" of the agency whose actions it reviews.

## C. PERCEPTIONS BY PARTY REPRESENTED

Attorneys for the United States win five of every six dollars adjudicated at the Board and also five of every six disallowances [246]. Naturally, on the other side grantees are losing. One would expect this disparity in outcomes to translate into marked differences in attitudes about the Board. To measure such differences, we segregate, in Table 8B, infra, the questionnaire ratings by party represented [244].

A measurable difference is found in most categories, with grantee attorneys generally giving the Board lower ratings. But what is truly remarkable is the narrowness of the spread. Overall, grantee lawyers rated the Board as satisfactory or better in 83.5% of the ratings, while the United States attorneys did so at a 90.3% proportion. Similarly, the composite means are only .2 points apart, 3.3/4 for the U.S. attorneys, 3.1/4 for the grantee representatives. Ratings of Board personnel are even closer. And in evaluating Board efficiency, grantee lawyers gave GAB higher grades than the U.S. attorneys.

There is a marked difference in the perception of validity of case outcomes. In only 13% of the cases were grantee lawyers willing to say that the final outcome of a case was "very fair," compared to 42% of the other side. Also, 5% less grantee attorneys thought the case result to be "fair." Put in converse terms, a sizeable block of grantee attorneys were unhappy (n.25) or very unhappy (n.4) with the outcome of the case they litigated before the Board. The mean scores of the "fairness of outcome" question were significantly divergent: U.S., 3.36/4; Ge, 2.57/4. Part of the explanation appears to be that the GAB Members, while competent (grantee attorneys actually scored them higher than U.S. attorneys on "competence"), are perceived as partial to the United States. On impartiality, U.S. lawyers rated the Members 3.44/4, while grantee lawyers 3.03/4.

TABLE 8A. ATTORNEY RATINGS OF CAB PROCEDURES  
PERSONNEL, EFFICIENCY AND OUTCOMES

QUESTION	VERY INFREQUENT STRONGLY APPROVE		INFREQUENT APPROVE FAIR ADEQUATE		NEUTRAL		FREQUENT DISAPPROVE UNFAIR INADEQUATE		VERY FREQUENT STRONGLY DISAPPROVE VERY UNFAIR VERY POOR		MEAN	MEDIAN	
	No.	%	No.	%	No.	%	No.	%	No.	%			
Final Outcome?	31/127	24%	64/127	50%			27/127	21%		5/127	4%	3.0/4	3.0
Efficiency?	53/129	41%	62/129	48%			10/129	8%		4/129	3%	3.3/4	3.3
Chance to Present Case?	58/128	45%	59/128	46%			7/128	6%		4/128	3%	3.3/4	3.4
Notices?	60/131	46%	65/131	50%			4/131	3%		2/131	2%	3.4/4	3.4
Chance to Prove Facts?	73/130	56%	46/130	35%			8/130	6%		3/130	2%	3.5/4	3.6
Chance to Prove Law?	75/131	57%	50/131	38%			5/131	4%		1/131	1%	3.5/4	3.6
Discovery Opportunity?	15/118	13%	74/118	63%			18/118	15%		17/118	14%	2.8/4	2.9
Deadlines?	35/131	27%	85/131	65%			8/131	6%		3/131	2%	3.2/4	3.1
Accessibility CAB Opinions?	22/128	17%	39/128	31%			43/128	34%		24/128	19%	2.5/4	2.4
Issue Clarity?	59/108	55%	42/108	39%			3/108	3%		4/108	4%	3.4/4	3.6
Adversary Competence?	29/110	26%	71/110	65%			9/110	8%		1/110	1%	3.7/4	3.1
Fact Competence?	40/108	37%	65/108	60%			2/108	2%		1/108	1%	3.3/4	3.3
Evidence CAPS?	26/105	25%	65/105	62%			13/105	12%		1/105	1%	3.1/4	3.1
Redundant Evidence?	23/106	22%	54/106	51%			22/106	21%		7/106	7%	2.9/4	2.9
Surprise Witness?	60/104	58%	37/104	36%			5/104	5%		2/104	2%	3.5/4	3.6
Judge's Evidence Ratings?	24/97	25%	64/97	66%			6/97	6%		3/97	3%	3.1/4	3.1
Telephone Hearing?	35/99	35%	51/99	52%			9/99	9%		4/99	4%	3.2/4	3.2
Judge's Competence?	60/131	46%	62/131	47%			8/131	6%		1/131	1%	3.4/4	3.4
Judge's Impartiality?	48/131	37%	62/131	47%			17/131	13%		4/131	3%	3.2/4	3.2
Judge's Use of Discretion?	30/127	24%	77/127	61%			14/127	11%		6/127	5%	3.0/4	3.1
TOTAL	856/2379	36%	1194/2379	50%			230/2379	10%		91/2379	4%	3.2/4	3.2

TABLE 08. QUESTIONNAIRE RATINGS BY PARTY REPRESENTED

QUESTION	VERY INFREQUENT STRONGLY APPROVE VERY FAIR VERY GOOD		INFREQUENT APPROVE FAIR ADEQUATE		FREQUENT DISAPPROVE UNFAIR INADEQUATE		VERY FREQUENT STRONGLY DISAPPROVE VERY UNFAIR VERY POOR		MEANS						
	U.S.	GE	BOTH	U.S.	GE	BOTH	U.S.	GE	BOTH	U.S.	GE	BOTH			
Final Outcome?	42% (21)	13% (10)	25% (31)	54% (27)	49% (37)	51% (64)	2% (1)	33% (25)	21% (26)	2% (1)	5% (4)	4% (5)	3.36	2.57	2.95
Efficiency?	39% (19)	43% (34)	41% (53)	45% (22)	49% (39)	48% (61)	10% (5)	6% (5)	8% (10)	6% (3)	1% (1)	3% (4)	3.16	3.34	3.27
Chance to Present Case?	62% (31)	35% (27)	46% (56)	36% (18)	52% (40)	46% (58)	2% (1)	8% (6)	6% (7)	0% (0)	5% (4)	3% (4)	3.60	3.17	3.38
Notices?	46% (23)	4% (3)	4% (60)	52% (26)	48% (38)	49% (64)	2% (1)	4% (3)	3% (4)	0% (0)	3% (2)	2% (2)	3.44	3.38	3.40
Chance to Prove Facts?	68% (34)	48% (38)	56% (72)	28% (14)	41% (32)	36% (46)	2% (1)	9% (7)	6% (8)	2% (1)	3% (2)	2% (2)	3.62	3.34	3.45
Chance to Prove Law?	74% (37)	46% (37)	57% (74)	24% (12)	48% (38)	39% (50)	0% (0)	6% (5)	4% (5)	2% (1)	0% (0)	1% (1)	3.70	3.40	3.52
Discovery Opportunity?	18% (8)	10% (7)	13% (15)	80% (36)	51% (37)	62% (73)	0% (0)	25% (18)	15% (18)	2% (1)	14% (10)	9% (11)	3.12	2.57	2.79
Deadlines?	24% (12)	29% (21)	27% (35)	64% (32)	65% (52)	65% (84)	8% (4)	5% (4)	6% (8)	4% (1)	1% (1)	2% (2)	3.08	3.22	3.16
Accessibility GAB Opinions?	27% (13)	12% (9)	17% (22)	39% (19)	26% (20)	21% (39)	25% (12)	40% (31)	34% (43)	10% (5)	23% (18)	18% (23)	2.81	2.26	2.45
Issue Clarity?	62% (28)	50% (31)	55% (59)	29% (13)	45% (28)	38% (41)	2% (1)	3% (2)	3% (3)	7% (3)	2% (1)	4% (4)	3.47	3.44	3.44
Adversary Competence?	29% (13)	23% (15)	26% (28)	58% (26)	70% (45)	65% (71)	11% (5)	6% (4)	8% (9)	2% (1)	0% (0)	1% (1)	3.13	2.57	2.16
Fact Completeness?	41% (18)	35% (22)	37% (40)	57% (25)	62% (39)	60% (64)	0% (0)	3% (2)	2% (2)	2% (1)	0% (0)	1% (1)	3.36	3.32	3.23
Evidence Gaps?	36% (16)	16% (10)	25% (26)	57% (25)	66% (40)	62% (65)	5% (2)	18% (11)	12% (13)	2% (1)	0% (0)	1% (1)	3.27	2.98	3.11
Redundant Evidence?	27% (12)	14% (11)	22% (23)	43% (19)	57% (35)	51% (54)	21% (9)	21% (13)	21% (22)	9% (4)	5% (3)	7% (7)	2.88	2.87	2.66
Surprise Witness?	61% (27)	55% (33)	58% (60)	34% (15)	37% (22)	36% (37)	5% (2)	5% (3)	5% (5)	0% (0)	3% (2)	2% (2)	3.52	3.42	3.49
Judge's Evidence Rulings?	28% (11)	23% (13)	25% (24)	60% (24)	70% (39)	66% (63)	8% (3)	5% (3)	6% (6)	5% (2)	2% (1)	3% (3)	3.10	3.14	3.22
Telephone Hearing?	48% (21)	26% (14)	35% (35)	46% (20)	56% (31)	52% (51)	5% (2)	13% (7)	9% (9)	2% (1)	6% (2)	4% (4)	3.39	3.02	3.18
Judge's Competence?	52% (26)	43% (34)	46% (60)	36% (18)	54% (43)	47% (61)	10% (5)	4% (3)	6% (8)	2% (1)	0% (0)	1% (1)	3.38	3.39	3.38
Judge's Impartiality?	52% (26)	28% (22)	37% (46)	42% (21)	51% (41)	48% (62)	4% (2)	18% (14)	12% (16)	2% (1)	4% (3)	4% (3)	3.44	3.03	3.18
Judge's Use of Discretion?	30% (15)	20% (15)	24% (30)	56% (28)	63% (48)	60% (76)	6% (3)	15% (11)	11% (14)	8% (4)	3% (2)	5% (6)	3.08	3.00	3.03
General Rating: GAB Procedures (1-10)												7.54	6.66	7.01	
General Rating: State Procedures (1-10)												6.0	6.69	6.58	
General Rating: Federal Procedures (1-10)												7.40	7.54	7.49	
General Rating: GAB Judges (1-10)												7.06	6.92	7.02	
General Rating: GAB Staff (1-10)												7.11	7.07	7.09	
TOTAL	43.6%	31.1%	36.1%	46.7%	52.4%	50.1%	6.3%	12.5%	10.0%	3.4%	4.1%	3.8%			
(411/943)	442/1421	853/2364	440/943	744/1421	1184/2364	59/948	177/1421	236/2364	32/943	58/1421	90/2364				

TOTAL

43.6% 31.1% 36.1% 46.7% 52.4% 50.1% 6.3% 12.5% 10.0% 3.4% 4.1% 3.8%

(411/943) 442/1421 853/2364 440/943 744/1421 1184/2364 59/948 177/1421 236/2364 32/943 58/1421 90/2364

Composite Mean

3.30 3.10 3.18



## IX. OPPORTUNITIES TO BE HEARD

Pushing cases speedily through an adjudicative process may sacrifice party participation. The fewer events in a case, the quicker it can be resolved. From an instrumental perspective, curtailing "opportunities to be heard" may deprive the Board of relevant fact, law, policy data, and analysis, thereby leading to Board ineffectiveness in case results. Efficiently ineffective is not our goal in civil litigation. We want correct decisions efficiently reached.

We saw in Section VI how aggressively the Board shepherds each case by using multiple management techniques. While Section VIII taught us that attorneys for both sides are generally quite pleased with the Board's procedures and practices, including case management, we learned in Section VII that a significant number of grantee lawyers thought the result in their losing case to be "unfair" or "very unfair." This may be, of course, the natural grouching of lawyers who, caught up in the adversary system, come to convince themselves of the "justness" of their cause. But it may also be a perception caused or fed by the Board's tight case management. As one illustration, a sizeable number of attorneys practicing at the Board want broader discovery opportunities [248]. The view that a case result was unfair might have been formed on the basis of denied discovery which the attorney believed would have unearthed facts damaging to the other side.

We measured "opportunities to be heard" in several ways. One was to identify and count the various participatory requests in the 274 cases sampled. We looked for the different opportunities sought and the Board's disposition of such motions, petitions, and requests. We started with an inventory of participatory requests typically found in civil litigation and added the new ones we uncovered in our scrutiny of case files. Table 9A, below, contains our inventory of requests and the number of each found in the case files.

TABLE 9A: ATTORNEYS' PARTICIPATORY REQUESTS

Request	No.
1. FACT HEARING	21
2. WITHDRAW APPEAL WITHOUT PREJUDICE	11
3. CONSOLIDATE CASES	10
4. SUMMARY DECISION	8
5. DISCOVERY	7
6. CONFERENCE	7
7. SUBMIT DOCUMENT	6
8. SUBMIT ADDITIONAL BRIEF	6
9. INTERVENE	6
10. ADVISORY OPINION	5
11. MEDIATION	4
12. GAB PROVIDE CERTAIN DATA	2
13. PARTICULAR PERSON BE PRODUCED	2
14. SUMMARY JUDGMENT	2
15. CHANGE OF VENUE	1
16. SUBSTANTIVE CHANGE IN TRANSCRIPT	1
17. CHANGE FORMULATION OF ISSUE	0
18. ADD AN ISSUE	0

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 99

What surprised us most about this inventory was the small size of the count. The attorneys who practice at GAB do not seem to press very hard for opportunities to be heard beyond what the Board offers in its standard procedural formats. The often expressed idea that case delay and inefficiency is bred by lawyers engaged in procedural maneuvering is not confirmed by the litigation experience at the Board. Nor can it be said that the paucity of participatory requests is produced by the likelihood of denial. In fact, the Board granted 51 of the contested requests, compared to only 26 denials, the balance of requests being either withdrawn or resolved by party agreement.

Another way we measured "opportunities to be heard" was to collect and count side disputes: wrangling over technicalities unrelated to the case merits. This is what is commonly known as "motions" practice in state and federal court [249].

Consistent with our findings on participatory requests, we encountered few disputes divorced from the merits. What we mostly found were issues concerning the Board's jurisdiction over the particular subject matter or concerning the timeliness of the appeal. There were 26 jurisdictional issues injected into our sampled cases. Most of these controversies were initiated sua sponte by the Board Chair. The bulk of these peripheral matters, therefore, cannot be attributed to overly contentious attorneys.

Separating out matters of the Board's authority, what remained was only a handful of spats. We found eight instances when one side moved to impose sanctions upon the other for alleged procedural error, three motions to strike documents submitted by the adversary, one formal discovery motion pursued

with briefs, and one motion to add a party claimed to be necessary.

In arguing side disputes, neither party submitted extensive briefs in the normal case. The attorneys for the appellant-grantees averaged only 3.7 pages in their briefs on these technical matters, compared to an average brief of ten pages in their main argument on the merits and an average reply brief of 8.3 pages. Briefs for the United States in side disputes averaged 6.2 pages, compared to an average 12.2 pages in their main briefs on the merits.

In summary, we found relatively few issues tangential to the merits being raised. When technical matters were placed in controversy, the parties did not invest substantial resources and energy in pursuing them.

As another measure of "opportunities to be heard" we asked the attorneys directly about their participatory opportunities and found, consistent with the above data, a high level of contentment with Board practice. As a general matter the lawyers believe that the Board's procedural tracks offer sufficient process for them to present their cases fully, with the exception of some attorneys who want freer discovery [250].

When asked about the "completeness of fact presentation" in the last case they litigated at the Board, 108 lawyers answered. 65 (60%) thought the facts were adequately complete and 40 (37%) believed the facts to have been very complete. One way or another, therefore, the Board manages to obtain a reasonably complete record of the facts underlying the dispute. We also asked the lawyers to rate their "opportunities to present facts," which focuses more narrowly on their personal litigation chances. Answers to this question demonstrated even greater respect for the Board with 56% (73/130) of the respondents replying "very fair" and 35% (46/130) replying "fair."

Lawyers have the opportunity to present their law by the normal means of main and reply briefs. Also, the Board will occasionally issue "Invitations to Brief" on important issues common to several appeals [251]. We further noted that many appellants inserted legal analysis and citation in their notices of appeal. Lawyers perceive these different "opportunities to present law" as quite satisfactory. Most of the 131 respondents, 57%, thought this aspect of Board practice to be "very fair," with the remainder mostly rating such opportunities as "fair" (38%). As we noted earlier [252], lawyers have not sought extra litigation advantages very frequently. We found in 274 case files only six requests to submit additional briefs.

Overall, there was a 91% rate of contentment with litigation opportunities. The response to the question "To what extent did the GAB procedures provide you with an opportunity to present all of the evidence and arguments favoring your side of the case?" is displayed in Table 9B below. We readily see that lawyers

litigating at the Board believe that the heavy case management practiced there does not negatively affect their "opportunities to be heard."

TABLE 9B: LAWYERS' PERCEPTION OF OPPORTUNITIES TO BE HEARD

Rating	No.	%
VERY GOOD	58	45%
ADEQUATE	59	46%
INADEQUATE	7	6%
VERY POOR	4	3%

While grantee lawyers were less willing than their U.S. counterparts to rate Board opportunities as "very good," 35% versus 62%, most, 52% thought the opportunities adequate [253]. This combined rating of 87% satisfied is very impressive considering that grantee attorneys lose 80% of their cases at the Board and 80% of the dollars appealed [254].

## X. CONCLUSIONS AND LIMITS THEREON

## A. SYNOPSIS OF THE BOARD'S RECORD

The law's inefficiencies have commanded considerable national attention in the 1980's. Motored by the trenchant criticisms of respected legal scholars, a consensus is rapidly developing that the cost and delay of civil litigation must be combatted in substantial ways and that this is the duty of those who preside over courts and administrative boards. Many years ago the California Chief Justice pronounced his duty to be not merely the achievement of justice but the efficient achievement of justice [255]. He said:

Every court has a responsibility to the public to see that justice is administered efficiently and expeditiously and that the facilities of the court are made available at the first possible moment to those whose cases are awaiting trial.[256]

It may be that other chief justices have likewise perceived their court management duties over the years, but only tinkering and patchwork [257] and little systemic improvement have occurred in response. Now that the plight of our courts is regularly surfacing as a matter of serious national concern, however, we have to hope that judicial efficiency will receive the attention and effort it deserves.

This study focuses on one promising approach: action-forcing procedures and aggressive case management by the judge to whom a case is assigned. We have attempted to measure empirically the results of certain case management procedures and techniques employed by the Grant Appeals Board in a conscious effort to improve the efficiency of its administrative adjudications.

Our empirical measurements, our questionnaire results, and our interviews have produced a composite picture of a hard-working administrative court which produces speedy resolutions of disputes involving substantial dollar sums. Based upon attorney evaluations and the upholding of most Board actions by federal courts, we can conclude further that the Board decides correctly as well as quickly. Cases worth \$1.2 million on the average and \$125,000 at the median get decided with a well-reasoned opinion about five months after the case is filed, with each case being given sufficient attention to please the legal representatives of the parties. Section VII revealed that lawyers are quite satisfied with the procedural system at GAB, discovery and publication of opinions being the only areas of significant discontent, and give solid overall ratings to the Board and its personnel. This evaluation is quite remarkable in light of the fact that grantee lawyers gave high grades to the Board for efficiency even though as a group they lost five-sixths of the cases they brought there.

In sum, we have found at GAB a successful adjudicatory system

for processing civil disputes. The question now is whether the Board's procedures and practices could serve, in whole or part, as a model for court reform initiatives elsewhere. To try to answer this question, we shall first isolate those features of Board practice that seem particularly important to its success and then discuss factors which might limit the utility of Board procedures in other settings.

## B. PEOPLE FACTORS

While this is primarily a study of procedural rules and techniques, we cannot overlook the human element. The combination of good people and good rules produces the Board's outstanding record, not one or the other alone. So, before analyzing the aspects of Board procedures which contribute most significantly to its high efficiency and effectiveness, we must relate our impressions about the human engines which drive the Board's procedures.

We have observed in the GAB Members a commitment to professional excellence and a deep pride in workmanship. One observer stated that the "single most important factor" underlying the Board's excellent record is the fact that its Members are high quality, hard-working judges with a universal commitment to excellence in process and excellence in result. Based upon our reading of Board opinions and case files, our observations of Members at work, and our interviews with them, we concur in this evaluation. The questionnaire results show that the attorneys practicing at the Board are in agreement too. It states almost the obvious to say that good procedures incompetently applied will produce inferior results. To some degree, therefore, this study necessarily presumes that those who adopt the Board's procedures, in whole or part, are comparably competent and enthusiastic in their application. Each court administrator must determine whether delay and inefficiency in his adjudicatory system is a product of poor procedures rather than personnel problems.

Other characteristics of the Members at GAB are important to an understanding of the Board's success. All of the Members bring to their jobs considerable prior experience in dealing with government procurement and grant-in-aid issues, and the stability of the Board's membership has enabled that experience to grow year by year. As one Member said, "We have been here so long this is our expertise." This means that each Member infuses each case with a sound general understanding of the policies, patterns, and practices of Congress and the Executive Branch in establishing programs under the Spending Power. They also possess deep understandings of specific statutes and regulatory material which they have had multiple opportunities to examine in earlier cases. This program expertise is reinforced by a case assignment system which is not random but which affirmatively places disputes in the hands of Members with relevant past adjudications.

Members consequently bring to most disputes a ready understanding of the issues and the parties' respective positions and, more importantly, enough substantive competence for them to engineer a sound decision even if the parties have failed to present their best cases. During interviews several Members emphasized their duty to decide cases correctly regardless of the competence of the party presentations. They do not hesitate to add issues overlooked by the parties, to suggest new areas for

factual exploration, and to dig up relevant laws and regulations unknown to the adversaries. This most frequently happens in cases where the appellant is appearing pro se or by means of inexperienced counsel. In interviews agency counsel readily admitted using GAB as a training ground for aspiring litigators. In such a case, the Presiding Member will help him develop his case, leading to complaints by veteran litigators that the Board will sometimes "bend over backwards" in favor of appellants.

From the perspectives of this study, efficiency and effectiveness, such program expertise is a mixed blessing. It lengthens a case's processing time to add new issues, explore new facts, dig up new documentation, and find and assess new legal norms. It is faster and easier to take the cases as presented by the parties and to let them suffer the consequences of their neglects. But such a laissez faire approach sacrifices correct results on the merits. At the Board, the Members' approach, one which appears dissimilar to the "adversarial system" in American courts, is not merely to umpire the game of adversaries but to insure that the party with the better case wins.

This elevation of substance over form is heartening. It appears to stem from the public nature of the issues before the Board. The Board adjudicates entitlements to public revenues by applying norms derived from laws and regulations. Should it err in such adjudications the loser is not only the litigator, but also the public at large whose program goals have been undercut. For this reason adjudicators of public law disputes like Board Members tend to perceive their primary goal to be to the law rather than to the mere umpiring of an adversarial joust.[258] This is reflected in the Board's reluctance to impose sanctions against the United States for violations of Board orders and procedures if the effect is to deprive the U.S. Treasury of receipts to which it would otherwise be entitled [259].

Another important "people factor" underlying GAB's remarkable efficiency is the cooperative spirit among Board Members which enables them to reach consensus quickly. This is reflected in the publication of almost 800 three-Member opinions without one dissent and with but one concurring opinion. A Member said the Board is comprised of "like-minded people." We take this to mean a sharing of professional understandings about technical matters rather than similarity in personal values. All Members are likely to read a grant-in-aid regulation the same way. The Board "is not the Supreme Court," as the Members say, meaning both that it does not have the Court's time and resources to pursue the filigree of policy debates and that its matters are mundane, technical, and somewhat arcane as opposed to the matters of intense personal importance which regularly wrench the high court.

A final observation is that Board Members are part of the federal government's personnel management system and are rated biannually on their performances. Written performance criteria,

reproduced in Appendix F, are utilized by the Board Chair who is responsible for these ratings. Treating judges as personnel to be "managed" by a "superior officer" and by biweekly computer case status reports is as unusual in a judicial system as it is common in business and the executive branches of government. In interviews, Board Members believed that performance ratings worked subtly to maintain high levels of productivity and responsibility. They did not believe that the rating system in any way compromised their independence of judgment about the merits of cases. [260] Persons in charge of courts and boards elsewhere are advised to consider adopting modern personnel management techniques whenever the danger to independence of judgment can be avoided or minimized. If judges are not exempt from being efficient in the work for which they are paid, there seems to be little reason not to measure that efficiency periodically [261], as long as no effort is made to gauge the "accuracy" or "correctness" of their adjudicatory decisions. [262]

## C. PROCESS FACTORS

In Section VI we described and quantified the various management techniques which Board Members utilize within the structure created by the rules of procedure, explained in Section IV-C. While each particular procedure and practice contributes in some way across the Board's caseload, certain of them appear to have a particularly powerful positive influence on Board efficiency and effectiveness.

Heading the list, we believe, is the assignment of cases to a "presiding" Board Member. Apart from jurisdictional preliminaries which are all handled by the Board Chair, each surviving case is assigned for processing to one Board Member. Although a panel of three ultimately determines the merits, the Presiding Member shapes it and moves it along from step to step. He or she rules on motions, plans and presides at the conference or hearing, and otherwise brings the case to the point of decision. This is, essentially, the "individual calendar system" which has proved effective in federal district court compared to the inefficient "master calendar system." [263] By assigning all responsibility to a single judge, the individual calendar system enables managers to ascertain where and why backlogs and breakdowns are occurring. The clear visibility of case progress puts pressure on the Members to effectuate the Board's case management goals and enables the Board Chair to "manage" performance by rating Board Members under written performance standards.

This is not to say that case schedules will not vary, both individually and in the aggregate, from Member to Member. Variations are normal because each case imposes different demands, the interstices of set "routines" have considerable flexibility and adjustability, and leeway exists for each Member to fashion a personal adjudicatory style. To illustrate, we learned that one Member averaged 147 days to resolve 42 full-cycle cases while another Member averaged 264 days for 29 full-cycle cases [264]. Still, we believe that GAB's "action-forcing" procedural system both minimizes such individual disparities [265] and keeps even the most deliberative judge on a reasonably fast track. In short, while large differences between cases make complete routinization impossible, management rules and techniques can avoid the inefficiencies inherent in the case "customization" so prevalent in state and federal court.

Also important to the Board's case management success is the appeal file system. Within a few weeks of the appeal's filing the Presiding Member has on his or her desk many of the documents containing the relevant case facts. To quote one Member, "the cases are off and running at an early date." [266] The notice of appeal has delineated the issues and the basis for the Agency's action. The appeal file now displays the background documentation. With these in hand, the Presiding Member may thoroughly familiarize himself or herself with the case facts, understand the issues and the parties' positions, begin to

structure the process suitable to the case, and issue preliminary case management directives. [267] Any dispute preceded by party interactions which create a factual record is amenable to the appeal file approach.

Another important management technique is the "tracking" of cases based on amount-in-controversy and issue complexity. Because the Board generally does not rule on constitutional issues [268], it need not worry about cases with small dollars but important principles at stake. It may rely on the dollar amount appealed to ascertain the "worth" of cases and their respective claims to the Board's attention. So, unlike federal court where cases small in dollars and even principles get the same Federal Rules as the blockbusters [269], Board cases worth \$25,000 or less, about 18% of the docket, are assigned to an expedited processing track. Such assignment takes maneuver options away from the lawyers and practically guarantees a fast, inexpensive disposition. In our case sample, such cases were decided on the merits an average of five months after being filed.

The Board of course recognizes that a \$200 claim may involve difficult, complex questions of adjudicative fact "correctly" resolved only after an elaborate trial. Conversely, a \$200 million dispute may involve only questions of law or simple fact resolved after a brief study of uncontroverted documents. The Board retains the power, therefore, of assigning cases to trial-type process when the case so merits. The important distinction from normal civil procedure is that the Board makes such assignments, not the lawyers. The lawyers cannot threaten an extended trial as a negotiating ploy, nor do they have free rein to waste valuable litigation resources on matters of small importance.

In practice as well as procedure the Board thwarts attorney maneuvers which contribute to delay. For example, in the case files we often found warnings that further time extensions would not be granted except under extraordinary circumstances. The Members are generous about granting the first or second request for more time, thereby stretching case disposition time by some 22 days on the average. But stern warnings accompanying such approvals have the effect of discouraging further requests for additional time. Here we see another important facet of Board practice leading to efficiency in disposition: the anti-dilatory attitude of Board Members. Possibly more important than action-forcing procedures are action-forcing attitudes on the part of judges, enforcement of procedures being at bottom wholly discretionary. The Board Members believe in the time disposition goals established by rule [270] and actively seek to accomplish them by discouraging dilatory tactics and enforcing the procedures as written. The fact that their own performances are being regularly measured may play some role in creating the pressure to move cases along rapidly. In comparison, most court systems permit attorneys to set a pace of litigation convenient to the attorneys' office caseload [271]. At the Board we noted a

total rejection of such a judicial laissez-faire attitude.

The above anti-dilatory attitude may explain the comparative absence at the Board of "side disputes": wrangling about technical matters like pleading error, jurisdiction, and discovery, which consumes so much time, energy and resources in state and federal court. Attorneys practicing at the Board, half of whom have one or more prior litigations there, may sense that the Presiding Member will take a hostile view of dilatory and strategic motions and avoid all but the most well-founded petitions.

The absence of trial formalities also seems to contribute importantly to the Board's efficiency, and is another factor meriting emphasis. We found only a handful of formal hearings in the 274 cases sampled. At these hearings direct examination and cross-examination take place, but in a relatively casual, conversational style. In opening such hearings the Presiding Member reminds counsel that the formal rules of evidence do not apply. The routine includes the following statement:

We try to preserve an informal atmosphere for this type of hearing, but we need to produce an orderly transcript, particularly since there are two other board members who will not be here all the time and will work only from the transcript.

So generally we need to take the same care concerning oral presentation as we would in the courtroom. That is the witnesses and attorneys should speak slowly, clearly, one at a time, and avoid visual displays such as nods which will not get on the record.

The board has always taken a liberal view of the rules of evidence in this type of proceeding, and except where I determine that evidence or testimony is clearly irrelevant, immaterial, or unduly repetitious, it will be included as set out in Section 1611(b) of the board's rules. So I ask the attorneys to try to keep to a minimum your objections based on evidentiary matter.

There should be few exhibits introduced in this hearing because both sides have had ample opportunity to develop and add to the appeal file. If there are documents which either of you wish to introduce, would you follow the procedure, please, of handing a copy to the reporter for marking and a copy to opposing counsel, move introduction of the document. I will ask for objections; if there are none or the objection is overruled, the document will be admitted, and the board should be given a copy.

We encountered few or no evidentiary objections and rulings in the 17 hearing transcripts we studied. Most objections were handled informally by suggestions from the Presiding Member agreed to by counsel. In summary, we noted little of the gamesmanship and rituals so common in adjudicatory jury trials. The emphasis was on getting to the facts of the case, the policies behind the relevant grant rules, and the parties'

respective positions on both. We suspect that an hour of "trial" time at the Board would translate into three or four hours in civil court and much more taking into account post-trial motions.

This trial efficiency becomes even more pronounced when the hearing format is the telephone conference. The relaxation of formal evidence rules and procedures similarly discourages technical objections, which are rarely noted. Further, the use of telephones seems to encourage attorneys and parties to "get to the point." In observing telephone conferences, listening to tapes, and reading transcripts, we observed little of the meandering typical of attorney examination of witnesses in civil court. The lawyers and witnesses addressed, usually directly and forthrightly, the questions posed by the Presiding Member in a pre-conference statement. Having had time to prepare responses, the parties quickly and directly answered the critical fact and policy questions raised by the Presiding Member.

The final Board practice which we think merits special attention is the active search by the Presiding Member for relevant facts, law, and policy. This may be, indeed, the most critical determinant of the Board's efficiency and effectiveness. Such Member activism, which occurs as early in the process as the acknowledgement of appeal, quickly and firmly channels the case along productive lines.

After studying the notice of appeal, a Member may issue a directive to the Agency to respond to matters not considered during the audit process. Having examined the notice of appeal, appeal brief, and appeal file, the Member might instruct the Agency to respond to a list of questions in its respondent's brief. After examining both briefs and the appeal file, a Member might ask the parties to satisfy, in further briefs or at a conference or hearing, the Member's information needs. These might be clarifications of documents submitted by the parties; or refinement of a party's factual or legal theories; or completion of the factual record; or further legal research. Members use the questioning technique systematically and intensively, disgoring from the parties whatever is needed to complete the record so that the final decision will be based on the merits and not the relative competence of the parties. In the 274 case files studied, we encountered 272 sets of questions, many cases having multiple sets.

In the process do the Members lose their neutrality and objectivity? They think not. One Member stated that her interventionism in completing the record might work to the advantage of the less competent party, but that once the record was complete she felt neutral in her weighing of facts and legal analysis. All Members conceived their duty as getting to correct results regardless of the parties' respective ability to marshal facts and to argue the law. Thus, even if subtle biases might attend their interventionism, which they did not admit, the price paid would be small compared to the large benefit of correct decisions.

While the grantee lawyers did give a significant negative vote on the question of Member bias, we read the data as meaning a general slant in favor of the United States, rather than bias in particular cases [272]. Indeed, legal representatives of the United States were more likely than grantee lawyers to complain that Member intervention in specific cases favored the other side, but there were only five such complaints [273].

#### D. LIMITING FACTORS

Certain characteristics of the cases and parties appearing at the Board partially explain its adjudicatory success. To the extent these characteristics are unique to Board litigation, they limit the results one might expect at a court or agency which adopts the Board's adjudicatory system. A good illustration is the high median and mean dollar value of the cases at the Board. While large economic stakes may motivate the parties to fight fiercely, they do not necessarily correlate with case complexity. Large dollar appeals at the Board sometimes involve only questions of statutory interpretation and simple ones at that [274]. Also, the audit process frequently brings the same issue and parties back for one or more subsequent disallowances. Using joint consideration techniques [275], the Board can run up its record of case and dollar adjudications with little extra effort. In summary, the fact that many zeroes are in controversy at the Board is quite unique and not an accurate measure of case complexity there.

One unique feature of Board adjudications is the cooperative and continuing nature of the programs within which controversies arise. We have written elsewhere about the "cooperative" essence of federal grants-in-aid, meaning that the parties to an assistance agreement have the common legal goal of providing the services defined in the statute, regulation, and agreement [276]. This means that dollar disputes at the Board sometimes have an almost surrealistic aura. By winning, the Agency defeats the grantee's ability to effectuate the program which the Agency is pledged to promote [277]. Enforcement of grant conditions does, of course, have a deterrent effect on other grantees, thereby keeping the national program on the route planned by Congress. But the fact that the litigants are generally partners and only sporadically adversaries does mollify the disputatiousness which might otherwise attend Board litigation. We hesitate to emphasize this factor, however, because Members have assured us that grantee attorneys, particularly state agency counsel, fight as vehemently and competently for "their" dollars as attorneys in the private sector.

A more important "limiting factor" is the considerable pre-processing of disputes which occurs before an appeal is filed at the Grant Appeals Board [278]. Months and even years of audit investigation and resolution have served to sharpen the factual and legal issues and to gather the documentary evidence relevant thereto. The fact that the Board receives a meaty package at the outset enables it to begin active case management right away--an opportunity generally not present in civil court where the starting case package is only the raw claims in the pleadings.

This limits the replicability of the Board's procedures to those cases which have a substantial pre-filing record needing to be "fine-tuned" in court. Other government disputes with a substantial investigative file would qualify, as would business

deals which have generated a substantial pre-dispute paper record. Government contract matters are natural candidates for the Board's adjudicatory system; indeed, the Board Chair said that his experience at boards of contract appeals inspired the 1981 GAB procedural reform.[279]

The Board system could also be a planned second stage of dispute resolution. Parties could first be channeled into a private dispute resolution mode, such as mediation, negotiation, or arbitration, which, should it fail in whole or part, can serve to produce a factual record and definition of issues. Board-type procedures can then pick up the dispute and provide a swift second-stage adjudicatory resolution. A major impediment to such a two-stage system is the rule normally attached to arbitration, mediation, and negotiation that the "record" of such a process is not to be admissible in court. Policy makers would have to determine whether such a confidentiality rule is so critical to the viability of stage one that it cannot be abandoned in favor of an effective and efficient stage two.

Even in civil court or ALJ proceedings unmodified by compulsory arbitration or the like, phase one might be a magistrate-directed discovery phase, with the product of that discovery forming the "appeal file" for the next phase which heavily borrows GAB processing techniques. [280] We suspect that this is what generally happens in complex cases in federal district court, though there may still be some ideas in this report of interest to federal judges who support aggressive case management.

Cases where facts are peculiarly within the possession of one party who has motivations to suppress them, such as conspiracy, fraud, or antitrust claims, are not suitable for the Board's procedural system, at least ab initio. The "merits" of such cases cannot be reached without affording one side ample opportunity to disgorge the facts possessed by the other. In most Board cases a substantial package of facts already exists at the time of appeal and is held by both sides. While the Board does some fact supplementation, its basic job is to determine the legal implications of facts which, for the most part, the parties do not contest. As we discussed above, the Board system may, nonetheless, be valuable as a second stage. The pre-processing which occurs at the Agency level and leads to the set of documents forming the appeal file could be replicated in other types of disputes as, for example, a discovery phase managed by a magistrate or a non-confidential negotiations phase. What arrives in court, then, might be a reasonably developed fact record, like the GAB appeal file, to which the judge can apply his managerial skills.

The dispute with strong fact conflicts is another category of case unsuitable for GAB methodology. When parties and witnesses are likely to distort and color the "truth," testing by cross-examination is essential, as are rules for authentication

of documents. Estoppel issues at the Board may present issues of credibility, and the pressures of office may occasionally tempt a witness to color the truth, but these are not typical issues litigated at the Board. Usual "fact" is a matter of documentation kept in the normal course of government business with the controversy being one of meaning and effect rather than authenticity. Indeed, our case file study left us with the impression that the substantial majority of case facts in Board disputes are uncontroverted. Frequently the question was whether there were more relevant facts or documents to be placed in the record; rarely was the reliability of what was in the record a cause for concern.

## E. CONCLUSIONS

We set out many pages and months ago to test a thesis empirically: That the Grant Appeals Board was operating an efficient and effective system for the adjudication of important disputes between the U.S. Department of Health and Human Services and its grantees. In 1981 GAB devised a set of procedures aimed at producing high quality decisions in efficient fashion [281]. Our study hoped to measure the result of that study. If what seemed to be a "success story" withstood our factual probing, we might have a model worthy of emulation elsewhere.

We have found such success at GAB. In the sections of this study we have reported the details of GAB's practices and procedures and the effects thereof in a random sample of 274 cases and in a questionnaire survey answered by 131 attorneys who practice at GAB. In summary, the Board is doing a superb job under a set of procedures worthy of careful study and selective adoption by adjudicatory bodies throughout the country.

We were commissioned by the Administrative Conference of the United States, whose charter is to recommend improvements in the functioning of administrative agencies of the United States. The recommendations in the next section are directed to that end. We hope that improvements in the scores of adjudicatory centers throughout the federal bureaucracy will be inspired by our findings.

But these are not natural limits on our findings and recommendations. Lessons are here to be learned by those in charge of civil adjudications wherever located: boards, commissions, ALJ's, municipal courts, county courts, administrative courts, federal courts. The cause of improved adjudication of American civil disputes is urgent. We hope our study contributes to that cause.

## FOOTNOTES

[1] Fed. R. Civ. P. 1. See generally Subrin, "The New Era in American Civil Procedure," 67 A.B.A.J. 1648 (1981) (criticizing amendments to Fed. R. Civ. P. 11, 16, and 26 for their deemphasis of simplicity and uniformity). See also Resnik, "Failing Faith: Adjudicatory Procedure in Decline," 53 U. Chi. L. Rev. 494, 504 n.43 (1986) (drafters of federal rules interested in "keeping distinctions to a minimum") [hereinafter cited as RESNIK].

[2] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS (BNA 1979); R. Cappalli, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY AND PRACTICE, 3 vols. (Callaghan 1982) [hereinafter cited as FEDERAL GRANTS].

[3] We even find the FRCP's adopted, at times verbatim, as rules for administrative proceedings. See 1 Pa. Admin. Code §§31.1-35.251.

[4] See, e.g., Fed. R. Civ. P. 26(f) advisory committee note ("The committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require ... basic changes ...."); Fed. R. Civ. P. 16 advisory committee note ("In many respects, the rule has been a success").

[5] See, e.g., Shaffer v. Heitner, 433 U.S. 186, 211 (1977) ("We believe ... that the fairness standard of International Shoe can be easily applied in the vast majority of cases.") Compare, e.g., Broderick, "Compulsory Arbitration: One Better Way," 69 A.B.A.J. 64, 65 (1983) ("prompt and less expensive alternative") with A.Lind & J.Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983) (high percentage of trial de novo demands).

[6] See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[7] See, e.g., M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

[8] See, e.g., W. Gellhorn, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

[9] Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims," 59 Cornell L. Rev. 772 (1974) [hereinafter cited as MASHAW].

[10] See, e.g., Rosenberg, "Devising Procedures That Are Civil to Promote Justice That is Civilized," 69 Mich. L. Rev. 797, 800 (1971) ("bagful of tinkering and patchings").

[11] Newman, "Rethinking Fairness: Perspectives on the

Litigation Process, " 94 Yale L. J. 1643 (1985) [ hereinafter cited as NEWMAN].

[12] Bok, "A Flawed System of Law Practice and Training, " 33 J. Legal Educ. 570 (1983).

[13] See Frankel, "The Search for Truth-- An Umpireal View," 30 Record of the N.Y.C.B.A. 14 (1975); Frankel, "The Search for Truth: An Umpireal View," 123 U. Pa. L. Rev. 1031 (1975); Frankel, "The Adversary Judge, " 54 Texas L. Rev. 465 (1976).

[14] See, e.g., NEWMAN, supra note 11, at 1657; Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 5 (Federal Judicial Center 1977)[ hereinafter cited as FLANDERS]; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 135, 135-36 (1978).

[15] A controlled experiment would be one in which certain cases would be litigated through the "reformed" system while others followed the usual course. See generally M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 16-22 (1964). This would enable one to be sure that whatever different results obtained were the product of the "reforms" and not outside factors. Since we have no control group, the best we can do is empirically measure the GAB results, ascertain correlations, estimate the causes of certain phenomena, and be aware of other factors, unmeasured, which may have influenced the outcomes. See text at Section VI-A.

[16] For a general discussion of the characteristics which differentiate the alternative processes for resolving disputes, see S. Goldberg, E. Green & F. Sander, DISPUTE RESOLUTION ch. 1 (1985) [hereinafter cited as DISPUTE RESOLUTION].

[17] See text accompanying note 214, infra.

[18] See text accompanying note 150, infra.

[19] See, e.g., Adler et al, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 8-12 (Rand Inst. for Civil Justice 1983).

[20] See Rosenberg, Rient & Rowe, "Expenses: The Roadblock to Justice," 20 Judges' J. 16-19 (1981) reproduced in DISPUTE RESOLUTION, supra note 16, at 300-306.

[21] See generally A. Lind & J. Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983).

[22] See, e.g., Verkuil, "The Ombudsman and the Limits of the Adversary System," 75 Colum. L. Rev. 845 (1975).

[23] F. James & G. Hazard, CIVIL PROCEDURE 300 (3d ed. 1985)

[hereinafter cited as JAMES].

[24] See notes 37-45, infra, and accompanying text.

[25] JAMES, supra note 23, at 300.

[26] See Alschuler, "Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases," 99 Harv. L. Rev. 1808, 1823 (1986) [hereinafter cited as ALSCHULER].

[27] See RESNIK, supra note 1, at 545.

[28] See W. Brazil, SETTLING CIVIL SUITS 1, 44-45 (1985).

[29] See JAMES, supra note 23, at 299-300.

[30] See, e.g., L. Forer, MONEY AND JUSTICE; WHO OWNS THE COURTS (1984) (Philadelphia Court of Common Pleas); "Disorder in the Courts," Phila. Inquirer, Jan 26, 1986, at 1, cols. 1-4, 10A, cols. 1-5, 11A, cols. 1-5, 12-A, cols. 1-5; Jan. 27, 1986, at 1, cols. 1-3, 6A, cols. 1-5, 7A, col.1; Jan. 28, 1986, at 1, cols. 1-4, 8A, cols. 1-5, 9A, cols. 1-5, 10A, cols. 1-5; Jan. 30, 1986, at 1, cols. 1-6, 16A, cols. 1-5, 17A, cols. 1-5, 18A, cols. 1-5 (same).

[31] See JAMES, supra note 23, at 295-96.

[32] Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know And Think We Know) About Our Allegedly Contentious and Litigious Society," 31 UCLA L. Rev. 4, 6-7 (1983) [hereinafter cited as GALANTER]. The word apparently comes from Manning, "Hyperlexis: Our National Disease, " 71 Nw. U. L. Rev. 767 (1977).

[33] GALANTER, supra note 32, at 63.

[34] Criminal, domestic relations, and tort caseloads have increased substantially, while property, contract, and commercial disputes have dropped significantly. Id. at 43.

[35] See GALANTER, supra note 32, at 45-47. See also Selvin, M. & Ebener, P.A., MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 43-46 ( Rand Institute for Civil Justice 1984) [hereinafter cited as SELVIN].

[36] See GALANTER, supra note 32, at 72. See also Friedman, "The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America," 39 Md. L. Rev. 661 (1980).

[37] See Kaufman, "The Philosophy of Effective Judicial Supervision Over Litigation," 29 F.R.D. 207 (1961) quoting an address by Mr. Chief Justice Warren to the American Bar Association [hereinafter cited as KAUFMAN].

[38] Burger, "Isn't There a Better Way?," 68 A.B.A.J. 274 (1982).

[39] Newman, supra note 11, at 1644 ("Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.").

[40] Id. at 1643. And making the system more susceptible to uneven attorney quality, waste of client resources, and procedural manipulation by parties with large budgets. See RESNIK, supra note 1, at 523-24.

[41] Frankel, "The Adversary Judge," 54 Tex. L. Rev. 465, 483 (1976).

[42] See, e.g., Kaufman, supra note 37, at 207 ("The layman's greatest grievance with the legal profession and our legal processes is that he feels that justice follows too slow and tortuous a path in reaching its goal and that there is far too much reliance on what he considers 'technicalities'."); Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," 61 Judicature 400, 401 (1978) ("The litigation explosion has created an unprecedented crisis in the administration of justice. The burgeoning volume, complexity and cost of civil litigation threatens to exhaust the resources of courts and litigants."); Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition," 69 Calif. L. Rev. 770 (1981) ("[T]oday's massive volume of litigation and the skyrocketing costs of attorney fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager.") [hereinafter cited as PECKHAM].

[43] See L. Forer, MONEY AND JUSTICE: WHO OWNS THE COURTS (1984).

[44] Bok, "A Flawed System of Law Practice and Training," 33 J. Legal Educ. 570, 571 (1983).

[45] See, e.g., T. Church et al., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (National Center for State Courts 1978) [hereinafter cited as CHURCH]; SELVIN, supra note 35; FLANDERS, supra note 14.

[46] See CHURCH, supra note 45, at chs. 4,5; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147, 151 (1978).

[47] See FLANDERS, supra note 14, at ix, ch.2; Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS 56-57 (Federal Judicial Center 1980).

[48] See CHURCH, supra note 45 at 36 ("The differences in civil case disposition times between the two systems is striking. the mean disposition time of individual calendar courts is over 200 days faster than the mean of the master calendar courts.").

- [49] See Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS 57-58 (Federal Judicial Center 1980).
- [50] See CHURCH, supra note 45, at 24 ("By whatever index chosen, it is apparent that size of court bears little relationship to civil processing time.").
- [51] See SELVIN, supra note 35, at 38; CHURCH, supra note 45, at 27 : "The data suggest that civil judge caseload has little relation to civil case disposition time. Courts with heavy filings per judge can be either relatively fast or relatively slow." Of course, when caseload begins to produce backlog, the effect is to slow the pace of each case to disposition.
- [52] See CHURCH, supra note 45, at 33 (inverse relationship between settlement intensity and disposition time). See also SELVIN, supra note 35, at 81-84.
- [53] See CHURCH, supra note 45, at 79-80; SELVIN, supra note 35, at 103. Adding judges is likely to lead to a decrease in average productivity per judge.
- [54] See SELVIN, supra note 35, at 80.
- [55] KAUFMAN, supra note 37, at 207. See also Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147 (1978) ("Judicial supervision of the civil docket is a relatively new phenomenon in American courts.").
- [56] KAUFMAN, supra note 37, at 210-11, 213.
- [57] Id. at 212.
- [58] See generally Resnik, MANAGERIAL JUDGES (Rand Institute for Civil Justice 1982); Elliott, "Managerial Judging and the Evolution of Procedure," 53 U. Chi. L. Rev. 306 (1986) [hereinafter cited as ELLIOTT]; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147 (1978); Galanter, "The Emergence of the Judge as a Mediator in Civil Cases," 69 Judicature 257 (1986).  
For a monumental review of the aspirations underlying the original Federal Rules of Civil Procedure, as well as a comprehensive overview of current thinking and literature, see RESNIK, supra note 1.
- [59] See, e.g., Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," 61 Judicature 400 (1978); PECKHAM, supra note 42; Rubin, "The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts," 4 Just. Sys. J. 135 (1978) [hereinafter cited as RUBIN]. There has been little such

activity in state court systems. See CHURCH, supra note 45, at 39.

[60] Cases are assigned to a particular judge for all purposes. See generally FLANDERS, supra note 14, at 13-15.

[61] For his preliminary status conference, Judge Peckham uses a telephone conference call with a reporter present rather than an actual meeting. PECKHAM, supra note 59, at 780.

[62] Data "strongly suggests that a great deal of the time during which most cases are pending is essentially lost. The lawyers are undoubtedly are busy, but they are busy on other cases." FLANDERS, supra note 14, at 69.

[63] See Neubauer, "Judicial Role and Case Management," 4 Just. Sys. J. 223 (1978). See also ELLIOTT, supra note 58, at 316-17; FLANDERS, supra note 14, at 17:

The strongest findings of this project concern differences in the ways courts manage civil cases during the pretrial phases. The courts differ widely in the controls they exercise over preparation of civil cases. The degree of control is closely associated with the time required for each stage of a case, which also varies greatly among courts.

[64] See FLANDERS, supra note 14.

[65] See id. at xi-x.

[66] RUBIN, supra note 59, at 140.

[67] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 172-73 (1979). See generally FEDERAL GRANTS, supra note 2, at §1:03-1:16.

[68] See FEDERAL GRANTS, supra note 2, at §1:13.

[69] United States Dep't of Transp. v. Paralyzed Veterans of America, 54 U.S.L.W. 4854, 4857 (June 24, 1986).

[70] See Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). See generally FEDERAL GRANTS, supra note 2, at §10:10.

[71] 1 C.F.R. §305.82-2 (1986).

[72] See FEDERAL GRANTS, supra note 2, at §§11:04-11:06.

[73] In re: Louisiana Dep't of Health & Human Servs., HHS Grant App. Bd., Dec. No. 647 (May 9, 1985).

[74] In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 190 (June 17, 1981). See also In re: Illinois

Dep't of Public Aid, HHS Grant App. Bd., Dec. No. 733 (Mar.26, 1986).

[75] See In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 673 (July 19, 1985).

[76] In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706 (Nov. 21, 1985).

[77] In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 648 (May 17, 1985), aff'd on reconsideration, Nov. 22, 1985.

[78] In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 307 (May 28, 1982). See also In re: Oregon Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 729 (Mar.20, 1986).

[79] See In re: California Dep't of Health Servs., HHS Grant App. Bd., Dec. No. 665, at p. 2 (June 28, 1985).

[80] See generally FEDERAL GRANTS, supra note 2, at §§4:24-4:54.

[81] See, e.g., In re: New York City Human Resources Admin., HHS Grant App. Bd., Dec. No. 720 (Jan. 30, 1986) (grant advances not accounted for constitute a debt to the United States); In re: Economic Opportunity Council of Suffolk County, Inc., HHS Grant App. Bd., Dec. No. 679 (Aug. 12, 1985) (grantee allowed to prove allowable costs actually paid).

[82] Id.

[83] See, e.g., In re: Area IV PSRO of Michigan, HHS Grant App. Bd., Dec. No. 651 (June 3, 1985) (employee deferred compensation plan). See generally FEDERAL GRANTS, supra note 2, at §§ 4:31-4:52.

[84] In re: Puerto Rico Office for Human Development, HHS Grant App. Bd., Dec. No. 474 (Nov.9,1983), aff'd sub nom., Puerto Rico v. United States, No. 84-0388 (D.P.R. April 19, 1985).

[85] In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 151 (Feb. 26, 1981).

[86] See In re: Area IV PSRO of Michigan, HHS Grant App. Bd., Dec. No 651 (June 3, 1985).

[87] See In re: Ohio Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 725 (Mar. 7, 1986).

[88] See In re: Utah Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 750 (April 30, 1986).

[89] See generally FEDERAL GRANTS, supra note 2, at §5:11.

[90] See App. A at app. A, para.D.

[91] See FEDERAL GRANTS, supra note 2, at ch. 19.

[92] See id. at ch. 20.

[93] See id. at ch. 21.

[94] See id. at ch. 22.

[95] Sometimes under the particular wording of a grant statute the failure of a grantee to comply with grant conditions leads to "ineligibility" for the grant rather than the disallowance of certain costs incurred by an eligible grantee. See, e.g., In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706, at pp. 5-7 (Nov. 21, 1985).

[96] See generally FEDERAL GRANTS, supra note 2, at §§6:04, 6:05, 6:16.

[97] See, e.g., In re: Effect of DEFRA Amendments on Utilization Control Disallowances, HHS Grant App. Bd., Dec. No. 655 (June 7, 1985).

[98] See, e.g., New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 628 (Mar. 19, 1985) (medicaid incentive payment for states which enroll the help of local governments in collecting from liable third parties).

[99] See, e.g., In re: National Urban Indian Council, HHS Grant App. Bd., Dec. No. 710 (Dec.5, 1985) ( grant properly terminated where grantee stopped performing primary grant activities without justification).

[100] See generally FEDERAL GRANTS, supra note 2, at ch. 6.

[101] Compliance with certain grant conditions is often the subject of special reviews of all grantees. These may lead to multiple disallowances and appeals. See, e.g., In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706, at pp. 8-9 (Nov. 21, 1985) (review of state's eligibility for supplemental child welfare grants).

[102] See 38 Fed. Reg. 9,906 (1973). For general discussions of the origin, growth, caseload and procedures of the Board, see FEDERAL GRANTS, supra note 2, at §§8:66-8:78.10 (rev. ed. 1985); 5 Mezines, Stein & Gruff, ADMINISTRATIVE LAW §54.08 (1984) [hereinafter cited as ADMINISTRATIVE LAW ].

[103] Now the Department of Health and Human Services ("DHHS").

[104] In 1973 President Nixon began to fight inflation by impounding federal assistance. See FEDERAL GRANTS, supra note 2,

at §§4:05-4:08.

[105] See generally Office of Economic Opportunity, CATALOG OF FEDERAL DOMESTIC ASSISTANCE (Jan. 1973); 1969 LISTING OF OPERATING FEDERAL PROGRAMS COMPILED DURING THE ROTH STUDY, H.R. Doc. No. 91-177, 91st Cong., 1st Sess. (1969).

[106] See 45 C.F.R. pt. 16, apps. A-E (1977).

[107] See 38 Fed. Reg. 9,906 (1973).

[108] 37 Fed. Reg. 24,675 (1972).

[109] Id.

[110] 38 Fed. Reg. 9,907 (1973).

[111] Readers who wish to know more about the distinctions between "formula" and "discretionary" grants can refer to FEDERAL GRANTS, supra note 2, at §4:01.

[112] The Administrative Conference of the United States has declined to go beyond recommending "informal complaint mechanisms" to process such cases. See 1 C.F.R. §305.82-2 (1985) at para. III-A.

[113] The Board dropped this type of dispute from its jurisdiction in the 1981 revision of Part 16. See 46 Fed. Reg. 43,816 (1981); *In re Life Planning/Health Servs., Inc.*, HHS Grant App. Bd., Dec. No. 343 (Sept. 28, 1982).

[114] For misrepresentation in its procural, for example.

[115] For a discussion of indirect costs and the establishment of rates, see FEDERAL GRANTS, supra note 2, at §§4:53-4:54.

[116] See 45 C.F.R. § 16.10(d) (1977) ("In any case in which the head of the constituent agency modifies or reverses the initial decision of the Panel, he shall accompany such action by written statement of the grounds for such modification or reversal....").

[117] See 38 Fed. Reg. 9,907 (1973).

[118] See 45 C.F.R. §16.10(d) (1977).

[119] 45 C.F.R. §16.8(a) (1977).

[120] 40 Fed. Reg. 33,936 (1975).

[121] 37 Fed. Reg. 24,676 (1972).

[122] See 45 C.F.R. §16.8(b) (1977).

[123] See, e.g., 5 U.S.C. §556(c) ("In ... determining claims for money or benefits ... an agency may, when a party will not be

prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.").

[124] See 43 Fed. Reg. 9,264 (1978), codified at 45 C.F.R. pt. 16, app. A, para. B(a) (1985).

[125] For detailed breakdowns, see Table 4C.

[126] This step had a curious history. Before 1981 the Board rules explicitly allowed the head of an HHS Constituent Agency to review and affirm, modify, or reverse the Board decision. See 45 C.F.R. §16.81 (1977). The 1981 proposal would have transferred that discretionary review power to the Secretary. 46 Fed. Reg. 1,649 (1981) (proposed to be codified at 45 C.F.R. §16.21). In the final regulation, however, the proposed solution was omitted because it provoked considerable opposition. See 46 Fed. Reg. 43,817 (1981). The Department was to study the matter further and, in the interim, the Board's decisions would be the final DHHS action. The matter seems to have been resolved, whether by conscious action or inertia, in favor of GAB finality because neither the original clause nor its proposed substitute has resurfaced to date.

[127] Telephone interview with John Settle, July 16, 1986.

[128] Some of this distrust still persists. One questionnaire respondent described the Board as a "kangaroo court that rubber stamps the wishes of the U.S."

[129] *Wingate v. Harris*, 501 F. Supp. 58 (S.D.N.Y. 1980).

[130] The Board's Chair, John Settle, and Member Judy Ballard were the chief architects of the new procedures. See ADMINISTRATIVE LAW, supra note 102, at §54.08[3][b].

[131] The goals are taken from the preamble to the proposed rules. See 46 Fed. Reg. 1,644 (1981).

[132] See 45 C.F.R. §74.304 (1985); FEDERAL GRANTS, supra note 2, at §8:68.

[133] 46 Fed. Reg. 1,644 (1981).

[134] See id.

[135] "The Board may, at the time it acknowledges an appeal or at any appropriate later point, request additional documents or information; request briefing on issues in the case; ...." 45 C.F.R. §16.9 (1985).

[136] 45 C.F.R. §16.4 (1985).

[137] "[T]he documents supporting the claim, tabbed and organized chronologically and accompanied by an indexed list identifying each document." 45 C.F.R. §16.8(a)(1) (1985).

[138] "[A]ny additional documents supporting the respondent's position, organized and indexed ...." 45 C.F.R. §16.8(b)(1) (1985).

[139] See Section VI-B.

[140] 46 Fed. Reg. 1,644 (1981).

[141] "The Board may ... issue orders to show cause why a proposed finding or decision of the Board should not become final; ..." 45 C.F.R. §16.9 (1985).

[142] See Table 6A.

[143] See 45 C.F.R. §16.10(a) (1985).

[144] 45 C.F.R. §16.4 (1985). The preamble to the final regulation emphasizes that the conference is not an evidentiary hearing and is, to the extent possible, confined in scope to the material in the appeal file. Thus, while parties can make oral presentations, such are intended to be analyses of the record and arguments based thereon.

[145] The conference format is normally established by preliminary telephonic scheduling conferences. See 45 C.F.R. §16.9 (1985) Such conference calls establish the time for the conference, identify disputed legal issues, determine procedures, and establish participants, including witnesses. See 45 C.F.R. §16.10(b) (1985).

[146] 45 C.F.R. §16.10(a) (1985).

[147] Compare DeFoor, II & Sechen, "Telephone Hearings in Florida," 38 U. Miami L. Rev. 593 (1984).

[148] See 45 C.F.R. §16.10(c)(4) (1985).

[149] The case files reveal either verbatim transcripts or summaries of the conference prepared by staff. Apparently, the Presiding Member and staff assistant will judge which type record would best serve the needs of the case. The rules imply a right to a verbatim transcript: "On request, a party will be sent one copy of the transcript." 45 C.F.R. §16.10(c)(1) (1985).

[150] 45 C.F.R. §16.12(d)(3) (1985).

[151] Because all disputes have been processed to some extent at the Agency level, the distinction is between informal and on-the-record proceedings, although the latter do not have to follow Federal Administrative Procedure Act formalities.

[152] See 45 C.F.R. §16.4 (1985).

[153] The rules do state in a section entitled "Summary of

procedures below" that "[c]onferences may be conducted by telephone conference call." 45 C.F.R. §16.4 (1985) (emphasis added).

[154] See ADMINISTRATIVE LAW, supra note 102, at pp.54-143 n.31, 54-150. A sixth Member was appointed in 1986. This Member does Part 16 work on a part-time basis; most of his work involves certain civil money penalties imposed in the medicare program.

[155] 45 C.F.R. §16.13 (1985).

[156] The Board has expressed doubts about its power to enforce deadlines against the Agency. It has stated that it may indirectly deter unreasonable delay by closing the record on a tardy Agency. See 46 Fed. Reg. 43,817 (1981).

[157] We have encountered an en banc decision in a major consolidated case. See In re: Effect of DEFRA Amendments on Utilization Control Disallowances, HHS Grant App. Bd., Dec. No. 655 (June 7, 1985).

[158] At the time of writing, only one concurrence in 754 opinions. This happened in In re: Vermont Agency of Human Servs., HHS Grant App. Bd., Dec. No. 338 (June 30, 1982).

[159] The Presiding Member signs last under Board customs.

[160] See generally ADMINISTRATIVE LAW, supra note 102, §54.08[3] at pp. 54-150 to 54-151.

[161] See note 124, supra, and accompanying text.

[162] Actual amounts appealed in 1984 and 1985, both over \$500 million, show that recent appeals are even more valuable. See Table 4A.

[163] We treated the "summary decision," a form of summary judgment based on directly applicable precedents in parallel cases, as a full-cycle adjudication.

[164] See Section V-A.

[165] It is not one-third because a number of full-cycle cases have no dollar values assigned.

[166] See, e.g., GALANTER, supra note 32, at 28 (88% settlement rate).

[167] For descriptions of each procedure, see Section IV-C.

[168] See ADMINISTRATIVE LAW, supra note 102, at p.54-195.

[169] See text accompanying notes 112-115. These are: noncompliance terminations; cost rates and plans; voiding a grant; and denial of a noncompeting continuation award.

[170] The Board's decisions are not formally published. They are issued in typed, mimeographed form to the parties and are mailed free of charge to persons who have so requested.

[171] The appeal is technically filed when an appellant "submit[s]" a notice of appeal. See App. A at §16.7(a). That date is identified by postmark on the mailing envelope or date of hand delivery. GAB's responsibility to dispose of an appeal expeditiously can only commence when it has knowledge of the appeal.

[172] See Section V-E.

[173] 1984 Annual Report of the Director of the Administrative Office of the United States Courts at p. 192 [hereinafter cited as 1984 ANNUAL REPORT].

[174] See FLANDERS, supra note 14, at 25, table 9.

[175] See 1984 ANNUAL REPORT, supra note 173, at 286, table C-5.

[176] See CHURCH, supra note 45, at 11, table 2.1.

[177] See id. at 10, table 2.1.

[178] See id. at 10-11, table 2.1.

[179] See SELVIN, supra note 35, at 27.

[180] See App. A at §16.23.

[181] Id.

[182] See Table 5F.

[183] See Section X-B; App. F.

[184] See App. A at §16.15(b).

[185] See FEDERAL GRANTS, supra note 2, at §8:68.

[186] Time spans are legally counted by excluding the day the event occurs which sets a time period running and also excluding the last day if it is a Saturday, Sunday, or holiday. See App. A at §16.19.

[187] While the Chair initially inspects appeals for jurisdictional compliance, see App. A at app. A, para. G, it may be that he does not press timeliness questions absent Agency insistence with the same rigor that he inspects and dismisses for lack of subject matter jurisdiction. In an interview, the Board Chair stated that he issues a show cause order automatically whenever it appears on the face of the record (as when the

appellant's date of receipt is stamped on the disallowance notice) that the appeal is untimely.

[188] See App. A at §16.7(b).

[189] See Section V-D.

[190] Further special briefing occurs occasionally.

[191] See Church et al, PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY 34-35 (Nat'l Center for State Courts 1978).

[192] See Ebener, COURT EFFORTS TO REDUCE PRETRIAL DELAY 39-42 (Rand Inst. for Civil Justice 1981).

[193] See App. A at §16.13.

[194] We found only one written objection to a time extension requested by the other party.

[195] The Board is empowered to "suspend cases which are not ready for review . . . ." See App. A at §16.13.

[196] See, e.g., Fed. R. Civ. P. 42(a).

[197] See FEDERAL GRANTS, supra note 2, at §8:68 n.75.

[198] To a "main" case would be added "consolidated" ones. The main case would serve as the litigation vehicle for all cases. The same appeal file, briefs, conferences, hearings, and witnesses would serve for all. If many different states were joined, lead counsel might be agreed upon.

[199] This amount is swollen by three very large cases, two for \$16 million each and one for \$64 million, that were jointly considered.

[200] See App. A at §16.13.

[201] See App. A at §16.20.

[202] See Table 8A.

[203] See Table 8B.

[204] See Table 8C.

[205] See Section IV-D.

[206] See In re: Ohio Dept. of Human Servs., HHS Grant App. Bd., Doc. No. 725 (Mar. 7, 1986), aff'd on reconsideration, June 6, 1986.

[207] The appeal was for \$8,008. One wonders whether a dismissal would be entered on the same facts in an \$8 million

appeal.

[208] Correspondence on file with author concerning In re Illinois Dept. of Public Aid, Dkt. No. 83-192.

[209] Another Member viewed this incident differently, stating:

I do not think it was "unfortunate" that we held a hearing. What was unfortunate was that the State did not fully develop the facts and the Agency had not fully developed its legal position to the point of considering the consequences. We thus took a long time to sort matters out. The reason our questions ultimately had the result they did was that we had developed expertise in reimbursement systems and indirect cost questions, as well as in the way Medicaid had implemented the timely claims requirement.

[210] See Table 8A.

[211] See FEDERAL GRANTS, supra note 2, passim; R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS (1979).

[212] See, e.g., J. L. Mashaw et al., SOCIAL SECURITY HEARINGS AND APPEALS xx (1978).

[213] Review is under "substantial evidence" and "arbitrary and capricious" standards. See, e.g., Illinois ex rel. Illinois Dep't of Pub. Aid, 609 F. Supp. 1421, 1426-27 (N.D. Ill. 1985).

[214] See 46 Fed. Reg. 1,645 (1981). The Board Members and staff attorneys have been trained in mediation techniques. Even though few cases have been successfully mediated, such training is valuable for the enhancement of interpersonal skills. Board Members stated that the training helped them manage their assigned cases.

[215] See Practice Manual: Departmental Grant Appeals Board 15-16 (first draft; undated) [hereinafter cited as PRACTICE MANUAL].

[216] See DISPUTE RESOLUTION, supra note 16, at pp. 485-87.

[217] Cf. Behre, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?," 16 Pub. Cont. L. Rev. 66 (1986).

[218] See Section VI-B-9.

[219] 1984 ANNUAL REPORT, supra note 173, at 152.

[220] In 51 cases adjudicated by the Board, some portion of the appealed dollars, usually minor, was withdrawn from the Board's authority by settlement.

[221] See Section IV-D,

[222] See Table 8B.

[223] Id.

[224] See Table 4G.

[225] See App. E, question 16.

[226] Derived from Table 8A.

[227] Derived from Table 8C.

[228] Derived from Table 8B.

[229] See In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 115 (Aug. 8, 1980), aff'd, New Jersey v. Department of Health & Human Servs., 670 F.2d 1284 (3d Cir.), cert. denied, 459 U.S. 824 (1982); In re: Montana Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 119 (Sept. 29, 1980), aff'd, Montana Dep't of Social & Rehab. Servs. v. United States Dep't of Health & Human Servs., No. CV-80-208-H (D. Mont. Feb. 10, 1982); In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 135 (Nov. 28, 1980) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 146 (Jan. 29, 1981) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 153 (Feb. 27, 1981) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 195 (June 30, 1981) & In re: New Jersey HHS Grant App. Bd., Dec. No. 199 (July 31, 1981), aff'd, New Jersey v. Department of Health & Human Servs., 670 F.2d 1262 (3d Cir. 1981); In re: California Dep't of Benefit Payments, HHS Grant App. Bd., Dec. No. 160 (Mar. 31, 1981), aff'd, California v. Heckler, No. 81-2443 (N.D. Cal. May 8, 1984), aff'd, 765 F.2d 149 (9th Cir. 1985); In re: Montana Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 171 (April 30, 1981), aff'd, Montana Dep't of Social & Rehab. Servs. v. United States Dep't of Health & Human Servs., No. 77-78 (D. Mont. Nov. 1983 & June 28, 1984); In re: Washington Dep't of Social & Health Servs., HHS Grant App. Bd., Dec. No. 176 (May 26, 1981), aff'd, Washington v. Schweiker, No. C81-1197R (W.D. Wash. Feb 28, 1983), aff'd sub nom., Washington v. Heckler, 722 F.2d 1451 (9th Cir. 1984); In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 187 (May 31, 1981), reconsideration denied, In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 377 (Jan 27, 1983), aff'd, Colorado Dep't of Social Servs. v. Department of Health & Human Servs., 585 F. Supp. 522 (D. Colo. 1984), aff'd, 771 F.2d 1422 (10th Cir. 1985); In re: Maryland Dep't of Health & Mental Hygiene, HHS Grant App. Bd., Dec. No. 210 (Aug. 31, 1981), aff'd, Maryland v. United States, No. 132-82 (Ct. Cl. May 22, 1985); In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 218 (Sept. 30, 1981), aff'd, Colorado Dep't of Social Servs. v. Department of Health & Human Servs., No. 83-1395 (10th Cir. May 9, 1984); In re: Joint Consideration: Institutions for Mental Diseases, HHS Grant App. Bd., Dec. No. 231 (Nov. 30, 1981), rev'd, Connecticut, Dep't of Income Maintenance v. Schweiker, 557 F. Supp. 1077 (D. Conn.

1983), rev'd sub nom., Connecticut Dep't of Income Maintenance v. Heckler, 731 F.2d 1052 (2d Cir. 1984), aff'd, 105 S. Ct. 2210 (1985); In re: Joint Consideration-Abortion Funding, HHS Grant App. Bd., Dec. No. 260 (Feb. 26, 1982), aff'd, Illinois ex rel. Illinois Dep't of Pub. Aid v. United States Dep't of Health & Human Servs., 594 F. Supp. 147 (N.D. Ill. 1984), aff'd, 772 F.2d 329 (7th Cir. 1985); In re: Massachusetts Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 262 (Feb. 26, 1982), rev'd, Massachusetts ex rel. Dep't of Pub. Welfare v. Secretary of Health & Human Servs., 749 F.2d 89 (1st Cir. 1984), cert. denied, 105 S. Ct. 3478 (1985); In re: Michigan Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 290 (April 30, 1982), aff'd, Michigan Dep't of Social Servs. v. Schweiker, 563 F. Supp. 797 (W.D. Mich. 1983), aff'd sub nom., Michigan v. Secretary of Health & Human Servs., 744 F.2d 32 (6th Cir. 1984); In re: Hawaii Dep't of Social Servs. & Housing, HHS Grant App. Bd., Dec. No. 295 (May 7, 1982), aff'd in pt. & rev'd in pt., Hawaii v. Heckler, No. 83-0506 (D. Hawaii June 21, 1984), aff'd, 760 F. 2d 1031 (9th Cir. 1985); In re: Florida Dep't of Health & Rehab. Servs., HHS Grant App. Bd., Dec. No. 296 (May 14, 1982), aff'd, Florida v. Heckler, No. 82-0935 (N.D. Fla. Jan. 5, 1984); In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 311 (June 16, 1982), aff'd, Perales v. Heckler, 611 F. Supp. 333 (N.D.N.Y. 1984), aff'd per curiam, 762 F. 2d 226 (2d Cir. 1985); In re: Joint Consideration: Reimbursement of Foster Care Servs., HHS Grant App. Bd., Dec. No. 337 (June 30, 1982), aff'd, Oregon, Dep't of Human Resources & Children's Servs. Div. v. Heckler, No. 83-1466 (D. Ore. Feb. 6, 1984); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 344 (Sept. 29, 1982), aff'd, Maryland Dep't of Human Resources v. Department of Health & Human Servs., No. 82-3402 (D.D.C. Oct. 12, 1983), aff'd, 763 F.2d 1441 (D.C.Cir. 1985); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 358 (Nov. 29, 1982), aff'd, Maryland Dep't of Human Resources v. Department of Health & Human Servs., No. 83-586 (D. Md. Feb.1, 1984), aff'd, 762 F. 2d 406 (4th Cir. 1985); In re: North Carolina Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 361 (Nov. 30, 1982), aff'd, North Carolina v. Heckler, 584 F. Supp. 179 (E.D.N.C. 1984); In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 398 (Mar. 18, 1983), aff'd, Pennsylvania, Dep't of Pub. Welfare v. Heckler, 730 F.2d 923 (3d Cir. 1984); In re: Ohio Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 453 (July 29, 1983), aff'd, Ohio, Dep't of Pub. Welfare v. Heckler, No. 2-84-0184 (S.D. Ohio July 31, 1985); In re: Illinois Dep't of Pub. Aid, HHS Grant App. Bd., Dec. No. 457 (July 29, 1983), aff'd, Illinois ex rel. Illinois Dep't of Pub. Aid v. Heckler, 616 F. Supp. 620 (N.D.Ill. 1985); In re: Puerto Rico Office for Human Dev., HHS Grant App. Bd., Dec. No. 474 (Nov.9, 1983), aff'd, Puerto Rico v. United States, No. 84-0388 (D.P.R. April 19, 1985); In re: Wisconsin Dep't of Health & Social Servs., HHS Grant App. Bd., Dec. No. 482 (Nov. 30, 1983) & In re: Wisconsin Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 525 (Mar.30, 1984), rev'd & remanded, Wisconsin, Dep't of Health & Social Servs. v. Heckler, Nos. 84-C-75, 84-C-334, 84-C-682 (W.D. Wis. Dec. 11, 1984), rev'd sub nom., Wisconsin

Dep't of Health & Social Servs. v. Bowen, 797 F.2d 391 (7th Cir. 1986); In re: Oklahoma Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 484 (Nov. 30, 1983), aff'd, Oklahoma, ex rel. Dep't of Human Servs. v. Heckler, No. 84-865 (W.D. Okla. Jan. 15, 1985); In re: Mississippi Medicaid Comm'n, HHS Grant App. Bd., Dec. No. 504 (Jan. 31, 1984), aff'd, Mississippi Medicaid Comm'n v. United States Dep't of Health & Human Servs., 633 F. Supp. 78 (S.D. Miss. 1985), aff'd mem., 786 F.2d 1161 (5th Cir. 1986); In re: Illinois Dep't of Pub. Aid, HHS Grant App. Bd., Dec. No. 517 (Feb. 29, 1984), aff'd, Illinois v. Heckler, 609 F. Supp. 1421 (D.C. Ill. 1985); In re: Granville House, Inc., HHS Grant App. Bd., Dec. No. 529 (April 1984), aff'd, 772 F. 2d 451 (8th Cir. 1985); In re: Vermont Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 546 (June 27, 1984), rev'd, Vermont Dep't of Social & Rehab. Servs v. United States Dep't of Health & Human Servs., No. 84-325 (D. Vt. Aug. 28, 1985), rev'd, No. 85-6320 (2d Cir. Aug. 12, 1986); In re: Texas Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 617 (Jan. 17, 1985), aff'd in pt. and remanded in pt. for clarification, Texas Dep't of Human Resources v. Heckler, No. 85-CA-183 (W.D. Tex. Oct. 9, 1985); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 639 (April 15, 1985), aff'd, Massinga v. Bowen, No. 85-2340 (D.Md. Aug. 28, 1986).

We have not counted two cases which reversed Board decisions but whose reasoning was rejected by the courts of appeals of other circuits. See In re: Arkansas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 423 (April 29, 1983), remanded for further consideration, Arkansas v. Heckler, No. 83-467 (E.D. Ark. Sept. 17, 1984), reinstated after rehearing. In re: Arkansas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 717 (Jan. 8, 1986); In re: Missouri Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 448 (June 30, 1983), rev'd, Department of Social Servs. v. Heckler, No. 84-4106 (W.D. Mo. Sept. 24, 1984).

[230] See In re: Hawaii Dep't of Social Servs. & Housing, HHS Grant App. Bd., Dec. No. 295 (May 7, 1982), aff'd in pt. & rev'd in pt., Hawaii v. Heckler, No. 83-0506 (D. Hawaii June 21, 1984), aff'd, 760 F.2d 1031 (9th Cir. 1985); In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 346 (Sept. 30, 1982), rev'd, Pennsylvania v. Department of Health & Human Servs., 723 F.2d 1114 (3d Cir. 1983); In re: Massachusetts Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 438 (May 31, 1983), rev'd, Massachusetts v. Heckler, 616 F. Supp. 687 (D. Mass. 1985); In re: Texas Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 381 (Jan. 31, 1983), remanded for clarification, Texas Dep't of Human Resources v. Heckler, No. 83-CA-159 (W.D. Tex. Aug. 2, 1985), disallowance rev'd. In re: Texas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 381 (June 18, 1986).

[231] See, e.g., In re: Texas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 381 (June 18, 1986).

[232] See CHURCH, supra note 45, at 54. See also FLANDERS, supra note 14, at 69-70.

[233] We cannot be more precise because our reporting category was indefinite: "6 or more." See App. E, question 4.

[234] We scattered questions rather than organize them by category so as not to influence the responses.

[235] See Table 8A.

[236] See Section IV-D.

[237] See ELLIOTT, supra note 58, at 321-22 (worrying about standardless narrowing of issues by managerial judges).

[238] This is proportionately higher than the direct evaluation of Board procedures (7.01/10). We shall offer an explanation later. See Section VIII-C.

[239] See PRACTICE MANUAL, supra note 215, at 6-9.

[240] See Fed. R. Civ. P. 26(b) advisory committee note.

[241] See Section X-D.

[242] 424 U.S. 319 (1976).

[243] See PRACTICE MANUAL, supra note 215, at 9.

[244] See Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U. S. 694 (1982).

[245] For example, inadequate discovery favors the United States since the grantee has the burden of proving that the fiscal disallowance was unlawful. See FEDERAL GRANTS, supra, note 2, at §8:78. Indeed, placing such burden on one side can itself be seen as a procedural bias.

[246] See Section IV-D.

[247] See also Table 8C for a cross-tabulation of the views of winners, losers, and splitters. We attempted three other rating cross-tabulations: 1) number of cases an attorney had litigated at GAB; 2) number of years practicing law; and 3) date of last litigation at GAB. Such breakdowns produced too few attorneys reporting in several categories to have statistical meaning. Also, we noted few differences dramatic enough to pursue further.

[248] See Table 8A.

[249] For interesting information about the kinds and volume of motions filed in federal district courts, see Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (Fed. Judicial Center 1980).

[250] See Table 8A. Although the Board will rarely order

discovery of the Agency, depositions or production orders for example, it will sometimes arrange for the Agency to agree to show specified documents to the appellant, or to make a person available for questions or to answer certain grantee interrogatories. This discovery by agreement often satisfies the appellant's need for information while avoiding formal motions and rulings. See generally PRACTICE MANUAL, supra note 215, at 8.

[251] See Table 6A.

[252] See Table 9A.

[253] See Table 8B.

[254] See Section IV-D.

[255] See *Fuentes v. Tucker*, 31 Cal.2d 1, 187 P.2d 752 (1947) (Gibson, C.J.).

[256] 187 P.2d at 754.

[257] See Rosenberg, "Devising Procedures That Are Civil to Promote Justice That is Civilized," 69 Mich. L. Rev. 797, 800 (1971).

[258] Cf. MASHAW, supra note 9, at 780 (adjudicating entitlements to benefits under public laws is a "regime of strict law").

[259] This reasoning applies with equal vigor to grantees' defaults since the law might direct public funds into their hands absent the procedural sanction.

[260] See generally Rosenblum, "Contexts and Contents of 'For Good Cause' as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors," 6 Western N. Eng. L. Rev. 592, 620-33 (1984) (low productivity as cause for judge's removal).

[261] See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts.

[262] Cf. MASHAW, supra note 9, at 791-804 (quality control systems applied to public benefit adjudications).

[263] See CHURCH, supra note 45, at 36.

[264] See Table 5E.

[265] See FLANDERS, supra note 14, at ix.

[266] Studies have shown that the early months a case sits on a federal district court docket are mostly lost, the attorneys being busy on other matters. See FLANDERS, supra note 14, at 69.

- [267] In effect, the judge is supervising the lawyers' preparation and tactics rather than the client (or supervising officer), who is often unable or unwilling to perform this function. See generally ELLIOTT, supra note 58, at 330-32.
- [268] The Board has yet to reach a constitutional issue, having found a statute or regulation on point and controlling in cases where constitutional issues were pressed.
- [269] See Fed. R. Civ. P. 1. Differentiation is beginning to occur, as in the 1983 amendments which allow district judges to tailor discovery to the "amount in controversy" and the "needs of the case." See Fed. R. Civ. P. 26(b)(1). For an elaborate proposal to amend the federal rules to create a "fast track" option, see McMillan & Siegel, "Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure," 60 Notre Dame L. Rev. 431 (1985). See also RESNIK, supra note 1, at 547 (need special procedures for subsets of cases).
- [270] See 45 C.F.R. §16.23 (1985).
- [271] See CHURCH, supra note 45, at 54.
- [272] See Section VIII-C.
- [273] See Section VIII-B.
- [274] See, e.g., In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 673 (July 19, 1985).
- [275] See Section V-F.
- [276] See FEDERAL GRANTS, supra note 2, at §§1:03-1:06.
- [277] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 86 (1979).
- [278] See Section IV-A.
- [279] The impetus for the 1981 reform was more than academic. By that time GAB had inherited and accumulated a large backlog of unresolved disputes.
- [280] Compare ALSCHULER, supra note 26, at 1845-59.
- [281] See notes 130-131, supra, and accompanying text.

APPENDIX A: JURISDICTION AND PROCEDURES OF THE  
GRANT APPEALS BOARD, DEPARTMENT OF HEALTH AND HUMAN SERVICES



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 16 and 74

Grant Appeals Board; Process for Appeals From Final Written Decisions

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

**SUMMARY:** The Department of Health and Human Services (HHS) revises 45 CFR Part 16 to substitute new requirements and procedures applicable to disputes arising under certain HHS grant and cooperative agreement programs. HHS also adds certain related provisions to 45 CFR Part 74, which contains general requirements applicable to all HHS grant and cooperative agreement programs. The provisions will improve the Department's capability to provide a fair, quick and flexible process for appeals from final written decisions.

**DATE:** Effective September 30, 1981.

**FOR FURTHER INFORMATION CONTACT:** John Settle, Chair, Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street, S.W., Washington, D.C. 20201; Telephone: (202) 245-0222.

**SUPPLEMENTARY INFORMATION:**

I. Background

On January 6, 1981, HHS published a Notice of Proposed Rulemaking in the Federal Register containing proposed new requirements and procedures applicable to the Departmental Grant Appeals Board and those who use the Board's dispute resolution services (48 FR 1844). The rules below contain changes made in response to comments received.

II. Summary of comments and changes

Overall, the comments were very supportive of the proposed procedures. The few criticisms are discussed below.

**Small cases.** We invited comment on whether we should eliminate Board review of small cases, suggesting a threshold of \$5,000. Comments were negative; furthermore, since we receive few cases under \$5,000, the savings of time by the Board would be minimal. We therefore have not eliminated small cases from Board jurisdiction. The procedures do contain an expedited review process for cases of \$25,000 or less (§ 16.12).

**Subgrantees.** One commenter argued that subgrantees of HHS grantees should have a right to appeal to the

Board. We have not provided such a general right of access. The Board's primary responsibility is to deal with disputes between HHS and its grantees, and Board resources are not great enough to permit us to substantially expand our role. Furthermore, HHS has no direct relationship with the subgrantee, and disputes between the subgrantee and the grantee generally should be resolved between those parties. The rules do contain a provision (§ 16.10) under which a subgrantee which is the real party in interest can intervene if the appellant does not object, and any party with an identifiable interest in a case may, in the discretion of the Board, participate in the process in some lesser manner (for example, by submitting a brief).

**Standard of review.** One commenter suggested that the Board adopt a standard of review, such as a "substantial evidence" test. We have not done so because the wide range of programs the Board serves, and the complexity of issues within those programs, cannot be adequately covered by a single standard of review or burden of proof statement.

**Conflict of interest.** One commenter felt that the proposed rules were weak concerning potential conflicts of interest on the part of Board personnel. We have modified the provisions to state an affirmative but general standard, based on the Code of Judicial Conduct and case law such as *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). This case states that the test for disqualification is whether a disinterested observer could conclude that the decisionmaker "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Canon 3.C.(1) of the Code says that "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned," and lists examples of circumstances. The Board will use the Code and relevant case law as guidance in applying its rule (see § 16.5(d)).

**Filing time limits.** Three commenters felt the time frames in §§ 16.7 and 16.8 were too short. We have not modified these provisions, because we believe that the commenters failed to realize that the new provisions actually represent a substantial expansion of front-end filing time over existing regulations. Under provisions currently in effect, the grantee is required to file an application for review within 30 days after the adverse agency decision. The application for review contains both notice of an appeal and the appellant's substantive argument. Under the new

rule, an appellant has 30 days to file a notice of appeal (which can be very brief) and then has a further 30 days to prepare its argument after the Board acknowledges the notice of appeal. Thus, §§ 16.7 and 16.8 more than double the amount of front-end time the appellant has to prepare its position.

In return for this expanded time at the beginning of the appeal, the Board expects greater completeness in grantee briefing, so that the Board will save time later by avoiding successive requests for information or briefing.

**Uses of conferences.** Section 16.10 has been modified slightly to clarify that the conference is provided not only to elicit answers to specific questions from the Board, but also to give the parties an opportunity to make an oral presentation. The Board still intends to keep the scope of the conference, to the maximum extent practicable, restricted to consideration of material in the appeal file. The conference is not an evidentiary hearing.

**Electing a hearing.** One commenter found § 16.11(a) too restrictive, reading it to mean that unless a party specifically requested a hearing at the outset of a case, none would be granted, regardless of the issues involved. The commenter suggested this would lead to *pro forma* requests for hearings in all cases. This interpretation was not intended, and we have added language to make it clear that the Board can respond to a later request for a hearing or can schedule one on its own.

**Prehearing conferences and the record.** One commenter stated that it was "unclear" about § 16.11(b), which states that the Board, "after consulting with the parties," may reduce the results of an informal prehearing conference to writing in a document which would be made part of the record. The commenter felt that both parties should be given the opportunity of reviewing and commenting on what the Board proposes to include in the record. The Board intends to provide precisely that opportunity, and that is how the Board will interpret the "consulting" phrase.

**Sanctions.** Two commenters felt the provisions of § 16.15(b), providing for possible dismissal of an appeal for failure to meet deadlines, were too severe or unfair compared to penalties applicable to the HHS component. The procedures give the Board ample authority to accommodate the legitimate needs of grantees which need extensions for valid reasons, but we cannot allow unreasonable delays. The reason the procedures do not contemplate dismissal against the HHS component for failure to meet deadlines is that there is a substantial legal and

policy question whether the Board could or should take an action effectively precluding HHS from recouping funds which HHS determined the grantee possesses or claims illegally, by virtue, for example, of having incurred an unallowable cost. If the HHS component does unreasonably delay, the Board can treat the HHS case as submitted for decision based on the record assembled to that point.

**Secretarial review.** The provision which provoked the most comments was proposed § 16.21(c), which provided that Board decisions would not be final and would be subject to modification in whole or part at the discretion of the Secretary. The Department continues to study whether Board decisions should be "final" or should be subject to Secretarial review. In order to avoid further delay in implementing the other provisions, these procedures are being published without § 16.21(c), and that section is reserved for the addition of a provision dealing with the matter of the finality of Board decisions. In the interim, the decisions of the Board will be the final administrative action of the Department on the matter in dispute.

**Staying agency action.** Several commenters objected to § 16.22(b), on the basis that it gives an HHS component too much authority to take action pending the outcome of the appeal. The range of actions an HHS component may take under the provisions of § 16.22(b) (1) through (3) are reasonably limited; the broadest authority is contained in § 16.22(b)(4), which provides for any other action "specifically authorized by statute or regulation." The latter provision merely restates what would be the rule even if this provision were not included here, and we believe that commenters' attention generally should focus on the adequacy or desirability of any specific provision of law or regulation that may be proposed by an HHS component to authorize or require predecision action. However, we have clarified § 16.22(b)(3). It is intended to apply only to certain Social Security Act programs in situations where a disallowance is taken, based on a report of actual expenditures, before the disallowed claim has ever been approved.

**Provisions related to jurisdiction.** The final rule adds disallowances under Title III of the Older American Act. Under a final rule published by the Social Security Administration (46 FR 29190, May 29, 1981), the Board will also review certain audit determinations, and provide a hearing on a proposed finding of "substantial failure," in disputes

arising under section 221 of the Social Security Act.

One commenter expressed "disappointment" that the Board would rely so heavily on HHS component input in situations where Board jurisdiction is unclear, since we will be bound by an HHS opinion that is not clearly erroneous (Appendix A, Paragraph C). The determination that the Board should have jurisdiction for certain programs reflects a policy decision by Departmental managers. Thus, it would be inappropriate for the Board to extend jurisdiction to cases where we did not clearly have it. Furthermore, it is important to have a rapid decision-making mechanism in these unclear cases, to let the grantee and the agency involved know quickly what their review options are.

**"Final" agency decisions.** Concerning proposed § 74.304, one commenter observed that there can be a problem with an HHS component delaying a final decision, so that failure to provide a final decision should trigger a right to appeal. We have not included such a provision. It is administratively very difficult to determine the scope of an undefined dispute, and thus in most cases virtually impossible to adjudicate it. The Board's regulation does indicate that an agency should issue a decision "promptly." Board personnel who participate in agency training sessions continually try to impress upon agency personnel the need to issue timely final decisions, both to reduce legal and political risk and to foster good grantee/grantor relationships.

**Minor wording changes.** A number of other minor changes have been made to assure consistent terminology, to clarify meaning without substantial change, and to improve grammar and style.

### III. Continuing comments invited

Although this is a final rule, we invite comment and criticism on a continuing basis, and we will make modifications in the future as they are needed. Please communicate with the Chair, Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street, S.W., Washington, D.C. 20201 (telephone 202/245-0222).

### IV. Implementation

These procedures apply to all appeals filed on and after the effective date. These procedures also apply to all appeals pending on the effective date, to the extent practicable and not inconsistent with fairness to the parties. The Board will conduct all hearings and conferences in pending appeals in accordance with the new §§ 16.5, 16.10 and 16.11, but the parties in these cases

are not required to duplicate earlier effort by developing the appeal file under new § 16.8. Unless the parties otherwise agree, the expedited process in § 16.12 does not apply to pending appeals. The Board will consult with the parties in each pending appeal concerning the transition to the new procedures, and will apply the old procedures where a party shows why they would be fairer in that appeal.

Accordingly, the Department amends 45 CFR as follows:

#### 1. By revising Part 16 as follows:

### PART 16—PROCEDURES OF THE DEPARTMENTAL GRANT APPEALS BOARD

#### Sec.

- 16.1 What this part does.
- 16.2 Definitions.
- 16.3 When these procedures become available.
- 16.4 Summary of procedures below.
- 16.5 How the Board operates.
- 16.6 Who represents the parties.
- 16.7 The first steps in the appeal process: the notice of appeal and the Board's response.
- 16.8 The next step in the appeal process: preparation of an appeal file and written argument.
- 16.9 How the Board will promote development of the record.
- 16.10 Using a conference.
- 16.11 Hearing.
- 16.12 The expedited process.
- 16.13 Powers and responsibilities.
- 16.14 How Board review is limited.
- 16.15 Failure to meet deadlines and other requirements.
- 16.16 Parties to the appeal.
- 16.17 Ex parte communications (communications outside the record).
- 16.18 Mediation.
- 16.19 How to calculate deadlines.
- 16.20 How to submit material to the Board.
- 16.21 Record and decisions.
- 16.22 The effect of an appeal.
- 16.23 How long an appeal takes.

#### Appendix A—What Disputes the Board Reviews.

Authority: 5 U.S.C. 301 and sections 1, 3, 6, and 7 of Reorganization Plan No. 1 of 1953, 18 FR 2063, 67 Stat. 631 and authorities cited in the Appendix.

#### § 16.1 What this part does.

This part contains requirements and procedures applicable to certain disputes arising under the HHS programs described in Appendix A. This part is designed to provide a fair, impartial, quick and flexible process for appeal from written final decisions. This part supplements the provisions in Part 74 of this title.

#### § 16.2 Definitions.

(a) "Board" means the Departmental Grant Appeals Board of the Department of Health and Human Services.

Reference below to an action of "the Board" means an action of the Chair, another Board member, or Board staff acting at the direction of a Board member. In certain instances, the provisions restrict action to particular Board personnel, such as the Chair or a Board member assigned to a case.

(b) Other terms shall have the meaning set forth in Part 74 of this title, unless the context below otherwise requires.

**§ 16.3 When these procedures become available.**

Before the Board will take an appeal, three circumstances must be present:

(a) The dispute must arise under a program which uses the Board for dispute resolution, and must meet any special conditions established for that program. An explanation is contained in Appendix A.

(b) The appellant must have received a final written decision, and must appeal that decision within 30 days after receiving it. Details of how final decisions are developed and issued, and what must be in them, are contained in 45 CFR 74.304.

(c) The appellant must have exhausted any preliminary appeal process required by regulation. For example, see 42 CFR Part 50 (Subpart D) for Public Health Service programs and Part 75 of this title for rate determinations and cost allocation plans. In such cases, the "final written decision" required for the Board's review is the decision resulting from the preliminary review or appeal process. Appendix A contains further details.

**§ 16.4 Summary of procedures below.**

The Board's basic process is review of a written record (which both parties are given ample opportunity to develop), consisting of relevant documents and statements submitted by both parties (see § 16.8). In addition, the Board may hold an informal conference (see § 16.10). The informal conference primarily involves questioning of the participants by a presiding Board member. Conferences may be conducted by telephone conference call. The written record review also may be supplemented by a hearing involving an opportunity for examining evidence and witnesses, cross-examination, and oral argument (see § 16.11). A hearing is more expensive and time-consuming than a determination on the written record alone or with an informal conference. Generally, therefore, the Board will schedule a hearing only if the Board determines that there are complex issues or material facts in dispute, or that the Board's review would otherwise

be significantly enhanced by a hearing. Where the amount in dispute is \$25,000 or less, there are special expedited procedures (see § 16.12 of this part). In all cases, the Board has the flexibility to modify procedures to ensure fairness, to avoid delay, and to accommodate the peculiar needs of a given case. The Board makes maximum feasible use of preliminary informal steps to refine issues and to encourage resolution by the parties. The Board also has the capability to provide mediation services (see § 16.18).

**§ 16.5 How the Board operates.**

(a) The Board's professional staff consists of a Chair (who is also a Board member) and full- and part-time Board members, all appointed by the Secretary; and a staff of employees and consultants who are attorneys or persons from other relevant disciplines, such as accounting.

(b) The Chair will assign a Board member to have lead responsibility for each case (the "presiding Board member"). The presiding Board member will conduct the conference or hearing, if one is held. Each decision of the Board is issued by the presiding Board member and two other Board members.

(c) The Board staff assists the presiding Board member, and may request information from the parties; conduct telephone conference calls to request information, to clarify issues, or to schedule events; and assist in developing decisions and other documents in a case.

(d) The Chair will assure that no Board or staff member will participate in a case where his or her impartiality could reasonably be questioned.

(e) The Board's powers and responsibilities are set forth in § 16.13.

**§ 16.6 Who represents the parties.**

The appellant's notice of appeal, or the first subsequent submission to the Board, should specify the name, address and telephone number of the appellant's representative. In its first submission to the Board and the appellant, the respondent (i.e., the federal party to the appeal) should specify the name, address and telephone number of the respondent's representative.

**§ 16.7 The first steps in the appeal process: the notice of appeal and the Board's response.**

(a) As explained in 45 CFR 74.304, a prospective appellant must submit a notice of appeal to the Board within 30 days after receiving the final decision. The notice of appeal must include a copy of the final decision, a statement of the amount in dispute in the appeal, and

a brief statement of why the decision is wrong.

(b) Within ten days after receiving the notice of appeal, the Board will send an acknowledgment, enclose a copy of these procedures, and advise the appellant of the next steps. The Board will also send a copy of the notice of appeal, its attachments, and the Board's acknowledgment to the respondent. If the Board Chair has determined that the appeal does not meet the conditions of § 10.3 or if further information is needed to make this determination, the Board will notify the parties at this point.

**§ 16.8 The next step in the appeal process: preparation of an appeal file and written argument.**

Except in expedited cases (generally those of \$25,000 or less; see § 16.12 for details), the appellant and the respondent each participate in developing an appeal file for the Board to review. Each also submits written argument in support of its position. The responsibilities of each are as follows:

(a) *The appellant's responsibility.* Within 30 days after receiving the acknowledgment of the appeal, the appellant shall submit the following to the Board (with a copy to the respondent):

(1) An appeal file containing the documents supporting the claim, tabbed and organized chronologically and accompanied by an indexed list identifying each document. The appellant should include only those documents which are important to the Board's decision on the issues in the case.

(2) A written statement of the appellant's argument concerning why the respondent's final decision is wrong (appellant's brief).

(b) *The respondent's responsibility.* Within 30 days after receiving the appellant's submission under paragraph (a) of this section, the respondent shall submit the following to the Board (with a copy to the appellant):

(1) A supplement to the appeal file containing any additional documents supporting the respondent's position, organized and indexed as indicated under paragraph (a) of this section. The respondent should avoid submitting duplicates of documents submitted by the appellant.

(2) A written statement (respondent's brief) responding to the appellant's brief.

(c) *The appellant's reply.* Within 15 days after receiving the respondent's submission, the appellant may submit a short reply. The appellant should avoid repeating arguments already made.

(d) *Cooperative efforts.* Whenever possible, the parties should try to

develop a joint appeal file, agree to preparation of the file by one of them, agree to facts to eliminate the need for some documents, or agree that one party will submit documents identified by the other.

(c) *Voluminous documentation.* Where submission of all relevant documents would lead to a voluminous appeal file (for example where review of a disputed audit finding of inadequate documentation might involve thousands of receipts), the Board will consult with the parties about how to reduce the size of the file.

**§ 16.9 How the Board will promote development of the record.**

The Board may, at the time it acknowledges an appeal or at any appropriate later point, request additional documents or information; request briefing on issues in the case; issue orders to show cause why a proposed finding or decision of the Board should not become final; hold preliminary conferences (generally by telephone) to establish schedules and refine issues; and take such other steps as the Board determines appropriate to develop a prompt, sound decision.

**§ 16.10 Using a conference.**

(a) Once the Board has reviewed the appeal file, the Board may, on its own or in response to a party's request, schedule an informal conference. The conference will be conducted by the presiding Board member. The purposes of the conference are to give the parties an opportunity to make an oral presentation and the Board an opportunity to clarify issues and question both parties about matters which the Board may not yet fully understand from the record.

(b) If the Board has decided to hold a conference, the Board will consult or correspond with the parties to schedule the conference, identify issues, and discuss procedures. The Board will identify the persons who will be allowed to participate, along with the parties' representatives, in the conference. The parties can submit with their briefs under § 16.8 a list of persons who might participate with them, indicating how each person is involved in the matter. If the parties wish, they may also suggest questions or areas of inquiry which the Board may wish to pursue with each participant.

(c) Unless the parties and the Board otherwise agree, the following procedures apply:

(1) Conferences will be recorded at Department expense. On request, a party will be sent one copy of the transcript. The presiding Board member

will insure an orderly transcript by controlling the sequence and identification of speakers.

(2) Only in exceptional circumstances will documents be received at a conference. Inquiry will focus on material in the appeal file. If a party finds that further documents should be in the record for the conference, the party should supplement the appeal file, submitting a supplementary index and copies of the documents to the Board and the other party not less than ten days prior to the conference.

(3) Each party's representative may make an oral presentation. Generally, the only oral communications of other participants will consist of statements requested by the Board or responses to the Board's questions. The Board will allow reply comment, and may allow short closing statements. On request, the Board may allow the participants to question each other.

(4) There will be no post-conference submissions, unless the Board determines they would be helpful to resolve the case. The Board may require or allow the parties to submit proposed findings and conclusions.

**§ 16.11 Hearing.**

(a) *Electing a hearing.* If the appellant believes a hearing is appropriate, the appellant should specifically request one at the earliest possible time (in the notice of appeal or with the appeal file). The Board will approve a request (and may schedule a hearing on its own or in response to a later request) if it finds there are complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the Board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing. The Board will also provide a hearing if otherwise required by law or regulation.

(b) *Preliminary conference before the hearing.* The Board generally will hold a prehearing conference (which may be conducted by telephone conference call) to consider any of the following: the possibility of settlement; simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; scheduling the hearing, and any other matter that may aid in resolving the appeal. Normally, this conference will be conducted informally and off the record, however, the Board, after consulting with the parties, may reduce results of the conference to writing in a document which will be made part of the record, or may transcribe

proceedings and make the transcript part of the record.

(c) *Where hearings are held.* Hearings generally are held in Washington, D.C. In exceptional circumstances, the Board may hold the hearing at an HHS Regional Office or other convenient facility near the appellant.

(d) *Conduct of the hearing.* (1) The presiding Board member will conduct the hearing. Hearings will be as informal as reasonably possible, keeping in mind the need to establish an orderly record. The presiding Board member generally will admit evidence unless it is determined to be clearly irrelevant, immaterial or unduly repetitious, so the parties should avoid frequent objections to questions and documents. Both sides may make opening and closing statements, may present witnesses as agreed upon in the prehearing conference, and may cross-examine. Since the parties have ample opportunity to develop a complete appeal file, a party may introduce an exhibit at the hearing only after explaining to the satisfaction of the presiding Board member why the exhibit was not submitted earlier (for example, because the information was not available).

(2) The Board may request the parties to submit written statements of witnesses to the Board and each other prior to the hearing so that the hearing will primarily be concerned with cross-examination and rebuttal.

(3) False statements of a witness may be the basis for criminal prosecution under sections 287 and 1001 of Title 18 of the United States Code.

(4) The hearing will be recorded at Department expense.

(e) *Procedures after the hearing.* The Board will send one copy of the transcript to each party as soon as it is received by the Board. At the discretion of the Board, the parties may be required or allowed to submit post-hearing briefs or proposed findings and conclusions (the parties will be informed at the hearing). A party should note any major prejudicial transcript errors in an addendum to its post-hearing brief (or if no brief will be submitted, in a letter submitted within a time limit set by the Board).

**§ 16.12 The expedited process.**

(a) *Applicability.* Where the amount in dispute is \$25,000 or less, the Board will use these expedited procedures, unless the Board Chair determines otherwise under paragraph (b) of this section. If the Board and the parties agree, the Board may use these procedures in cases of more than \$25,000.

(b) *Exceptions.* If there are unique or unusually complex issues involved, or other exceptional circumstances, the Board may use additional procedures.

(c) *Regular expedited procedures.* (1) Within 30 days after receiving the Board's acknowledgment of the appeal (see § 16.7), each party shall submit to the Board and the other party any relevant background documents (organized as required under § 16.8), with a cover letter (generally not to exceed ten pages) containing any arguments the party wishes to make.

(2) Promptly after receiving the parties' submissions, the presiding Board member will arrange a telephone conference call to receive the parties' oral comments in response to each other's submissions. After notice to the parties, the Board will record the call. The Board member will advise the parties whether any opportunities for further briefing, submissions or oral presentations will be established. Cooperative efforts will be encouraged (see § 16.8(d)).

(3) The Board may require the parties to submit proposed findings and conclusions.

(d) *Special expedited procedures where there has already been review.* Some HHS components (for example, the Public Health Service) use a board or other relatively independent reviewing authority to conduct a formal preliminary review process which results in a written decision based on a record including documents or statements presented after reasonable notice and opportunity to present such material. In such cases, the following rules apply to appeals of \$25,000 or less instead of those under paragraph (c) of this section:

(1) Generally, the Board's review will be restricted to whether the decision of the preliminary review authority was clearly erroneous. But if the Board determines that the record is inadequate, or that the procedures under which the record was developed in a given instance were unfair, the Board will not be restricted this way.

(2) Within 30 days after receiving the Board's acknowledgment of appeal (see § 16.7), the parties shall submit the following:

(i) The appellant shall submit to the Board and the respondent a statement why the decision was clearly erroneous. Unless allowed by the Board after consultation with the respondent, the appellant shall not submit further documents.

(ii) The respondent shall submit to the Board the record in the case. If the respondent has reason to believe that all materials in the record already are in

the possession of the appellant, the respondent need only send the appellant a list of the materials submitted to the Board.

(iii) The respondent may, if it wishes, submit a statement why the decision was not clearly erroneous.

(3) The Board, in its discretion, may allow or require the parties to present further arguments or information.

#### § 16.13 Powers and responsibilities.

In addition to powers specified elsewhere in these procedures, Board members have the power to issue orders (including "show cause" orders); to examine witnesses; to take all steps necessary for the conduct of an orderly hearing; to rule on requests and motions, including motions to dismiss; to grant extensions of time for good reasons; to dismiss for failure to meet deadlines and other requirements; to close or suspend cases which are not ready for review; to order or assist the parties to submit relevant information; to remand a case for further action by the respondent; to waive or modify these procedures in a specific case with notice to the parties; to reconsider a Board decision where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of these procedures.

#### § 16.14 How Board review is limited.

The Board shall be bound by all applicable laws and regulations.

#### § 16.15 Failure to meet deadlines and other requirements.

(a) Since one of the objectives of administrative dispute resolution is to provide a decision as fast as possible consistent with fairness, the Board will not allow parties to delay the process unduly. The Board may grant extensions of time, but only if the party gives a good reason for the delay.

(b) If the appellant fails to meet any filing or procedural deadlines, appeal file or brief submission requirements, or other requirements established by the Board, the Board may dismiss the appeal, may issue an order requiring the party to show cause why the appeal should not be dismissed, or may take other action the Board considers appropriate.

(c) If the respondent fails to meet any such requirements, the Board may issue a decision based on the record submitted to that point or take such other measures as the Board considers appropriate.

#### § 16.16 Parties to the appeal.

(a) The only parties to the appeal are the appellant and the respondent. If the

Board determines that a third person is a real party in interest (for example, where the major impact of an audit disallowance would be on the grantee's contractor, not on the grantee), the Board may allow the third person to present the case on appeal for the appellant or to appear with a party in the case, after consultation with the parties and if the appellant does not object.

(b) The Board may also allow other participation, in the manner and by the deadlines established by the Board, where the Board decides that the intervenor has a clearly identifiable and substantial interest in the outcome of the dispute, that participation would sharpen issues or otherwise be helpful in resolution of the dispute, and that participation would not result in substantial delay.

#### § 16.17 Ex parte communications (communications outside the record).

(a) A party shall not communicate with a Board or staff member about matters involved in an appeal without notice to the other party. If such communication occurs, the Board will disclose it to the other party and make it part of the record after the other party has an opportunity to comment. Board members and staff shall not consider any information outside the record (see § 16.21 for what the record consists of) about matters involved in an appeal.

(b) The above does not apply to the following: communications among Board members and staff; communications concerning the Board's administrative functions or procedures; requests from the Board to a party for a document (although the material submitted in response also must be given to the other party); and material which the Board includes in the record after notice and an opportunity to comment.

#### § 16.18 Mediation.

(a) *In cases pending before the Board.* If the Board decides that mediation would be useful to resolve a dispute, the Board, in consultation with the parties, may suggest use of mediation techniques and will provide or assist in selecting a mediator. The mediator may take any steps agreed upon by the parties to resolve the dispute or clarify issues. The results of mediation are not binding on the parties unless the parties so agree in writing. The Board will internally insulate the mediator from any Board or staff members assigned to handle the appeal.

(b) *In other cases.* In any other grants dispute, the Board may, within the limitations of its resources, offer persons trained in mediation skills to aid in

resolving the dispute. Mediation services will only be offered at the request, or with the concurrence, of a responsible federal program official in the program under which the dispute arises. The Board will insulate the mediator if any appeal subsequently arises from the dispute.

**§ 16.19 How to calculate deadlines.**

In counting days, include Saturdays, Sundays, and holidays; but if a due date would fall on a Saturday, Sunday or federal holiday, then the due date is the next federal working day.

**§ 16.20 How to submit material to the Board.**

(a) All submissions should be addressed as follows: Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street SW, Washington, D.C. 20201.

(b) All submissions after the notice of appeal should identify the Board's docket number (the Board's acknowledgement under § 16.7 will specify the docket number).

(c) Unless the Board otherwise specifies, parties shall submit to the Board an original and two copies of all materials. Each submission other than the notice of appeal, must include a statement that one copy of the materials has been sent to the other party, identifying when and to whom the copy was sent.

(d) Unless hand delivered, all materials should be sent to the Board and the other party by certified or registered mail, return receipt requested.

(e) The Board considers material to be submitted on the date when it is postmarked or hand delivered to the Board.

**§ 16.21 Record and decisions.**

(a) Each decision is issued by three Board members (see § 16.5(b)), who base their decision on a record consisting of the appeal file; other submissions of the parties; transcripts or other records of any meetings, conferences or hearings conducted by the Board; written statements resulting from conferences; evidence submitted at hearings; and orders and other documents issued by the Board. In addition, the Board may include other materials (such as evidence submitted in another appeal) after the parties are given notice and an opportunity to comment.

(b) The Board will promptly notify the parties in writing of any disposition of a case and the basis for the disposition.

(c) [Reserved]

**§ 16.22 The effect of an appeal.**

(a) *General.* Until the Board disposes of an appeal, the respondent shall take no action to implement the final decision appealed.

(b) *Exceptions.* The respondent may—

(1) Suspend funding (see § 74.114 of this title);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal;

(3) In programs listed in Appendix A, B.(a)(1), implement a decision to disallow Federal financial participation claimed in expenditures reported on a statement of expenditures, by recovering, withholding or offsetting payments, if the decision is issued before the reported expenditures are included in the calculation of a subsequent grant; or

(4) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

**§ 16.23 How long an appeal takes.**

The Board has established general goals for its consideration of cases, as follows (measured from the point when the Board receives the first submission after the notice of appeal):

—for regular review based on a written record under § 16.8, 6 months. When a conference under § 16.10 is held, the goal remains at 6 months, unless a requirement for post-conference briefing in a particular case renders the goal unrealistic.

—for cases involving a hearing under § 16.11, 9 months.

—for the expedited process under § 16.12, 3 months.

These are goals, not rigid requirements. The paramount concern of the Board is to take the time needed to review a record fairly and adequately in order to produce a sound decision. Furthermore, many factors are beyond the Board's direct control, such as unforeseen delays due to the parties' negotiations or requests for extensions, how many cases are filed, and Board resources. On the other hand, the parties may agree to steps which may shorten review by the Board; for example, by waiving the right to submit a brief, by agreeing to shorten submission schedules, or by electing the expedited process.

**Appendix A—What Disputes the Board Reviews**

**A. What this Appendix covers.**

This Appendix describes programs which use the Board for dispute resolution, the types of disputes covered, and any conditions for Board review of final written decisions

resulting from those disputes. Disputes under programs not specified in this Appendix may be covered in a program regulation or in a memorandum of understanding between the Board and the head of the appropriate HHS operating component or other agency responsible for administering the program. If in doubt, call the Board. Even though a dispute may be covered here, the Board still may not be able to review it if the limits in paragraph F apply.

**B. Mandatory grant programs.**

(a) The Board reviews the following types of final written decisions in disputes arising in HHS programs authorizing the award of mandatory grants:

(1) Disallowances under Titles I, IV, VI, X, XIV, XVI(AABD), XIX, and XX of the Social Security Act, including penalty disallowances such as those under sections 403(g) and 1903(g) of the Act and fiscal disallowances based on quality control samples.

(2) Disallowances in mandatory grant programs administered by the Public Health Service, including Title V of the Social Security Act.

(3) Disallowances in the programs under sections 113 and 132 of the Developmental Disabilities Act.

(4) Disallowances under Title III of the Older American Act.

(b) In some of these disputes, there is an option for review by the head of the granting agency prior to appeal to the Board. Where an appellant has requested review by the agency head first, the "final written decision" required by § 16.3 for purposes of Board review will generally be the agency head's decision affirming the disallowance. If the agency head declines to review the disallowance or if the appellant withdraws its request for review by the agency head, the original disallowance decision is the "final written decision." In the latter cases, the 30-day period for submitting a notice of appeal begins with the date of receipt of the notice declining review or with the date of the withdrawal letter.

**C. Direct, discretionary project programs.**

(a) The Board reviews the following types of final written decisions in disputes arising in any HHS program authorizing the award of direct, discretionary project grants or cooperative agreements:

(1) A disallowance or other determination denying payment of an amount claimed under an award, or requiring return or set-off of funds already received. This does not apply to

determinations of award amount or disposition of unobligated balances, or selection in the award document of an option for disposition of program-related income.

(2) A termination for failure to comply with the terms of an award.

(3) A denial of a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award.

(4) A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained).

(b) Where an HHS component uses a preliminary appeal process (for example, the Public Health Service), the "final written decision" for purposes of Board review is the decision issued as a result of that process.

#### D. Cost allocation and rate disputes.

The Board reviews final written decisions in disputes which may affect a number of HHS programs because they involve cost allocation plans or rate determinations. These include decisions related to cost allocation plans negotiated with State or local governments and negotiated rates such as indirect cost rates, fringe benefit rates, computer rates, research patient care rates, and other special rates. The "final written decision" for purposes of Board review of these disputes is the decision issued as a result of the preliminary appeal process at Part 75 of this title.

#### E. SSI agreement disputes.

The Board reviews disputes in the Supplemental Security Income (SSI) program arising under agreements for Federal administration of State supplementary payments under section 1616 of the Social Security Act or mandatory minimum supplements under section 212 of Pub. L. 93-88. In these cases, the Board provides an opportunity to be heard and offer evidence at the Secretarial level of review as set out in the applicable agreements. Thus, the "final written decision" for purposes of Board review is that determination appealable to the Secretary under the agreement.

#### F. Where Board review is not available.

The Board will not review a decision if a hearing under 5 U.S.C. 554 is required by statute, if the basis of the decision is a violation of applicable civil rights or nondiscrimination laws or regulations (for example, Title VI of the Civil Rights Act), or if some other hearing process is established pursuant to statute.

#### C. How the Board determines whether it will review a case.

Under § 10.7, the Board Chair determines whether an appeal meets the requirements of this Appendix. If the Chair finds that there is some question about this, the Board will request the written opinion of the HHS component which issued the decision. Unless the Chair determines that the opinion is clearly erroneous, the Board will be bound by the opinion. If the HHS component does not respond within a time set by the Chair, or cannot determine whether the Board clearly does or does not have jurisdiction, the Board will take the appeal.

#### PART 74—ADMINISTRATION OF GRANTS

2. Part 74 of Title 45 of the CFR is amended as set forth below:

a. Subparts R and S are reserved as follows:

##### Subpart R—(Reserved)

##### Subpart S—(Reserved)

b. The table of contents is revised by adding entries for a new Subpart T, as follows:

##### Subpart T—Miscellaneous

Sec.  
74.250-74.303 (Reserved)  
74.304 Final decisions in disputes.

##### Subpart T—Miscellaneous

##### §§ 74.250-74.303 (Reserved)

##### § 74.304 Final decisions in disputes.

(a) Granting agencies and other Departmental components attempt to promptly issue final decisions in disputes and in other matters affecting the interests of grantees. However, they do not issue a final decision adverse to the grantee until it is clear that the matter cannot be resolved informally through further exchange of information and views.

(b) Under various HHS statutes or regulations, grantees have the right to appeal from, or to have a hearing on, certain final decisions by Departmental components. (See, for example, Subpart D of 42 CFR Part 50 and 45 CFR Parts 10 and 75.) Paragraphs (c) and (d) of this section set forth the standards the Department expects its components to meet in stating a final decision covered by any of the statutes or regulations.

(c) The decision is brief but contains—

(1) A complete statement of the background and basis of the component's decision, including

reference to the pertinent statutes, regulations, or other governing documents; and

(2) Enough information to enable the grantee and any reviewer to understand the issues and the position of the HHS component.

(d) The following or similar language (consistent with the terminology of the applicable statutes or regulations) appears at the end of the decision: "This is the final decision of the [title of grant officer or other official responsible for the decision]. It shall be the final decision of the Department unless, within 30 days after receiving this decision, you deliver or mail (you should use registered or certified mail to establish the date) a written notice of appeal to [name and address of appropriate contact; e.g., the Departmental Grant Appeals Board, Department of Health and Human Services, Washington, D.C. 20201]. You shall attach to the notice a copy of this decision, note that you intend an appeal state the amount in dispute, and briefly state why you think that this decision is wrong. You will be notified of further procedures."

(e) If a decision does not contain the statement, information, and language described in paragraphs (c) and (d) of this section, the decision is not necessarily the granting agency's final decision in the matter. The grantee should notify the granting agency that wishes a formal final decision follow up any further exchange of views or information that might help resolve the matter informally.

Dated: August 3, 1981.

Richard Schweiker,  
Secretary.

[FR Doc. 81-5215 Filed 8-26-81. 8:45 am]  
BILLING CODE 4110-12-M

## APPENDIX B: PROJECT METHODOLOGY

## I. PROJECT DESIGN

We knew generally that our task would be to measure the "effectiveness" and "efficiency" of the Grant Appeals Board, meaning a study of the workings of a particular court. Our natural starting place was, therefore, the literature of "court" or "adjudication" theory and practice, with special emphasis on empirical studies of judicial-type systems. After gathering some relevant works by routine use of card catalogs and literature indices, we started "networking" by contacting those writers, like Professors Maurice Rosenberg of Columbia and Laurens Walker at the University of Virginia, who dominate the literature. These personal contacts helped us identify institutions sponsoring research such as ours, namely:

- \* National Center for State Courts;
- \* American Bar Foundation;
- \* National Science Foundation, Division of Law and Social Science;
- \* Federal Judicial Center;
- \* Administrative Office of the United States Courts; and
- \* Rand Corporation, Institute for Civil Justice.

We called the research director of each of these institutions and studied their publications catalogs, thereby completing and updating our literature search and "networking."

The end result of this phase was a court theory and reform library of modest size. These works underlie Sections II and III, the analytical foundation of our study. We quickly ascertained the existence of a superabundance of studies, both empirical and experiential, of particular reform efforts of particular courts. These turned out to be much too narrow in focus to be helpful. Fortunately, there remained about one hundred works of sufficient breadth to guide our undertaking. From these we greedily borrowed ideas, definitions, empirical methodologies, and even forms and questionnaires.

Besides structuring our analysis and empirical methodology, we hoped to find several comparable court studies into which we could "plug" ourselves. Our good luck did not stretch so far. On the one hand, many studies were of such ample magnitude--thousands of cases in dozens of courts--that the researchers used only gross data about cases in such courts. On the other hand, many other studies focused on a particular practice or procedure in a single court or system of courts. In the end our project, which aims to study the workings of all significant procedures on the complete calendar of a single court, turned out to be unique. We were blessed in the opportunity to blaze some trails; we were cursed in our limited ability to compare our empirical findings with those of others.

## II. CASE FILE DATA BASES

We would be working with closed cases at GAB by extracting from them data relevant to our measures of court success: speed; cost; impartiality; procedural fairness; flexibility; finality; effectiveness; and competence. In addition, while we knew about certain theoretical management practices from reading GAB's published procedures, we could learn about GAB's operational management practices from these case histories. Similarly, while we knew from our experience and readings what types of procedural opportunities lawyers normally request during litigation, in our study of the GAB closed cases we could identify and quantify the particular requests made in those disputes.

We started our data design by analyzing the GAB written procedures set forth in Appendix A and by studying several case files from different procedural "tracks." In Appendix C we reproduce the coding sheet that ultimately resulted. We refined it as we worked through the files.

A. Identification Data. The early items served to identify the file. The "case name," Item 1, is the title of the action, normally the name of the grantee organization appealing an adverse agency decision. "Docket #," Item 2, is the Board's code for identifying and filing cases. As in most court systems, cases are numbered seriatim as filed; 86-35 would be the 35th appeal filed in 1986. The Board's written decisions are numbered consecutively as rendered; so, "Decision #," Item 3, would be a single number between No. 268 and No. 672, the beginning and ending decisions rendered from the dockets which comprised our sample. Item 4, "Joint Consideration," represents the Board's practice of consolidating cases with common questions of law and fact. Here we would enter the other docket numbers (cases) being jointly considered with the case being coded. Item 5, "Appellant," is the name of the party bringing the appeal, and Item 7, "DHHS resp.," is the Agency (operating division of DHHS) defending the case.

B. Standard Variables. A case's procedural history and substantive result might be affected by a number of variables, for example, the type of organization appealing. Item 6, "Type Grantee," represents this variable: state agency; university; non-profit organization; local government; and Indian tribe. Because the categories of variables are mostly self-explanatory, we will simply list them, and the main entries in each category, below.

Item 7. DHHS Respondent:

- \* Office of Child Support Enforcement (OCSE)
- \* Health Care Financing Administration (HCFA)
- \* Office of Human Development Services (OHDS)
- \* Social Security Administration

(SSA)

\* Public Health Service (PHS)

Items 8 &amp; 9. Program name/law:

- \* Child Support Enforcement Program (SSA, 4-D)
- \* Medicaid (SSA, 19)
- \* AFDC (SSA, 4-A)
- \* Social Services Program (SSA, 20)
- \* Headstart Program (Headstart Act)
- \* Low Income Energy Assistance Program (LIEAA)

Item 10. Type decision appealed:

- disallowance (return; set-off)
- noncompliance termination
- denial of noncompeting continuation award
- voiding of grant
- cost allocation plans/rates

Item 14. Board members:

Ford  
Settle  
Ballard  
Teitz  
Garrett

Item 15. Staff Attorney:

Lauscher	Choppin
Reines-Grubard	Ruiz-Sedivich-O'Hare
Stern	Rosenthal
Horvath	Golkowicz
Kaufman	Young
Selzer	Ballard
McFadden	Stone
Cafasso	Jenner

Items 16-19. HHS Attorney:

85 different entries

Item 20. HHS Non-lawyer Representative:

15 different entries

Item 21. Grantee Attorney:

132 different entries

Item 24. Grantee Non-lawyer Representative:

80 different entries

C. Financial Data. We collected financial data about the "stakes" involved in each case and its financial results. "Total dollars appealed," Item 11, would serve as a

measure of the magnitude of the disputes before the Board as well as their range. The next items, "Amount Settled" (12) and "Amount Adjudicated" (13), would serve to measure the Board's propensity, for whatever reason, to promote voluntary agreements between the parties as opposed to Board adjudications. For cases in which a Board decision was needed to resolve the financial claims, Items 45 to 48 captured the final financial results for each disallowance appealed, in other words, who won. We also coded for split decisions, remands, and settlements.

D. Case Complexity. Several variables could be used to measure the relative complexity of cases. The most important variable, Item 28a, was the procedural "track" to which the case was assigned. The possibilities were, in order of increasing complexity [1] :

- \* special expedited;
- \* expedited;
- \* written submissions;
- \* conference;
- \* hybrid conference; and
- \* hearing.

For each process involving a form of "hearing," whether formal or informal, we also ascertained in Item 28b whether the hearing was conducted by telephone or in person, and in Item 25 whether witnesses testified.

A significant number of cases never reached the "merits" but terminated prior thereto in one of the following ways: lack of Board jurisdiction; withdrawal of appeal; settlement; dismissal for procedural noncompliance; and dismissal without prejudice to reinstatement. These cases followed a different path to disposition and had to be measured separately for economy and efficiency. Item 27 recorded these instances, as well as the time required to dispose of them. Finally, we noted in Items 49 and 50 whether jurisdictional and other technical objections had appeared in the case by means of party motions or Board sua sponte action.

E. Resources Invested. The volume of paperwork generated by civil litigation may also reflect the degree of complexity of a case. One may assume that normally the size of briefs and appeal files is directly related to the number of facts, rules, and other matters involved in the dispute. In Item 29 we simply counted the number of pages of briefs, documents, and transcripts we encountered in each case file.

We had hoped to be able to measure the "cost" of litigating at GAB. However, it was impossible to get meaningful cost data directly. The great majority of attorneys practicing at the Board are salaried government employees, meaning no billings exist. We theoretically could have questioned the participating lawyers about the time spent in each case. We judged, however, that the small benefit of such an inquiry, given the likely unreliability of lawyer estimates was far

outweighed by its cost. Tracking down the lawyers and asking them to remember their time spent on an old case was not feasible given the small project budget.

F. Processing Time. Careful recordkeeping by the Board enabled us to record the dates of action points and events. We listed such anticipated events in Item 30 and recorded the dates found on the documents in the files. In most cases the following procedures would appear chronologically [10 ]:

- (a) final written decision;
- (b) appeal filed;
- (c) appeal received;
- (d) appeal acknowledged;
- (e) appellant's brief;
- (f) respondent's brief;
- (g) appellant's reply;
- (h) first preliminary conference;
- (i) second preliminary conference;
- (j) conference or hearing;
- (k) GAB decision.

Occasionally, additional material for the appeal file would be submitted at some time between submission of appellant's brief and the conference or hearing. Similarly, additional briefs might be submitted in this interval.

We measured appellants' and respondents' requests for time extensions and the Board's actions thereon. See Items 37-42. The project also tried to ascertain whether objections were lodged against such requests and whether GAB had granted lesser time extensions than the number of days requested.

Occasionally cases would be "stayed" (put on hold) pending the outcome of some event, such as a settlement negotiation or the decision of a parallel case. Items 43 and 44 recorded such stays, as well as information about the party making such a request.

G. Board Controls. The heart of the study would be the Board's use of case management techniques, which we called "Board controls." Several could be identified on the face of the Board rules, see Appendix A, and from the sample case files we used to design the search. As we executed the data collection phase we discovered several more. The list below contains the distinct management techniques we encountered and recorded in Item 31.

1. GAB formulates issue(s) in dispute;
2. parties required to submit specified information to Board or to other side (includes "order to develop record");
3. parties ordered to address written questions at a conference or hearing or by mail;
4. questions to clarify parties' legal positions, factual assertions, and significance of documents;
5. questions seeking information about facts or law;
6. parties directed to specify issues;

7. cases consolidated by Board;
8. establish procedure for side dispute;
9. locate hearing outside District of Columbia;
10. procedural directions to party;
11. order to show cause why tentative, adverse Board decision should not be finalized;
12. warning on time extensions and possible sanctions;
13. seek concessions from parties;
14. require specified person to be at conference or hearing;
15. order to respond to tentative findings;
16. detailed preliminary analysis of issues and tentative findings;
17. parties ordered or invited to submit additional briefs;
18. Board separately docket a disallowance item;
19. Board orders parties to file status reports;
20. parties ordered to identify witnesses and substance of testimony;
21. order to consider mediation;
22. -----
23. summary decision

H. Participatory Requests. In Item 32 we registered information about distinct types of participation requested by parties to GAB litigation. For each such request we identified whether the request was made by appellant or respondent, whether there was opposition to the request, and what action the Board took on it.

Below are listed all types of participation requested by parties to GAB litigation. Requests were for:

1. fact hearing;
2. discovery;
3. submit document;
4. put on witness (none found);
5. add an issue (none found);
6. change procedural "track";
7. conference;
8. submit additional brief;
9. change formulation of issue (none found);
10. information (e.g., past case record) from GAB;
11. presence of particular person/party requested in litigation;
12. make substantive changes in transcript;
13. intervene;
14. advisory opinion;
15. mediation;
16. withdraw appeal without prejudice to reinstatement;
17. change of venue;
18. consolidate cases;
19. motion for summary judgment;
20. summary decision;
21. leave to amend notice of appeal.

### III. CASE SAMPLE

We started our sample of closed GAB cases with the first case subject to the new GAB procedures, Docket 81-172, which was filed (postmarked) on the effective date of the 1981 rules, September 30, 1981. We included every third closed case [3]. The Board separately docketed motions for reconsideration, which are simply extensions of the principal case; thus, we eliminated such dockets from our sample and chose the next valid docket. In Appendix D we list the 274 GAB dockets included in our sample. We closed the sample with Docket 85-79 (filed April 16, 1985; dismissed for non-prosecution on June 10, 1985). Because cases are continuously being decided and "closed," the sample is inevitably a smaller percentage of the total universe with each passing day.

The 274 cases in our sample represent 29.5% of the 927 cases docketed at the Board in the period between September 30, 1981 and April 16, 1985. The sample spans three years and seven months of Board activity. It included 137 cases, exactly 50% of the sample, which resulted in written Board opinions between March 31, 1982 (No. 268) and July 10, 1985 (No. 672).

#### IV. LAWYER QUESTIONNAIRE

While the raw data collected from the closed cases would provide an important statistical profile of the Board's efficiency, such data had to be contrasted with the perceptions of those practicing before the Board in order to obtain a complete picture. The questionnaire served several purposes. First, knowing the lawyers' general views as to the Board's set of procedures would help us understand the ease or difficulty of implementing such procedure both at the Board and elsewhere. We can call this the lawyers' "efficiency outlook." Lawyers from all parts of the country litigate at GAB; consequently, their views would represent those of a "national bar" and have particular importance. Based on legible postmarks, eighty questionnaires were returned from the following states:

Ariz. (1)	Me. (1)	Okla. (1)
Cal. (4)	Md. (7)	Pa. (5)
Colo. (3)	Mass. (1)	S.D.(1)
D.C. (7)	Mich. (1)	Tenn. (1)
Fla. (1)	Minn. (2)	Tex. (3)
Ga. (1)	Miss. (1)	Utah (1)
Ill. (6)	Mont. (1)	Vt. (1)
Iowa (1)	N.J. (4)	Va. (2)
Kan. (3)	N.M. (1)	Wash. (4)
Ky. (1)	N.Y. (10)	Wisc. (1)
	Ohio (3)	

Second, we could identify particular facets of Board practice which the attorneys strongly liked or disliked. This might serve as a helpful guide for the Board to improve its practices, as well as alerting reformers to troublespots--areas where efficiency reforms are likely to encounter stiff resistance from

the bar.

Third, we knew of no reasonable method of ascertaining the "correctness" of Board decisions other than to ask the advocates and hope they would give objective views. We would, of course, double check by comparing their views with the particular results in their cases.

Fourth, we could measure the lawyers' sense of fair play. When both the judge and the defendant come from the same family, the plaintiff's sensibility to unequal treatment is acute. While the rules on their face were neutral, grantee lawyers might have a sense that some parties were "more equal than others."

The questionnaire, which is reproduced in Appendix E along with cover letters, was designed after we completed our study of the case files at GAB. By then we were alert, through file documents and conversations with Board members, to particular points of procedure, like discovery and accessibility of Board opinions, which appeared to be troublesome. We could, therefore, sprinkle general questions about procedural likes and dislikes with inquiries about more specific matters.

We did not have the resources to subject the questions to a verification process. The Board Members and staff reviewed them and made helpful suggestions. Dr. Larry Rosen reviewed them for built-in biases and other facial flaws. That the questions worked well is evidenced by the ease with which the respondents answered them. Very few questions went unanswered and the questionnaires were remarkably free from marginal notations indicating doubt about the questions

The questionnaire was administered on an anonymous basis. We compiled a mailing list from the case files dating back to 1981. Many of the names and addresses on the mailing list were doubtlessly of attorneys who had moved on to different work and who would never receive our mailing. The mailing list numbered 290; of these, we guess that about one-third are attorneys who no longer represent the grantee institution they represented at the time of the GAB litigation. We therefore guess that some 200 attorneys actually received the questionnaire. We received 131 completed questionnaires, or, roughly 65% of the reachable addressees.

We had no reason to correlate the attorneys who litigated the cases in our case file data base and those who answered the questionnaire. We could ascertain no reason why those who answered the questionnaire would not be representative of those attorneys who litigated the cases in the files studied. Even if there were differences in the two populations and some "skewing" was inevitable, we saw no impact on study results. The file study would produce an empirical reality, valid in itself regardless of any "fit" with the "perception of reality" captured by the questionnaire results. Also, the questionnaire was administered anonymously, meaning we could not compare

information in the case file with questionnaire answers.

#### V. OBSERVATIONS and INTERVIEWS

We observed the Board at work in the summer months of 1985. When we had completed a first draft a year later, we forwarded it to Board Members and various attorneys who had substantial litigation experience at the Board. The Members and attorneys were interviewed in depth, and their reactions and observations are sprinkled throughout the report.

APPENDIX C. GAB CASE FILE DATA FORM

1. Case name \_\_\_\_\_
2. Docket # \_\_\_\_\_
3. Decision # \_\_\_\_\_
4. Joint consideration \_\_\_\_\_
5. Appellant \_\_\_\_\_
6. Type grantee \_\_\_\_\_
7. DHHS resp. \_\_\_\_\_
8. Program name \_\_\_\_\_
9. Law (title) \_\_\_\_\_
10. Type decision appealed \_\_\_\_\_
11. Total \$ Appealed \_\_\_\_\_
12. Amount settled \_\_\_\_\_
13. Amt. Adjudicated \_\_\_\_\_
14. Bd. members pres. \_\_\_\_\_  
 a. other \_\_\_\_\_  
 b. other \_\_\_\_\_
15. Staff attorney \_\_\_\_\_
16. HHS Attorney 1 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
17. HHS Attorney 2 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
18. HHS Attorney 3 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
19. HHS Attorney 4 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
20. HHS Non-lawyer rep. \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
21. Grantee Atty. 1 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
22. Grantee Atty. 2 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
23. Grantee Atty. 3 \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
24. Grantee Non-law. rep. \_\_\_\_\_  
 title \_\_\_\_\_  
 address \_\_\_\_\_
25. Witnesses at hearing/conf. \_\_\_\_\_  
 a. # for GE \_\_\_\_\_  
 b. # for DHHS \_\_\_\_\_
26. Mediation Referral \_\_\_\_\_  
 Yes \_\_\_\_\_ No \_\_\_\_\_  
 a. date \_\_\_\_\_  
 b. date referred back \_\_\_\_\_  
 c. elapsed days \_\_\_\_\_  
 d. amount settled \_\_\_\_\_
27. Summary disposition \_\_\_\_\_  
 a. date \_\_\_\_\_  
 b. elapsed days \_\_\_\_\_  
 c. type: \_\_\_\_\_  
 1. jurisdiction \_\_\_\_\_  
 2. appeal w/drawn \_\_\_\_\_  
 3. settlement \_\_\_\_\_  
 4. dismissal for non-pros./proced. \_\_\_\_\_  
 5. other \_\_\_\_\_
28. Appeal \_\_\_\_\_  
 a. type process \_\_\_\_\_  
 16.10 conference \_\_\_\_\_  
 16.11 hearing \_\_\_\_\_  
 16.12 expedited \_\_\_\_\_  
 16.12 (d) special expedited \_\_\_\_\_  
 16.0 hybrid conference \_\_\_\_\_  
 16.00 written submissions \_\_\_\_\_  
 b. type conference/hearing \_\_\_\_\_  
 1. telephonic \_\_\_\_\_  
 2. in person \_\_\_\_\_
29. # of pages \_\_\_\_\_  
 a. appellants brief \_\_\_\_\_  
 b. respondents brief \_\_\_\_\_  
 c. appellants reply \_\_\_\_\_  
 d. supplemental briefs \_\_\_\_\_  
 1. appellant \_\_\_\_\_  
 2. respondent \_\_\_\_\_  
 e. transcript \_\_\_\_\_  
 1. N/A \_\_\_\_\_  
 2. telephonic tape \_\_\_\_\_  
 3. telephonic summary \_\_\_\_\_  
 4. verbatim in person \_\_\_\_\_  
 f. appeal file \_\_\_\_\_  
 g. supplemental appeal file \_\_\_\_\_  
 h. motions/memoranda \_\_\_\_\_  
 1. appellant \_\_\_\_\_  
 2. respondent \_\_\_\_\_
30. Dates \_\_\_\_\_  
 a. final written decision \_\_\_\_\_  
 b. appeal filed \_\_\_\_\_  
 c. appeal received \_\_\_\_\_  
 d. appeal acknowledged \_\_\_\_\_  
 e. appellant's brief \_\_\_\_\_  
 f. respondent's brief \_\_\_\_\_  
 g. appellant's reply \_\_\_\_\_  
 h. first supp. appeal file \_\_\_\_\_  
 i. second supp. appeal file \_\_\_\_\_  
 j. third supp. appeal file \_\_\_\_\_  
 k. first supp. brief \_\_\_\_\_  
 l. second supp. brief \_\_\_\_\_  
 m. third supp. brief \_\_\_\_\_  
 n. first preliminary conference \_\_\_\_\_  
 o. second preliminary conference \_\_\_\_\_  
 p. conf./hearing \_\_\_\_\_  
 q. C.A.B. decision \_\_\_\_\_  
 r. post decision motion \_\_\_\_\_



## APPENDIX D: GAB DOCKETS IN RESEARCH SAMPLE

81-172	82-19	82-87	82-159	82-221	83-39	83-109	83-178
81-175	82-22	82-90	82-162	82-224	83-42	83-112	83-181
81-178	82-24	82-93	82-156	82-228	83-45	83-115	83-184
81-181	82-27	82-96	82-159	82-230	83-48	83-118	83-187
81-184	82-30	82-99	82-162	82-233	83-51	83-121	83-190
81-187	82-33	82-102	82-165	82-236	83-54	83-124	83-194
81-189	82-36	82-105	82-168	82-239	83-57	83-127	83-197
81-192	82-39	82-108	82-172	82-242	83-60	83-130	83-200
81-195	82-42	82-111	82-175	82-245	83-63	83-133	83-201
81-198	82-45	82-114	82-178	82-251	83-66	83-136	83-203
81-201	82-48	82-117	82-181	82-254	83-69	83-139	83-206
81-204	82-51	82-120	82-184	83-3	83-72	83-142	83-209
81-207	82-54	82-123	82-187	83-6	83-75	83-145	83-213
81-210	82-57	82-126	82-190	83-9	83-78	83-148	83-216
81-213	82-60	82-130	82-193	83-12	83-81	83-151	83-219
81-216	82-63	82-133	82-196	83-15	83-84	83-154	83-222
81-219	82-66	82-137	82-199	83-18	83-87	83-157	83-225
82-1	82-69	82-140	82-202	83-21	83-90	83-160	83-228
82-4	82-72	82-143	82-206	83-24	83-93	83-163	83-231
82-7	82-75	82-146	82-209	83-27	83-93	83-166	83-234
82-10	82-78	82-149	82-212	83-30	83-96	83-169	83-237
82-13	82-81	82-152	82-215	83-33	83-99	83-172	83-240
82-16	82-84	82-156	82-218	83-36	83-105	83-175	83-243

## APPENDIX D (CONT.)

83-246	84-19	84-89	84-150	84-227
83-249	84-22	84-92	84-154	84-230
83-252	84-25	84-95	84-157	84-233
83-255	84-28	84-98	84-163	84-239
83-258	84-31	84-101	84-166	84-250
83-260	84-35	84-104	84-172	85-1
83-263	84-40	84-106	84-175	85-5
83-266	84-46	84-109	84-179	85-12
83-269	84-49	84-112	84-184	85-18
83-272	84-52	84-115	84-184	85-26
83-275	84-55	84-118	84-189	85-37
83-278	84-58	84-121	84-192	85-49
83-281	84-63	84-124	84-195	85-55
83-284	84-66	84-127	84-198	85-59
83-287	84-69	84-131	84-201	85-71
84-2	84-72	84-134	84-205	85-79
84-5	84-75	84-137	84-212	
84-9	84-79	84-140	84-215	
84-13	84-83	84-143	84-221	
84-16	84-86	84-146	84-224	

APPENDIX E. QUESTIONNAIRES AND COVER LETTERS



TEMPLE UNIVERSITY  
A Commonwealth University

SCHOOL OF LAW

1719 N. Broad Street  
Philadelphia, Pennsylvania 19122

October 24, 1985

Dear Counselor:

You may love it or you may hate it, but you are sure to have strong opinions about the Grant Appeals Board at the U.S. Department of Health and Human Services. The Board has some truly unique ways of managing cases, and the Administrative Conference of the United States has commissioned me to study the Board and report back on its efficiency and effectiveness.

You have litigated at least one case before the Grant Appeals Board and are in a position to stand up and be counted. Please take a few minutes to answer and return the enclosed questionnaire. Do it now! Don't throw it in "tomorrow's" stack.

After three months of preliminary study, I presently have a high opinion of the Board's practices. It may, indeed, be a "national model" for court reform. Help me confirm my preliminary findings or tell me where I err.

Many thanks.

Sincerely,

*Richard B. Cappalli*  
Richard B. Cappalli  
Professor

RBC:jp  
Enclosure



TEMPLE UNIVERSITY  
A Commonwealth University

SCHOOL OF LAW

1719 N. Broad Street  
Philadelphia, Pennsylvania 19122

January 31, 1986

Dear Counselor:

This is the same questionnaire I sent last fall (without the typos). If you answered that one, you can throw this away. If not, please answer and return. Most of your colleagues found it easy and interesting to answer.

For those who are newly on my mailing list, this is a study of the Grant Appeals Board commissioned by the Administrative Conference of the United States. With your help we can better understand what makes for litigation efficiency and effectiveness.

Thanks for your help.

Sincerely,

*Richard B. Cappalli*

Richard B. Cappalli  
Professor

HHS Grant Appeals Board Study  
Sponsored by the Administrative Conference of the United States

Attorney Questionnaire

Instructions. Circle or mark the answer which is most accurate in your mind. If you have appeared in more than one case before the HHS Grant Appeals Board ("GAB"), answer case-specific questions on the basis of your experience in the most recent closed case in which you appeared.

This questionnaire should take no more than 15 minutes to answer. Your cooperation is greatly appreciated.

Definitions

- "Case management": Techniques used by Board members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, questions to clarify parties' legal and factual positions, and GAB formulation of the issues in dispute.
- "Efficiency": Reaching and deciding an issue with minimum investment of time and resources.
- "On the merits": If your case terminated on a jurisdictional or procedural ground, treat this as the "merits" and answer questions accordingly.
- "Resources": Technical capability of party and amount thereof available for the case.

Questions

1. Year of your last closed case at GAB:

1985      1984      1983      1982      1981

2. Case result for your party:

- 1. Win \_\_\_\_\_
- 2. Loss \_\_\_\_\_
- 3. Split \_\_\_\_\_

3. You represented:

- 1. United States \_\_\_\_\_
- 2. Grantee \_\_\_\_\_

4. Please specify the number of cases in which you have appeared at GAB:

1    2    3    4    5    6 or more

5. Please indicate the number of years you have been practicing law:

- 1. 1-5 years \_\_\_\_\_
- 2. 6-15 years \_\_\_\_\_
- 3. 16 or more years \_\_\_\_\_

6. If you have been a government attorney representing federal, state or local government, please specify the approximate number of years you have practiced in that capacity: \_\_\_\_\_

7. Have you participated in a GAB conference or hearing on the merits (see definition)?

- 1. yes \_\_\_\_\_ (Answer questions 8A-8H)
- 2. no \_\_\_\_\_ (Skip to question 9)

8. Please evaluate the GAB conference or hearing on the merits (see definition) of the following criteria:

A. clarity of issues

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

B. legal representation of adversary

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

C. completeness of fact presentation

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

D. gaps in evidence

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

E. redundant evidence

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

F. surprise witness/document

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

G. judge's evidentiary rulings

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

H. substitution of telephone for traditional in person hearing

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

9. Please rate the GAB procedures as to their efficiency, which means reaching and deciding an issue with minimum investment of time and resources.

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

10. Please evaluate the GAB procedures with respect to their conduciveness to sound decisions:

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

11. Please rate the following aspects of GAB procedures:

A. notices

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

B. parties' opportunities to present facts

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

C. parties' opportunities to present law

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

D. joint consideration practice (if you have ever appeared in a jointly considered case)

5	4	3	2	1	N/A
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE	DID NOT APPEAR IN SUCH CASE

E. opportunity for discovery

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

F. GAB deadlines

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

G. Board's evenhandedness in applying deadlines

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

H. If you answered the preceding question (11-G) with 1 or 2, please indicate which party received the more favorable treatment:

1. U.S.-respondent \_\_\_\_\_
2. Grantee-appellant \_\_\_\_\_

12. Please evaluate the presiding GAB judge in your case with respect to the following qualities:

A. competence

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

B. impartiality

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

C. deliberateness

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

D. wise use of discretion

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

13. A. Did the GAB presiding judge (directly or through the staff attorney) employ one or more "case management" techniques (see definitions) in your case?

- 1. yes \_\_\_\_\_ (Answer questions 13B, 13C, 13D)
- 2. no \_\_\_\_\_ (skip to question 14)
- 3. don't know \_\_\_\_\_ (skip to question 14)

B. Did the case management technique(s) make for a more efficient proceeding?

- 1. yes \_\_\_\_\_
- 2. no \_\_\_\_\_
- 3. don't know \_\_\_\_\_

C. Did the case management technique(s) help achieve a correct result on the merits (see definitions)?

- 1. yes \_\_\_\_\_
- 2. no \_\_\_\_\_
- 3. don't know \_\_\_\_\_

D. Please give your general opinion of this particular instance(s) of case management:

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

14. The procedures at GAB are distinguished by the large extent to which the GAB presiding judge may manage a case. See definition of "case management." Overall, what is your general opinion of this approach?

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

15. Overall, what is your general opinion of all the procedures (formal and informal, written and unwritten) employed at GAB?

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

16. Overall, to what extent do you feel that the final outcome of the case was fair to all involved?

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

17. To what extent did the GAB procedures provide you with an opportunity to present all of the evidence and arguments favoring your side of the case?

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

18. The authority of GAB is not coextensive with that of a federal or state court. For example, GAB cannot invalidate a departmental regulation.

- A. Please provide your opinion about such limits on GAB's authority:

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

B. Did the limits on GAB's authority produce an incorrect decision in the most recent closed case in which you appeared?

- 1. yes \_\_\_\_\_
- 2. no \_\_\_\_\_
- 3. possibly \_\_\_\_\_

C. Please describe changes in GAB's authority which you believe would improve its functioning:

- 1. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 2. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 3. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19. When GAB decides a case on the merits, it issues a written decision and opinion, in mimeographed form, which it may subsequently cite as a precedent. Please give your opinion about the accessibility of such GAB opinions.

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

20. The following question compares the relative resources (see definitions) available to the U.S.-respondent with those available to the grantee-appellant in litigation at GAB.

A. Compared to the resources available to the U.S.-respondent, the grantee's resources were:

3	2	1
SUPERIOR	EQUAL	INFERIOR

B. Compared to the participatory opportunities available to the U.S.-respondent for the case, the grantee-appellant's opportunities were:

3	2	1
SUPERIOR	EQUAL	INFERIOR

21. A. Please evaluate the impartiality of GAB members and staff with respect to equal and impartial treatment of the parties appearing before it.

4	3	2	1
VERY IMPARTIAL	IMPARTIAL	PARTIAL	VERY PARTIAL

B. If you marked 1 or 2 above (Question 21A), indicate toward which side GAB members and staff demonstrated partiality:

1. U.S.-respondent \_\_\_\_\_
2. Grantee-appellant \_\_\_\_\_

22. A. Please evaluate the impartiality of GAB's procedures with respect to equal and impartial treatment of the parties appearing before it:

4	3	2	1
VERY IMPARTIAL	IMPARTIAL	PARTIAL	VERY PARTIAL

B. If you marked 1 or 2 above (Question 22A), indicate toward which side GAB's procedures are partial:

- 1. U.S.-respondent \_\_\_\_\_
- 2. Grantee-appellant \_\_\_\_\_

23. Please rate GAB procedures on a scale of 1 to 10.

VERY BAD										VERY GOOD
1	2	3	4	5	6	7	8	9	10	

24. Please rate GAB judges on a scale of 1 to 10.

VERY BAD										VERY GOOD
1	2	3	4	5	6	7	8	9	10	

25. Please rate GAB staff attorneys on a scale of 1 to 10.

VERY BAD										VERY GOOD
1	2	3	4	5	6	7	8	9	10	

26. If you have had significant state court experience, please rate state court procedures on a scale of 1 to 10.

VERY BAD										VERY GOOD
1	2	3	4	5	6	7	8	9	10	

27. If you have had significant federal court experience, please rate federal court procedures on a scale of 1 to 10.

VERY BAD										VERY GOOD
1	2	3	4	5	6	7	8	9	10	



**APPENDIX F: STANDARDS FOR GAB MEMBERS' PERFORMANCE**

## JOB ELEMENT #1 (CRITICAL)

A Board Member produces written work that addresses issues, facts, and law and revises such work in accordance with comments. The Board produces final written work through a process of dialogue; a draft of a piece of work is acceptable if it reflects a reasonable approach, even though the approach is not the one ultimately adopted.

Performance Standard A

A Board Member demonstrates in his/her work an ability to be clear, concise, well-reasoned and organized. This ability is demonstrated if (1) other Board members believe that no changes are necessary to correct poor organization of a major nature or failure to logically develop a major point; (2) the work does not show a pattern of carelessness in style and editing requiring corrections for spelling, grammar, or citation errors; (3) the Board Members revises such work effectively in accordance with clear directions.

The nature and difficulty of the work, the grade level of the individual, and the time allotted for producing the work will be taken into account when evaluating the employee's performance. Successive drafts of one document will not be rated separately unless a decision is made to change the approach or result in such a way that more than minor revisions are required.

Level 0 - Failed to Meet- Less than 75% of the written work meets the standard.

Level 1 - Partially Met - 75% of the written work meets the standard.

Level 2 - Fully Met - 90% of the written work meets the standard.

Level 3 - Exceeded - Board Member meets the standard 100% of the time and in 80% of the cases, work needs no organization changes, all points are logically developed, and no necessary editing for other than minor points needs to be done.

Level 4 - Substantially Exceeded - Board Member meets the standard 100% of the time and in 90% of the cases, work needs no organization changes, all points are logically developed, and no necessary editing for other than minor points needs to be done.

Performance Standard B

A Board Member's research and analysis (1) identifies issues; (2) makes findings of fact, thoroughly considering the evidence in the record and according it the proper weight; and (3) analyzes and resolves issues in a well-reasoned way, considering the constitutional, statutory, regulatory provisions, and case law, applicable Departmental policy and precedent, and Grant Appeals Board precedent.

- Level 0 - Failed to Meet - A Board Member's work frequently fails to identify material issues, or meets the rest of the standard in less than 70% of the written work.
- Level 1 - Partially Met - A Board Member's work almost always identifies all material issues, or meets the rest of the standard in 70% of the written work.
- Level 2 - Fully Met - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 80% of the written work.
- Level 3 - Exceeded - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 90% of the written work.
- Level 4 - Substantially Exceeded - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 95% of the written work.

Performance Standard C

A Board Member closes cases within 30 days of the last action in the case, except in circumstances beyond the Board Member's control. Exceptional circumstances include the Board Member's caseload, excused absences within the critical period, the nature and difficulty of the work, clerical constraints, unreasonable delays caused by other Board members, failure of the Board members to reach consensus. The Board Member's failure to submit work for review within a time which reasonably allows the case to be closed within 30 days is not considered an exceptional circumstance. Exceptional circumstances also do not include situations which could have been avoided if the Board Member had brought the situation to the attention of the Board Chair in advance. All exceptions must be justified in writing, to the Board Chair's satisfaction.

- Level 0 - Failed to Meet - Less than 65% of cases are closed within 30 days of last action in case, or one or more cases is not closed within 60 days of the last action in the case.
- Level 1 - Partially Met - At least 65% of cases closed within 30 days of last action in case, and the remainder are closed within 60 days.
- Level 2 - Fully Met - At least 75% of cases closed within 30 days of last action in case, and the remainder are closed within 60 days.
- Level 3 - Exceeded - At least 90% of cases are closed within 30 days of last action in case and the remainder are closed within 45 days.
- Level 4 - Substantially Exceeded - All cases closed within 30 days of last action in case.

## JOB ELEMENT #2 (CRITICAL)

A Board Member conducts hearings and conferences (including telephone conferences).

Performance Standard

A Board Member conducts hearings and conferences (including telephone conferences) efficiently and effectively by keeping good order; interacting with the parties and witnesses tactfully; assuring development of a sound transcript; assuring that the parties address all matters necessary to complete and fair resolution; keeping to a minimum redundant, irrelevant, and immaterial testimony and arguments; and assuring that the parties have no valid complaints about procedural fairness.

- Level 0 - Failed to Meet - Performance does not meet the standard at least 75% of the time.
- Level 1 - Partially Met - Performance meets the standard 76 - 89% of the time.
- Level 2 - Fully Met - Performance meets the standard 90 - 100% of the time.
- Level 3 - Exceeded - Board Member meets Level 2, and there is evidence that in two or more hearings or conferences, a Board Member successfully handles complex evidentiary matters, difficult parties or witnesses, or other matters requiring some sensitive and tactful handling with little advance preparation.
- Level 4 - Substantially Exceeded - Board Member meets Level 2, and there is evidence that in two or more hearings or conferences, a Board Member successfully handles unusually complex evidentiary matters, acrimonious or recalcitrant parties or witnesses, or other matters requiring sensitive and tactful handling with little advance preparation.

**JOB ELEMENT #3 (CRITICAL)**

A Board Member reviews the draft written work of staff, supervisory attorneys and other Board Members and provides suggestions, comments, and criticism as needed, to assure that Board work products are of the highest quality. A Board Member returns drafts promptly and within time to meet established deadlines and goals.

Performance Standard

A Board Member's critique and comments on draft written work are constructive and are communicated clearly. They are precise, concise, informative, and useful, and are given in a tactful manner. Drafts are returned promptly and within time to meet established deadlines and goals.

Level 0 - Failed to Meet - Oversight does not meet the standard at least 75% of the time.

Level 1 - Partially Met - Oversight meets the standard 76 - 89% of the time.

Level 2 - Fully Met - Oversight meets the standard 90 - 100% of the time.

Level 3 - Exceeded - Board Member meets Level 2 standard, and written decisions overseen primarily by a Board Member thereafter frequently require no further substantial revision by the Board Chair and other Board Members.

Level 4 - Substantially Exceeded - Board Member meets the Level 2 standard, and decisions overseen primarily by a Board Member thereafter usually require no further substantial revision by the Board Chair and other Board Members.

**JOB ELEMENT #4 (CRITICAL)**

A Board Member takes steps to process cases, such as reporting on status of cases, preparing correspondence in cases, and identifying areas of a case which need to be developed.

Performance Standard

A Board Member provides timely information to the Board Chair on case status; monitors cases to ensure that the need for further developing a record is identified as soon as possible; prepares correspondence or takes other actions necessary to prevent undue delay in a case; and proposes alternative solutions to procedural problems.

The levels below are determined by a system of pluses and minuses, which can offset each other. A minus is given for actions such as failure to report or provide advice in a timely manner and failure to identify need for developing a record or need for action to prevent delay when need was clear. A plus is given for actions such as suggesting creative procedural alternatives, identifying problem areas at an early stage of a case where this took careful analysis, accepting a particularly heavy caseload.

Level 0 - Failed to Meet - A Board Member has an overall tally of less than -3.

Level 1 - Partially Met - A Board Member has an overall tally of between -1 and -3.

Level 2 - Fully Met - A Board Member has an overall tally of 0.

Level 3 - Exceeded - A Board Member has no minuses and receives a plus in at least 20% of the cases.

Level 4 - Substantially Exceeded - A Board Member has no minuses and receives a plus in at least 30% of the cases.

## JOB ELEMENT #5 (NON-CRITICAL)

A Board Member works in a professional manner.

Performance Standard

A Board Member (1) communicates with other Board members, colleagues, and Board Chair an articulate, tactful, sensitive, and cooperative manner; (2) volunteers to undertake new and varied assignments and duties when current workload permits; (3) shows an interest in new developments in related areas of the law; (4) participates in training or learning opportunities on a regular basis; (5) is responsive to guidance, instruction, advice, and constructive criticism; (6) consults with Board Chair about caseload management in order to avoid backlog.

Level 0 - Failed to Meet - A Board Member meets less than three of the components.

Level 1 - Partially Met - A Board Member meets three of the components.

Level 2 - Fully Met - A Board Member meets (1) and (5) and two other components.

Level 3 - Exceeded - A Board Member meets (1) and (5) and three other components.

Level 4 - Substantially Exceeded - A Board Member meets all of the components.

## JOB ELEMENT #6 (NON-CRITICAL)

A Board Member complies with administrative procedures, systems, and requirements imposed by his/her supervisor and with the established policy of the Board, such as filling out leave slips, providing statistical information, responding to need for action in court cases reviewing Board decisions, and providing information for litigation status report.

Performance Standard

A Board Member carries out administrative responsibilities in a timely, accurate, and complete manner.

Level 0 - Failed to Meet - A Board Member fails to meet the standard.

Level 1 - Partially Met - A Board Member occasionally meets the standard.

Level 2 - Fully Met - A Board Member generally meets the standard.

Level 3 - Exceeded - A Board Member almost always meets the standard.

Level 4 - Substantially Exceeded - A Board Member always meets the standard.