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Adjudicasaurus Rex

Jeffrey S. Wolfe

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Adjudicasaurus Rex

Jeffrey S. Wolfe*

 Excavation Sites	
 What If?	2
 <i>Adjudicasaurus Rex</i>	6
 <i>Adjudicasaurus Rex Endangered!</i>	13
 <i>Adjudicasaurus Rex and the Principles of Evolution</i>	19
 <i>Environmental Changes Now Require Adaptation</i>	22
A. <i>Rising Numbers of Claims</i>	23
B. <i>Rising Numbers of Attorneys and Non-Attorney Advocates</i>	25
 <i>What if, Revisited</i>	33
 <i>Rewinding the Clock</i>	36
 <i>A New Jurisprudence</i>	41
 <i>Conclusion</i>	54
 <i>Afterword</i>	62

di·no·saur

noun \ 'dī-nə-, sôr \

- 1: one of many reptiles that lived on Earth millions of years ago
- 2: someone or something that is no longer useful or current: an obsolete or out-of-date person or thing
- 3: one that is impractically large, out-of-date, or obsolete.¹



I. WHAT IF

What if dinosaurs had adapted to meet changing environmental circumstances? History shows that this was not to be. The passing of dinosaurs has become the defining measure of a failure to adapt. Their fate: *extinction*.

This same fate potentially awaits the Social Security Disability Insurance program. On March 14, 2013, Joyce Manchester, the then-Chief, Congressional Budget Office's (CBO) Long-Term Analysis Unit, testified before the Subcommittee on Social Security of the Committee on Ways and Means.² Her prognosis was dire:

The DI program's rapid expansion and the projected gap between its spending and dedicated revenues in the future raise questions about the financial sustainability of the program. Since 2009, the program has been paying out more in annual benefits than it receives

** The views expressed herein are solely those of the author and not those of the United States Government, the Social Security Administration or any component thereof. The author teaches as a member of the adjunct faculty at the University of Tulsa, College of Law; has prior service as United States Magistrate Judge, Northern District, Oklahoma; and currently serves as a federal Administrative Law Judge.*

¹ *Dinosaur*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/dinosaur>.

² *The Social Security Disability Insurance Program Before the Subcomm. on Social Security Comm. on Ways and Means*, 113th Cong. 8 (2013) (testimony of Joyce Manchester, Chief, Long-Term Analysis Unit, Cong. Budget Office). http://www.cbo.gov/sites/default/files/cbofiles/attachments/43995_DI-Testimony.pdf [hereinafter Manchester Testimony].

in taxes and in interest on the balances in its trust fund.⁹ CBO projects that the DI trust fund will be exhausted in 2016, nearly 20 years before the projected exhaustion of the trust fund for the Social Security retirement program.³

Ms. Manchester made yet another observation regarding Social Security trust fund operations – one likely unknown to most Americans: “If a trust fund’s balance falls to zero and current revenues are insufficient to cover the benefits that are specified in law and administrative expenses, SSA [the Social Security Administration] has no legal authority to pay full benefits when they are due.”⁴ The Congressional Budget Office also projected that the Old Age and Survivors Insurance (OASI) fund would reach exhaustion in 2038.⁵ If, as was done in 1994, funds are re-directed from the OASI fund to the DI fund, in effect combining the two, the projected exhaustion for both programs is 2034.⁶

Is this the future of the Social Security Disability Insurance program? Is it, like the dinosaurs, doomed to extinction? If so, at what price? Are steps being taken to address the issues?

Consider the following exchange between Congressman Darrell Issa of California and then-Acting Commissioner Carolyn Colvin in a June 11, 2014 hearing before the House Committee on Oversight and Government Reform.⁷

Chairman Issa:

“Do you believe that Congress needs to give greater authority, not greater money, greater authority, to fire, to reform, to review if

³ *Id.* at n. 9. “Federal trust funds, including those for Social Security, essentially constitute an accounting mechanism for tracking the relationship between a program’s spending and the revenues that are dedicated to that program. In a given year, the sum of a fund’s receipts along with the interest that is credited on previous balances, minus spending for benefits and administrative costs, equals a trust fund’s surplus or deficit.” *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Social Security Testimony Regarding Oversight of Federal Disability Programs Before the Oversight and Government Reform Comm.*, 113th Cong. (2014) (testimony of Carolyn W. Colvin, Acting Comm’r, SSA), http://www.ssa.gov/legislation/testimony_061114.html.

you are in fact going to represent the American people's best interest of their tax dollars?"

Ms. Colvin:

"I am not prepared to answer that question. I think that I would have to look at what the Merit Systems Review Board challenges are. I think that perhaps there could be some improvements there."

Chairman Issa:

"Ma'am, I asked you a question and I just want the answer to the question. You cannot, here today, if I hear you correctly, identify one area of authority or flexibility — not money; authority or flexibility — that would enhance your ability to protect the American people's taxpayer dollars?"

Ms. Colvin:

"I would be very happy to give you a thoughtful response at a later time on that."

Chairman Issa:

Instead of recommending reforms to the broken and wasteful disability appeals process your only suggestion was to express support for the recommendation of Rep. Gerald Conolly that Congress reallocate the payroll tax in order to fund the disability trust fund after 2016 when it will be bankrupt. A bailout of the disability fund after at least a decade of serious agency mismanagement and at the expense of the SSA retirement program, without meaningful reforms to a broken appeals process and disability re-evaluation process, is not a responsible solution.

Chairman Issa emphasized the need for fundamental reformation of the disability process. He sought to understand the past in order to guide the agency's future action, saying, "it is important that that the agency understand the full scope of the problem."⁸ Is this just political "*gotcha*," or does it signal a more significant substantive inquiry?

⁸ *Id.*

The Acting Commissioner's responses to Chairman Issa's request for solutions also raised questions, not only in the general absence of a "big-picture" response, but in the specific absence of a comprehensive, forward-looking policy, able to adapt to changing circumstances. At stake is the formulation of a policy protocol, which anticipates future changes rather than assesses blame for past mistakes. This article focuses upon the hearings and appeals process as a critical component of the Title II Disability Insurance (DI) program. It is here that the program has its highest public profile. It is here that Americans seek not only help but also justice.⁹

This article proposes a simple theme. While many issues plague the Social Security Disability Insurance and Supplemental Security Income programs, only reform of the hearings and appeals process can solve the decades-long (and growing) hearings backlog. Only then, can the remaining questions regarding the solvency of the DI trust fund be meaningfully addressed. As it now stands, the ongoing backlog of pending hearings and appeals feeds the twin plagues of rising costs and increasing delay. These are the very issues that

⁹ Other significant questions also arise in any examination of the DI program, not the least of which are the criteria by which disability benefits are awarded. Other issues are equally important, many of which are structural in nature and concern program implementation. These include revision of the Medical-Vocational Guidelines, which, at present, among other assumptions, presumes that a fifty year old, limited to unskilled sedentary work (sit-down jobs) would be unable to find a significant number of such jobs within the national or regional economies and is, therefore, "disabled" – even though he/she can, in fact, work at a sit-down job. Other questions are equally telling. Such as:

1. Why are disability applications from persons who seek Supplemental Security Income (SSI) benefits under Title XVI of the Social Security Act measured by the same legal standard as persons who seek Disability Insurance Benefits under II? In many instances, SSI applicants have little or no meaningful or sustained work as adults and so the declared inability to work rings hollow when measured against those with a lifetime of work.

2. Why are attorney fees predicated on the passage of time (past due benefits) and not expertise? Why does the Agency reward attorneys with a larger attorney fee the longer it takes to decide a case when there is a rising backlog-of pending hearings, causing ever-increasing delays in the hearings and appeals process? These are but a few of the many questions now being asked of the DI Program.

drove the federal courts in the passage of the Civil Justice Reform Act of 1990 (CJRA).¹⁰

What follows is an overview of the now-antiquated Social Security Disability hearings and appeals process – a process that has not substantively changed since the inception of the DI program; nor with the later adoption of the SSI program in 1972. As such, the system is a “dinosaur” – one that yet survives. In considering a *nom de guerre* for this system, only one is fitting: the “King of Administrative Adjudications,” or *Adjudicasaurus Rex*.

Can he be saved?



II. ADJUDICASAURUS REX

Adjudicasaurus Rex is the statutorily created hearings and appeals function of the Social Security Administration, established by the Social Security Act.¹¹ An appeal from an underlying administrative determination by the Social Security Administration is governed in part by 20 C.F.R. §404.900 (a)(3) which provides: “If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.”

Adjudicasaurus Rex claims the title of *King of Administrative Adjudications*, long outmoded, surviving still, despite growing backlogs, ever more revelations of fraud and abuse and a legal landscape whose evolutionary course has long since deigned that creatures such as *Adjudicasaurus Rex* should be no longer. Its tale is told yet today in the hallowed halls of Congress and in the courtrooms of the nation. It is a tale of woe, for within its workings

¹⁰ Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH & LEE L. REV. 89, 90 (Winter 1993). “Congress passed the Civil Justice Reform Act during 1990 because of mounting concern over abuse in civil litigation, particularly in the discovery process; the growing costs of resolving civil lawsuits; and decreasing federal court access in those cases. For a decade and a half, many federal judges, led by Chief Justice Warren Burger, had contended that the federal judiciary was experiencing a litigation explosion and increasing discovery and litigation abuse.” *Id.*

¹¹ 42 U.S.C. §205(b) (1981).

lies the timeworn ways of bygone times.¹² While *Adjudicasaurus Rex* appears strong and enduring, he lacks the ability, innate or otherwise, to adapt to an ever-dynamic social-legal environment and shall soon pass as a legacy of national history – a victim of a failure to evolve. The agency has not sought to change an adjudicatory model that has subsisted in its present form for more than 50 years. Given the shortcomings of earlier solutions, the present backlog augurs for change.

When first devised, the hearings process was conceived as “non-adversarial”, adopting an inquisitorial jurisprudence akin to that found in judicial systems in continental Europe, this in response to the fact that few persons were represented by counsel.¹³ Professor Robert M. Viles undertook a comprehensive study of the Social Security disability system in 1968.¹⁴ He described the 1968 hearing procedure in the words of one [then] hearing examiner [now, administrative law judge] as follows:

In 99% of the cases, people come in without any representation. It is my job to represent those people when they come in. It seems strange, but we use the terminology that we “wear three hats.” We put on the first hat, and we represent the claimant, we present all the testimony on his behalf, and drag it out of him by questioning. We then represent the government, the Social Security Administration, and search the law--that's the second hat. We search our minds, and we search whatever other records are available, we search the

¹² Robert M. Viles, *The Social Security Administration Versus the Lawyers . . . and Poor People Too, Part II*, 40 MISS. L. J. 24, 59 (1968).

Dean Robert M. Viles, in his thorough 1968 Mississippi Law Journal article, describing the Social Security Administration, noted that lawyers did not have a role under the Social Security Act:

The original Social Security Act of 1935 was silent on the question of representation of claimants for benefits. In 1939, however, §206 was enacted with the following explanation: **‘While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims,** the experience of other agencies would indicate that where such services are performed the fees charged therefor should be subject to regulation by the Board [now Administration], and it is so provided.

Id. at 59 (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

evidence, and we present the best case that the government has. Then we turn around and put on the third hat, and we decide which evidence is most favorable, and in whose behalf.¹⁵

But for one element, this forty-seven year-old description of the disability hearings process from 1968 precisely mirrors that of today's hearings. The variance? As contrasted with claimant representation in 1968, in today's world more than 80% of all claimants are represented, most by attorneys.¹⁶ This constitutes a dramatic change in the legal milieu, effectively rendering the current, longstanding hearings process obsolete.

Designed for a time when few persons were represented, the current hearings and appeals process at Title 20 CFR Part 404 §900(b) describes itself in contrast to the adversarial court system, as “informal” and “nonadversarial:”

In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case . . . You may present the information yourself or have someone represent you, including an attorney.¹⁷

Today, the overwhelming presence of lawyers in the disability appeals system dramatically changes the hearings dynamic, for American lawyers are advocates, trained to operate in a highly structured legal milieu in which the descriptor, “*non-adversarial*,” simply does not apply.¹⁸ The American adversarial system of justice

¹⁵ Viles, *supra* note 12 at 40-41.

¹⁶ See, e.g. *Claimant Representatives Barred from Practicing Before the Social Security Administration*, A-12-07-17057, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN. (Sept. 2007), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057_0.pdf [hereinafter A-12-07-17057] (showing that in fiscal year 2006, of the 559,000 claims heard by Administrative law judges, 439,000 were represented by attorney and non-attorney advocates, representing claimants in almost 80% of all claims appealed. Examined another way, the OIG notes, “[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR.”) *Id.*

¹⁷ 20 C.F.R. §404.900 (b) (2015).

¹⁸ See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 INDIANA L.J. 301 (1989), who writes: “The hallmark of American adjudication is the adversary system. The virtues of the adversary system, are so

contemplates two opposing parties, each seeking to defeat the other, made possible only with the adoption of comprehensive rules of procedure, evidence, and legal ethics, all designed to ensure a fair and impartial trial.¹⁹

Given the resulting and expected high levels of advocacy, the adversarial system is structured to restrict ‘win-at-all costs’ conduct,²⁰ all the while *encouraging* advocacy – all within the bounds of a fair trial.²¹ The adversarial system of justice is framed by rules of ethical conduct, bounded in both the civil and criminal courts by highly specific rules of procedure and evidence, bolstered further by ancillary procedures designed to foster alternative dispute

deeply engrained in the American legal psyche that most lawyers do not question it.” *Id.*

¹⁹ *Id.* at 304-05.

Once the evidence is presented, it must be interpreted, leaving room for further indeterminacy. These problems with reconstructing the past are a primary reason for the existence of burdens of proof. Each party to a dispute must try to persuade the trier of fact that his version of the facts corresponds to truth, and someone must bear the risk of nonpersuasion.

Id. (Citations omitted.)

²⁰ *Id.* at 307-08.

A third goal of a procedural system is behavior modification. Behavior modification is, of course, significantly tied to the substantive legal rules that are being applied, but the procedural system itself promotes this goal by providing sanctions for behavior that is disapproved in the substantive rules. All procedural systems do this to some extent because substantive rules that emerge from litigation, coupled with the likelihood of sanctions, affect how non-parties behave in the future.

Id. (Citations omitted.)

²¹ See e.g., *Preamble and Scope, Model Rules of Professional Conduct*, AMERICAN BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html, providing in-part:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

Id.

resolution.²² Codified by a variety of state and federal laws, including the Civil Justice Reform Act (CJRA)²³ as well as the Alternative Dispute Resolution Act of 1998,²⁴ among others, ancillary procedures within the adversarial judicial system contemplate early resolution of claims by means other than trial.²⁵ As a result, the overwhelming majority of claims filed in the federal civil courts are resolved before trial.²⁶ Not so in the antiquated Social Security system of hearings and appeals, where the overwhelming majority of claims filed are tried before an administrative law judge. *See, infra, Figures 1 and 2.*

²² *See* Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873 (2012), who observes:

Obviously, there is much to commend in court-connected mediation and what it offers to people caught up in disputes . . . Proponents of court-connected mediation can also point to a multitude of accomplishments. For example, and most strikingly, many cases settle in mediation. For the vast majority of those cases, litigants express satisfaction with the process and indicate that they had the opportunity to express themselves, that the other parties heard them, that they had input into the outcome, and that they view the process as fair.

Id.

²³ The Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (2013).

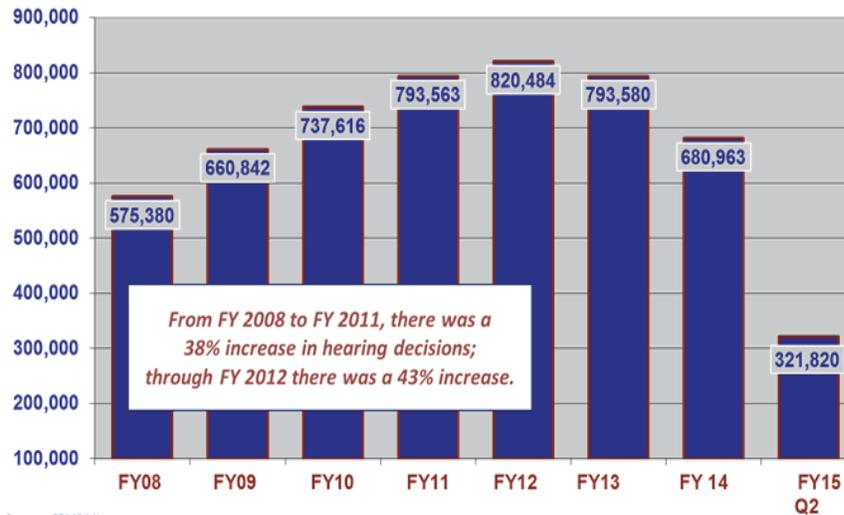
²⁴ 28 U.S.C. §651 (2013).

²⁵ *Id.* at n.1, (citing JENNIFER E. SHACK, RESOL. SYS. INST., BIBLIOGRAPHIC SUMMARY OF COST, PACE, AND SATISFACTION STUDIES OF COURT-RELATED MEDIATION PROGRAMS, 7 (2d ed. 2007)) (stating “58% of unlimited cases and 71% of limited cases settled as a result of mediation.”). Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 58 (2004) (reporting that “[m]ost studies reported a settlement rate between 47 and 78 percent.”).

²⁶ *See e.g.*, Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, J. OF EMPIRICAL LEGAL STUD., 659, 664 (Nov. 2004) (noting that between 1987 and 1996, 2,357,591 legal actions were filed in the federal courts. Of that number, only 74,253 or 3% were tried to conclusion...).

Figure 1

NATIONAL HEARING DECISIONS (FY 2008 - FYTD 2015)



Source: CPMS MI
Prepared by ODAR, OESSI, DMIA 4/8/15

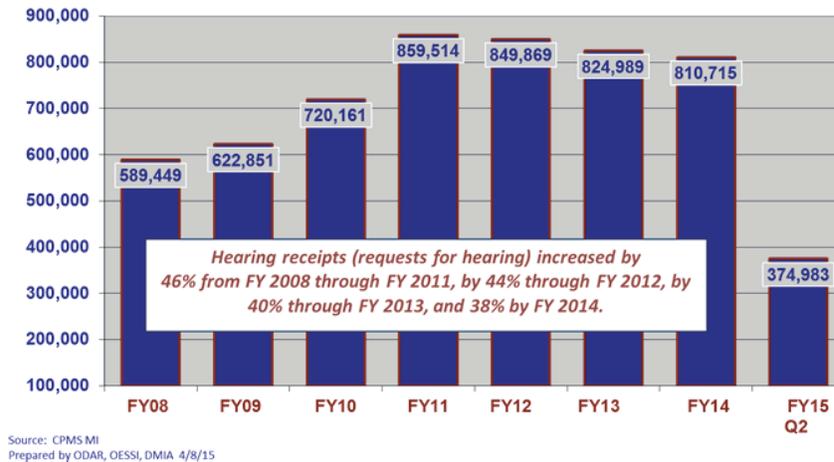
Source: Social Security Administration²⁷

Figure 1 depicts National Hearing Decisions since 2008; while Figure 2 indicates National Hearing Receipts or filings during this same period.

²⁷ *Hearings and Appeals*, SOC. SEC. ADMIN., <http://ssa.gov/appeals/#a0=3> (last visited, May 25, 2015).

Figure 2

**NATIONAL HEARING RECEIPTS
(FY 2008 - FYTD 2015)**



Source: Social Security Administration²⁸

In Fiscal Year 2014, 810,715 *Requests for Hearing* (before an Administrative Law Judge) were filed by Social Security disability claimants. Of that number, 680,963 hearing decisions were issued. The significance? Eighty-four percent of all *Requests for Hearing* were tried, as contrasted with less than 10% in the federal courts.

During this same period, between 2008 and the present, the agency has increased the size of its corps of administrative law judges. This has not, however, slowed the increasing backlog of pending hearings. See, *infra*, Figure 5. The issue is not, therefore, the productivity of judges, who are more productive than at any other time but is, instead, a reflection of the inherent inability of the current adjudicatory system to successfully adapt to a fundamentally altered legal environment.

²⁸ *Id.*



III. ADJUDICASAURUS REX ENDANGERED!

Adjudicasaurus Rex thrives within a complex multifactorial²⁹ legal climate his genesis found within the environs of a vast antediluvian tidal expanse, bounded by the caverns of Woodlawn, Maryland, the plains of Falls Church, Virginia and the bogs of Washington, D.C.³⁰ Despite his birth in the nation's capital, he roams the nation, seeking succor within 168 hearing offices and ten regional offices.³¹ Within these offices he finds his true environs, the cloistered spaces of his evolving habitat – the dangerous evolutionary realms of the legal landscape. It is here that *Adjudicasaurus Rex* has lived; and it is here he now finds what may be his imminent demise. The Social Security disability appeals system, structured under the Social Security Act and established as the Office of Disability Adjudication and Review (ODAR) is the unchallenged “King” of all administrative adjudicatory systems. In 2015, ODAR is home to more than 1,500 federal administrative law judges (ALJs), each appointed under the federal Administrative Procedure Act (APA).³²

The Commissioner of Social Security is charged with hearing and deciding matters arising under Title II and Title XVI of the Social Security Act. Title 42 United States Code (USC) § 405(a) calls for the Commissioner “to make findings of fact, and decisions as to the rights of any individual applying for a payment under this [title].”

²⁹ *Id.*, mul·ti·fac·tor \-'fak-tər\ : having, involving, or produced by a variety of elements or causes.

³⁰ Adam Karlin, *From Virginia through Maryland and up to Delaware, the Eastern Shore comprises a string of protected wetlands and preserved beaches, interspersed with resort towns*, WASHINGTON, D.C., CITY GUIDE, 232 (May 1, 2010).

³¹ *Hearings Office Locator, Office of Disability Adjudication and Review*, SOC. SEC. ADMINISTRATION, http://www.ssa.gov/appeals/ho_locator.html (last visited May 2, 2015).

³² *Hearings and Appeals, Administrative Law Judge Disposition Data*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html. (last visited May 2, 2015).

The APA recites that “the agency” or “one or more administrative law judges appointed under section 3105 of this title” “shall preside at the taking of evidence.”³³

The role of the administrative law judge stands as one of the critically important provisions of the APA, ensuring a separation of function between judges and others within the agency, “by separating those in the agency who investigate and prosecute from those who hear and decide . . . APA hearings are conducted by independent administrative law judges, who are not subject to agency control. ALJs are not permitted to “consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.”³⁴ Decisional independence by the administrative judiciary is a recognized hallmark of the APA, ensuring fundamentally fair and impartial decision-making through due process of law in administrative adjudications.

Despite APA protections, the Social Security Administration stands on the brink of a convergence of circumstances which may, absent fundamental corrective action, lead the American people to lament the fate of the nation’s preeminent disability program, examining the bones of its bureaucratic remains in future histories, much like a fossilized skeleton of some great dinosaur of ages past. This is not so much a doomsday prediction, as it is a factual assessment.³⁵

³³ 5 U.S.C. §556(a).

³⁴ Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L. J. 203, 208 (1996). *See also* the Administrative Procedure Act, 5 U.S.C. § 554.

³⁵ *See, e.g.,* Javier Meseguer, *Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, SOC. SEC. BULLETIN (Vol. 73 No. 2, 2013) who writes:

From 1970 through 2009, the number of beneficiaries in the DI [Disability Insurance] program more than tripled, while DI expenditures increased by almost seven times in inflation-adjusted figures (Congressional Budget Office, 2010). According to the Social Security Advisory Board (2012a), that expansion can be traced to several factors in addition to an increase in the general population.

One factor has been an increase in the share of lower mortality impairments with earlier onset (such as musculoskeletal and mental disorders). Applicants with those types of

Like the once-dominant dinosaur, the Social Security disability program is described by the United States Supreme Court in the landmark 1971 case, *Richardson v. Perales*³⁶ as encompassing “vast workings . . .” And, like the dinosaur, the question is one of survival or extinction – an issue now in doubt with the disclosure that the disability insurance benefits (DIB) program is insolvent, destined to exhaust the Title II disability trust fund in 2016, with little or no action taken by the agency to halt the downward slide.³⁷

impairments tend to enter the program at younger ages and remain as beneficiaries for longer periods of time. *Id.*

Another factor has been an increase in female labor force participation. The rapid pace at which women have joined the ranks among workers has considerably expanded the pool of applicants. Indeed, the gender composition of beneficiaries today is much closer to that of the population at large. *Id.*

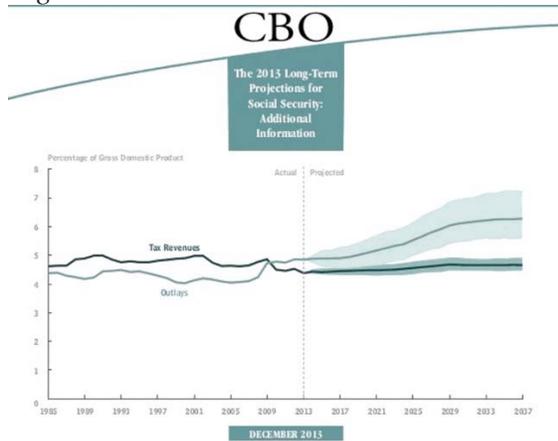
A third factor has been an increase in earnings replacement rates. Rising income inequality coupled with the average wage indexing of benefits has increased the portion of potential earnings replaced by DI benefits. Younger low-skilled workers in particular have experienced the highest increase in the value of DI benefits at a time of reduced demand for their labor. Exacerbating the gap between potential earnings and disability benefits is a reduction in private health insurance coverage. Eventual access to Medicare after 2 years on the DI rolls may provide an additional enticement to apply. *Id.*

³⁶ *Richardson v. Perales*, 402 U.S. 389 (1971).

³⁷ Manchester Testimony, *supra* note 2. Joyce Manchester made plain the impending crisis now facing the Social Security disability program: “Since 2009, the program has . . . paid out more annual benefits than it receive[d]” in dedicated revenues. These revenues come primarily from the Social Security payroll tax. In 2012, “[t]otal [Disability Insurance (DI)] expenditures were \$135 billion,” or 0.87 percent of gross domestic product (GDP), while the program’s dedicated tax revenues totaled \$102 billion, or 0.65 percent of GDP. In 2023, the Congressional Budget Office (CBO) projects the program’s spending will be 0.82 percent of GDP, and dedicated tax revenues will be 0.66 percent of GDP. The CBO further projects that “the DI Trust fund will be exhausted in 2016, nearly 20 years before the projected exhaustion of the [Social Security’s Old-Age and Survivors Insurance (OASI)] trust fund for the Social Security retirement program.” Jeffrey S. Wolfe & Dale ing, *Through the Disability Looking Glass: A Considered Response to Professor Pashler’s Wild Social Security Hare*, 44 U. MEM. L. REV. 523, 527 (2014) (Manchester Testimony, *supra* note 2).

Overall, the numbers are telling. “Total DI [Disability Insurance] expenditures were \$135 billion,” or 0.87% of gross domestic product (GDP) in 2012, while the program’s dedicated tax revenues totaled only \$102 billion, or 0.65% of GDP.³⁸ In other words, the system is now paying out more in disability benefits than it is taking in, in tax revenues. See, *Figure 3*. The Congressional Budget Office (CBO) projects that the Disability Insurance trust fund will be ‘in-the red’ in 2016, approximately 20 years before the projected end of Social Security’s Old-Age and Survivors Insurance (OASI) trust fund, which pays for the Social Security retirement program.³⁹

Figure 3



Source: Congressional Budget Office⁴⁰

[T]he Board of Trustees of the Social Security Trust Funds, in its 2013 Annual Report, projected that the reserves in the DI Trust Fund, which have declined since 2009, will continue . . .to be depleted in 2016. At that time, continuing income to the DI Trust Fund would be

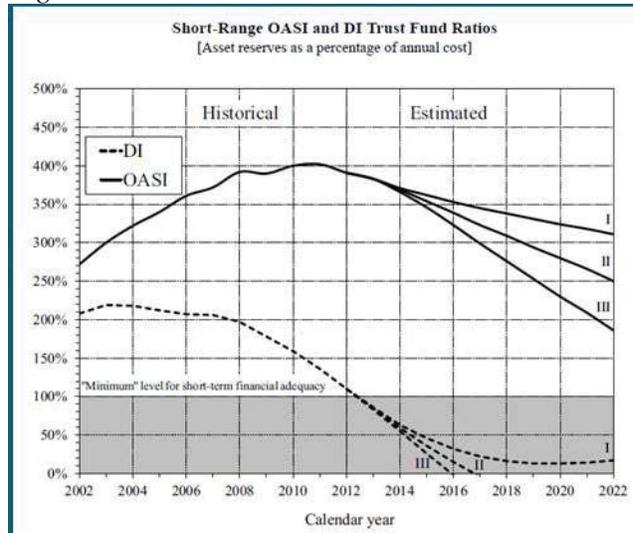
³⁸ *The Social Security Disability Insurance Program: Hearing Before the Subcomm. on Social Security H. Comm. on Ways and Means, U.S. HOUSE OF REPRESENTATIVES* (March 14, 2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43995_DI-Testimony.pdf [hereinafter *Manchester Hearings*] (testimony of Joyce Manchester, Chief, Long-Term Analysis Unit).

³⁹ *Id.*

⁴⁰ *Report: The 2013 Long-Term Projections for Social Security: Additional Information*, CONGRESSIONAL BUDGET OFFICE, (December 17, 2013), <http://cbo.gov/publication/44972>.

sufficient to pay only 80 percent of scheduled DI benefits. Absent an act of Congress, the *Social Security Act* does not permit further funding or allow SSA to make benefit payments from funds other than the Trust Funds. Consequently, if the Social Security Trust Fund reserves become depleted, current law would effectively prohibit SSA from paying full Social Security benefits.⁴¹

Figure 4



Source: Office of Inspector General, Social Security Administration⁴²

The causes are many, but even a cursory statistical review of the Title II disability insurance program reveals fundamental issues – both procedural and substantive – crying out for resolution.

That this is so, is evident from recent history. The General Accounting Office (GAO), now, the “*Government Accountability Office*,” has, over a period of years conducted periodic studies of the Social Security Administration and its handling of the disability appeals caseload. It notes in 1996 that the “[t]he Social Security

⁴¹ *The Social Security Administration’s Ability to Prevent and Detect Disability Fraud*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN.3 (September, 2014), http://oig.ssa.gov/sites/default/files/testimony/SSA's%20Ability%20to%20Prevent%20and%20Detect%20Disability%20Fraud_0.pdf.

⁴² *Id.*

Administration (SSA) operates the nation's largest programs providing cash benefits to people with severe long-term disabilities."⁴³ The GAO further observed that, "[d]espite numerous studies of SSA's disability programs and continued agency attempts to improve the disability appeals process, between 1985 and 1995, OHA's pending case backlog—the number of appealed cases waiting for a decision—grew from 107,000 to 548,000, and case-processing time increased from 167 to 350 days."⁴⁴

Given the foregoing, absent change, *Adjudicasaurus Rex* seems destined for extinction, with increasing delays, rising numbers of claimants and exhaustion of the DI Trust Fund – the *King of Administrative Adjudications* brought down by the inability to effectively address the claims and appeals of literally millions of Americans⁴⁵ in the company of thousands of lawyers and representatives. It is no secret, though not for some reason obvious, that *Adjudicasaurus Rex's* habitat – the legal landscape – has changed, no longer the vacant fields of the 1950's, 60's and 70's.

Of late, *Adjudicasaurus Rex's* environment is quite different from earlier times – inhabited by a new species – perhaps best termed, *Velociraptor advocatasaurus* – lawyers and representatives – abounding in greater numbers, as never before, in an environment which did not originally contemplate their presence. These recently-arrived *new-actors-in-the-system* migrated from their traditional habitats, seeking new venues wherein they might flourish. In coming, they now endanger *Adjudicasaurus Rex*, who ponderously lumbers, surrounded now by the more numerous and agile *Advocatasaurus*.

⁴³ *Social Security Disability: Backlog Reduction Efforts Under Way; Significant Challenges Remain*, GAO/HEHS-96-87, UNITED STATES GEN ACCOUNTING OFFICE (July, 1996), <http://www.gao.gov/assets/160/155557.pdf>.

⁴⁴ *Id.*

⁴⁵ *Policy Options for the Social Security Disability Insurance Program*, CONGRESSIONAL BUDGET OFFICE (July 16, 2012), <http://www.cbo.gov/publication/43421>. The CBO observes "[t]he Disability Insurance program provided benefits to 8.3 million disabled workers in 2011. By 2022, CBO projects, the program will provide benefits to over 10 million disabled workers and spending on benefits will exceed \$190 billion." *Id.*



IV. ADJUDICASAURUS REX AND THE PRINCIPLES OF EVOLUTION

In speaking to the need for a new system of administrative adjudications for Social Security, the system must be recognized for what it is. Social Security's system of hearings and adjudications is, in social-legal terms, a *mass social justice welfare system*. That label, standing alone, fails to describe the intricate workings of the system. In fact, Social Security's system of administrative adjudications is a highly complex undertaking involving hundreds if not thousands of variables. By its very nature, the number and effect of these variables is in constant flux, made all the more difficult with the introduction of lawyers and non-lawyer advocates. The entrance of lawyers and non-lawyer advocates fundamentally changes the adjudicatory system simply because the behaviors of such actors were not factors originally considered when the jurisprudence was devised.

"The original intent of the framers of the Social Security Act in their description of administrative decisionmaking – including adjudication – is, in the words of Paul Verkuil, made clear "[i]n a 1940 statement [by] the [Social Security] Board . . . [and describes anticipated decisionmaking under the new Social Security Act] . . . in terms of 'simplicity and informality' as well as 'accuracy and fairness'. . . The decision model proposed by the Social Security Board was designed to make an enormously complex program work at low cost and with substantial public satisfaction."⁴⁶ The goal identified is transparency in decisionmaking with sustained public approval in meeting the need for clear and timely administrative responses. Unfortunately, the lofty goals of the 1940's – to meet the

⁴⁶ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COL. L. REV. 258, 270-71 (1978).

needs of a nation poised on the brink of a new age, now lie buried, overwhelmed by numbers once not thought possible.”⁴⁷

This is not to say there are no regulations that concern representatives. Title 20 Part 404, Code of Federal Regulations Section 1740 *et seq.* generally addresses the conduct of representatives (lawyers and non-lawyers alike); but review of the overall jurisprudential scheme fails to find those procedural mandates and safeguards present in every other Anglo-American judicial system. Indeed, the reasons articulated by the Social Security Board in 1940 makes this clear: the goal was “simplicity and informality” – terms not generally associated with lawyers in the context of adjudications.

Examined through the lens of principles of biological evolution the following becomes readily apparent. Evolution occurs in a dynamically changing legal environment just as in a changing biological environment. When examining the evolutionary course of the dinosaurs, the inability of the dinosaur to adapt signaled the end of that age. The difference here is a question of choice—a choice the dinosaurs did not themselves share. To act, or not in the face of the demise of *Adjudicasaurus Rex* is the singular (albeit, largely unappreciated) question facing the American people. Failure to acknowledge the fundamental changes, which now dramatically affect the legal milieu, is tantamount to a failure to adapt.

From an evolutionary perspective, that *Adjudicasaurus Rex* is to be a victim of the very environment from which he springs is no accident of circumstance. Paleontologists note the critical role of environment in species survival: “the strongest predictive factors of extinction . . . were both the percentage of a genus's habitat that was lost when the sea level dropped and a genus's ability to tolerate broader ranges of temperatures. Groups that lost large portions of their habitat as ice sheets grew and sea levels fell, and those that had always been confined to warm tropical waters, were most likely to go extinct as a result of the rapid climate change.”⁴⁸ Modern theory goes

⁴⁷ Jeffrey S. Wolfe, *Civil Justice Reform in Social Security Adjudications*, 64 ADMIN. L. REV. 379, 383-84 (2012).

⁴⁸ Kevin Laland, Tobias Uller, Marc Feldman, et al, *Does Evolutionary Theory Need A Rethink?*, NATURE (October 8, 2014), <http://www.nature.com/news/does-evolutionary-theory-need-a-rethink-1.16080>.

further, proposing *extended evolutionary synthesis* (EES), postulating that:

“[O]rganisms are constructed in development, not simply ‘programmed’ to develop by genes. Living things do not evolve to fit into pre-existing environments, but co-construct and coevolve with their environments, in the process changing the structure of ecosystems.”⁴⁹

Such is the circumstance now facing *Adjudicasaurus Rex*. Had he evolved in response to changing environmental conditions, he would have not only adapted, but by virtue of his own change, would have effected yet further adaptation in the legal environment itself. Put simply, in the manifestation of his own adaptive response, he too becomes an agent of change. This concept – of elements within a system seen as exerting a systemic contributory influence affecting the very nature of the system itself—is not new. Professor Manfred Laublicher, Ph.D., of the Laubichler Lab, within the School of Life Sciences at Arizona State University, studies “the theory of Complex Adaptive Systems (CAS).”⁵⁰ He writes:

CAS [Complex Adaptive Systems] can be found across many different areas (from living and social to economical and

⁴⁹ *Id.*(emphasis added).

⁵⁰ Manfred Laublicher, *Theory of Developmental Evolution and Complex Adaptive Systems*, THE LAUBLICHER LAB, DEVELOPMENTAL EVOLUTION ARIZONA STATE UNIVERSITY, <http://devo-evo.lab.asu.edu/?q=theory> (last visited May 2, 2015). He notes further:

As a consequence of the numbers of agents and dynamics of CAS, their behaviors play out in an interactive space that has a very high number of dimensions and degrees of freedom. Until recently, systems of such high dimensionality were not tractable to human understanding, but recent advances in computation and modeling of CAS are creating the tools to manage, mine and manipulate the vast amount of data needed to describe such high dimensionalities. All efforts to characterize and understand CAS include advanced computational sciences and modeling to capture systems-based multidimensionality and new, responsive models and constructs, for experimental analysis. Although a single prescriptive statement that embraces all categories of CAS is difficult, it is increasingly possible to think about (and model) their fundamental shared properties; complexity, robustness and adaption.

Id.

technological systems) and are variable in form. Therefore, they are best captured by identifying the common features that describe their essential elements and convergent behaviors. CAS comprise many “agents” that exhibit independent properties and behaviors but work together to produce emergent properties that cannot be predicted by isolated understanding of these interacting agents/components.⁵¹

“One of the defining features of CAS, whether natural, technological, economic, social/cultural or biological, is that they are in large measure the product of *adaptive co-evolution with their environment*.”⁵² Despite an adjudicatory structure described by a complex system of disability laws, regulations and court rulings, literally affecting millions of Americans, *Adjudicasaurus Rex* – the disability adjudicative system, has neither evolved nor adapted to the changing legal environment. In this system, the theory of *Complex Adaptive Systems* postulates an evolutionary adaptation in response to changes in the legal landscape, which for the adjudicative system, is a primary integral element. Here, there has been little or no adaptation to the rising presence of *Velociraptor advocatasaurus* – lawyers and representatives – and the resulting increase in numbers of claims and *Requests for Hearings*.



V. TWO ENVIRONMENTAL CHANGES NOW REQUIRE ADAPTATION

Two critical evolutionary milestones mark now-evident changes to the disability legal landscape, each adversely affecting *Adjudicasaurus Rex* as a result of his inability to adapt. These include high rates of growth, marked both by rising numbers of disability claims and increasing numbers of *Requests for Hearings before an Administrative Law Judge*; as well as greater numbers of attorneys and non-attorney advocates.

⁵¹ *Id.*

⁵² *Id.*

A. Rising Numbers of Claims

First, the evolving disability legal environment is characterized by a high rate of growth over a relatively short period of time. This has resulted in a national “backlog” which the system is unable to resolve – no real mechanisms in place to resolve pending claims absent the supposed “simple” and “informal” decisionmaking process of the 1940’s – essentially holding hearings in the vast majority of all pending claims. This is evident not only from statistical data (*see, Figure 2, supra*), but in two key Supreme Court decisions. In 1971, the United States Supreme Court in *Richardson v. Perales*⁵³ described as “vast workings,” the administrative adjudicative and appeals system statutorily a part of the Social Security Disability program,⁵⁴ with “over 20,000 disability claim[s] hearings annually. . .”⁵⁵ A short twelve years later, in 1983, the Court in *Heckler v. Campbell* observed that “[t]he Social Security hearing system is

⁵³ *Richardson v. Perales*, 402 U.S. 389, 406 at n. 6 (1971).

⁵⁴ *See* 42 U.S.C. §405(a)(1), providing in-part:

The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title . . . Upon request by any such individual . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner’s findings of fact and such decision . . . The Commissioner of Social Security is further authorized, on the Commissioner’s own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

Id.

⁵⁵ *Richardson v. Perales*, 402 U.S. at 406.

‘probably the largest adjudicative agency in the western world.’⁵⁶ The Court went on to note “[a]pproximately 2.3 million claims for disability benefits were filed in fiscal year 1981. . . More than a quarter of a million of these claims required a hearing before an administrative law judge.”⁵⁷ This number now exceeds 800,000 annual hearings before administrative law judges.

Figure 2 depicts the growth in numbers of pending hearings from just 2008 to the present. In 2014 the number of pending hearings edged over the million case mark, described as the “backlog,”⁵⁸ exceeding the admitted capacity of 400,00 hearings by more than two times. Today, the number of pending disability appeals awaiting hearing far exceeds the once-described “vast” totals of 1971, swamping an adjudicatory system whose now antiquated jurisprudence renders it unable to effectively address such volumes.

⁵⁶ *Heckler v. Campbell*, 461 U.S. 458, n. 2 (1983) (citing, J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL, & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS XI* (1978)).

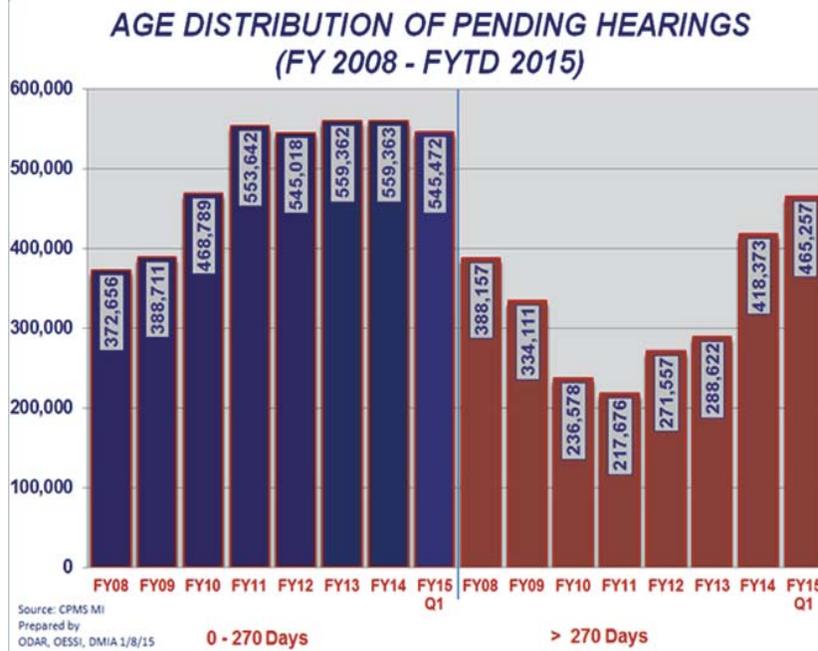
⁵⁷ *Id.*, (citing *SOCIAL SECURITY ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1981*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, 32, 35, 38 (1982)).

⁵⁸ *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs* GOV’T ACCOUNTABILITY OFFICE (December, 2007), <http://www.gao.gov/new.items/d0840.pdf>. The GAO notes that the Social Security Administration defines a ‘backlog’ as those cases pending beyond an optimal projected number at the end of a given fiscal year. The GAO describes the Social Security Administration’s definition of a ‘backlogged’ case as follows:

SSA measures its claims processing performance at each level of the process in terms of the number of claims pending each year and the time it takes to issue a decision. Since 1999, the agency has used a relative measure to determine the backlog by considering how many cases should optimally be pending at year-end. This relative measure is referred to as “target pending” and is set for each level of the disability process with the exception of the reconsideration level. SSA’s target pending is 400,000 for claims at the initial stage and 300,000 and 40,000 for the hearings and Appeals Council stages, respectively. The number of pending claims at year-end that exceed these numbers represents the backlog.

Id.

Figure 5



B. Rising Numbers of Attorneys and Non-Attorney Advocates

The second environmental element, now present in greater numbers than ever before, is the rising presence of lawyers and non-lawyer advocates. In a system originally designed to be “informal” in its jurisprudence, vesting the judge with the primary duty of inquiry, today’s legal environment has overwhelmed the adjudicatory system.

In the Anglo-American adversarial system of justice, the parties are “active”—it is they, the parties—who present the evidence they wish the decisionmaker to consider. The decisionmaker, judge and jury, are neutral and “passive”—that is, neither the judge nor the jury are sources of evidence. There is no independent duty of inquiry to ensure the record is adequately developed. In the adversarial system, a poor record will result in a loss. Not so under Social Security’s quasi-inquisitorial system. A poorly developed record may give rise to an appeal by the claimant, asserting the judge failed to do all that he or she should have done to ensure the record is adequately developed. In the adversarial system, it is the parties who must meet their respective burdens of proof going forward. There is no

evidentiary burden upon the judge. Her role is to ensure due process—ensuring a fundamentally fair, timely and just proceeding is had. In the words of one writer, two essential values frame the adversarial system;

An adversary system of adjudication, as generally defined, has two essential elements. First, the parties themselves are responsible for gathering and presenting evidence and arguments on behalf of their positions. Second, the decisionmaker knows nothing of the litigation until the trial, when the parties present their neatly packaged cases to him. These elements are related to some of the elements of fair adjudication identified above.⁵⁹

Social Security's version of an inquisitorial system requires the judge "look fully into the issues,"⁶⁰ donning "Three Hats": one in which she searches and gathers the evidence favorable to the claimant; then dons the second hat and searches for the evidence favorable to the government; finally deciding the case by returning to the middle with the neutral hat supposedly firmly in place.⁶¹ Professor Sward echoes the "active" role of the inquisitorial judge as directing the course of evidentiary production, effectively the reverse of the adversarial system:

Inquisitorial adjudication is generally cast as the opposite of adversarial adjudication. Thus, two essential elements of inquisitorial adjudication are: first, that the judge is primarily responsible for supervising the gathering of evidence necessary to resolve the issue; and, second, that the decisionmaker is not, therefore, merely a receptor for information at a neatly packaged trial, but is, instead, an active participant. In practice, an inquisitorial "trial" such as is found in continental Europe may continue as a series of hearings for several months as the judge considers what further information he might need to resolve the dispute.⁶²

This stands in stark contrast to traditional American jurisprudence where it is the parties who are responsible for development of the evidence. More significantly, because the Social Security hearings outcome is judge-driven, requiring the judge be an "active"

⁵⁹ Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312 (1989).

⁶⁰ 20 C.F.R. Part 404 §944.

⁶¹ See, *supra* note 12.

⁶² Sward, *supra* note 54 at 313-14.

participant in the development of the evidentiary record, she must, in effect, convene every case. There is no mechanism, which affects significant numbers of claims, to render decisions early, or, without a full hearing, as there is no “other party” with whom claimant’s counsel may confer. Thus, the “simple” and “informal” vision of the 1940 Social Security Board now continues, hobbling the system, causing backlogs, because the inherent jurisprudence, once thought ideal for an entitlements program in which few persons were represented, now stands stymied by overwhelming numbers, with no mechanism in place other than that which has been in place since the earliest beginning.

Professor Verkuil notes that the vision for Social Security specifically did not include a decisionmaking process akin to that in the courts. Instead, it was envisioned that an “administrator” would serve as an agent for the public, resolving questions of entitlement consistent with the public goals of the program:

As guidelines for the legion of social security decisionmakers who had to adjudicate eligibility and entitlement to the old-age and survivors insurance program (and as time went on, the disability program), the Social Security Board offered a new rationale for the role of the decisionmaker in the hearing process. In a 1940 statement, the Board discussed the values to be achieved in an administrative hearing in terms of “simplicity and informality” as well as “accuracy and fairness.” It referred to a social security decisionmaker as a “referee” or “social agent.”⁶³ This concept of the administrator as an agent for the public (working to ensure that the program goals are fulfilled) is different from the roles assigned to the common-law judge. The social security “referee” thus emerges with a role that is independent of the judicial one . . . The decision model proposed by the Social Security Board was designed to make an enormously complex program work at low cost and with substantial public satisfaction.⁶⁴

⁶³ In the original, the footnote is note 55, which reads:

See SOCIAL SECURITY BOARD 1940 REPORT, MONOGRAPH OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Pt. 3, S. Doc. No. 10, 77th Cong. 1st, Sess. 37, 46 app. (1941).

⁶⁴ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COL. L. REV. 258, 270-71 (1978).

This heritage continues within today's Social Security bureaucracy, which adopts terms such as "programmatically integrity" or "policy compliant," staunchly adhering to an outdated hybrid-inquisitorial system despite repeated and ongoing delay and rising costs.

The seeming innocuous fact that the percentage of claimants now represented by counsel is far greater than when *Adjudicasaurus Rex* first roamed⁶⁵ is not so innocuous in its effect. The "informal," "non-adversarial" climate once allowed the seeming beneficent Hearing Examiner, now, administrative law judge, to "wear Three Hats," with relative ease, adopting the role of public administrator—a role in which it was envisioned that most persons would accept the result, the government acting as "super parent:"

Here lies the essence of the current jurisprudence. It is an agency-centric model adopting a 1930's worldview powered by a 1950's caretaker mentality in which the role of counsel is minimized in favor of a strong agency decisionmaker, empowered to ensure the 'right result' is reached. It evokes an image of the government reminiscent of the State in juvenile cases – the State as *parens patriae* – or super-parent. More cogently, it accepts as a *procedural mandate* the public policy underlying the Social Security Act, expressed most plainly at 20 C.F.R. §404.508 (which deals with waiver of an overpayment where "adjustment or recovery will defeat the purpose of Title II"). That section provides, in-part, that to defeat the purpose of "benefits under this title" means "to deprive a person of income required for ordinary and necessary living expenses."⁶⁶ That is to say, the public policy underlying the Social Security Act is to provide daily maintenance and sustenance for those unable to

⁶⁵ See Robert G. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 693 (September 1972), who writes:

In 1964-65 [sic], attorneys represented claimants in approximately 17-18% of the hearings. In the first six months of 1971, the number approached 21-23%. Figures were obtained from Edward L. Binder, Technical Advisor, Bureau of Disability Insurance, SSA-Baltimore Headquarters, August, 1971. The right to retained counsel is available at prior decisional stages, but cases in which it is exercise is rare.

Id.

⁶⁶ 20 C.F.R. §404.508(a).

provide for themselves. The agency becomes the personified intention of the government to provide for those who cannot provide for themselves – in real terms, a ‘super parent.’” (Citations omitted).⁶⁷

Defining the Social Security decisionmaker (formerly the Hearing Examiner and now the Administrative Law Judge) as one who looks out for the welfare of the claimant by ensuring the record is fully developed by the wearing of “Three Hats” is a direct expression of this unique procedural mandate. In a jurisprudence described as “non-adversarial” where the government chooses not to appear; and instead imbues the decisionmaker with its and the claimant’s responsibilities to present evidence, there can be little doubt but that the intended role of the decisionmaker is not so much that of a neutral as it is agency facilitator or “super parent”– a uniquely different role from that of “judge” in the traditional Anglo-American system of jurisprudence.⁶⁸

The presence in great numbers of lawyers and non-lawyer advocates changed all this.

The introduction of *Velociraptor advocatasaurus* or lawyers, trained in the adversarial system of justice, upends the “Three Hat” jurisprudence. With the advent of widespread representation, *Adjudicasaurus Rex* no longer operates in the same legal environment; yet, he has not adapted. The hearings process requires that a claimant file a *Request for Hearing by Administrative Law Judge*⁶⁹ within 60 days of an adverse determination following reconsideration.⁷⁰ Hearings are closed to the public, on the record,⁷¹

⁶⁷ Jeffrey S. Wolfe, *Civil Justice Reform in Social Security Adjudications*, 64 ADMIN. L. REV. 379, 384 (2012).

⁶⁸ *Id.*

⁶⁹ SOC. SEC. ADMINI. FORM HA-501-U5 (01-2015) ef (01-2015).

⁷⁰ 20 C.F.R. §404.933 (2014).

⁷¹ 42 U.S.C. §405(g) provides for review by the federal courts of any decision reached by the Commissioner of Social Security, and further provides that “[a]s part of the Commissioner’s answer [in response to the claimant’s appeal to the court] the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.” *Id.* This has been interpreted to require an “on-the-record” proceeding for purposes of the Administrative Procedure Act. See, e.g., for a further discussion on the applicability of the Administrative Procedure

before an administrative law judge, akin to a “bench trial,”⁷² and are described by current regulation as “nonadversarial.”⁷³ Appeals from

Act to Social Security adjudications, Jeffrey S. Wolfe, *Will You Make that Commitment in Writing? The APA, ALJs and SSA*, 55 OKLA. L. REV. 203 (2002).

⁷² A “bench trial” is a type of trial in which there is no jury. The judge must determine both questions of law and questions of fact. See *Definitions*, FEDERAL JUDICIAL CENTER <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/800>; See e.g., *Lewis v. United States*, 518 U.S. 322 (1996).

⁷³ 20 C.F.R. §404.900 describes generally the appeals process as well as the jurisprudence of SSA’s decision-making process:

§ 404.900 Introduction.

(a) *Explanation of the administrative review process.* This subpart explains the procedures we follow in determining your rights under title II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. These procedures apply also to persons claiming certain benefits under title XVIII of the Act (Medicare); see 42 CFR 405.701(c). The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) *Initial determination.* This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in §404.902, that gives you a right to further review.

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) *Hearing before an administrative law judge.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) *Appeals Council review.* If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) *Federal court review.* When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) *Expedited appeals process.* At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) *Nature of the administrative review process.* In making a determination or decision in your case, we conduct the administrative review process in an informal,

a judge's decision may be made to the Appeals Council of the Social Security Administration, and if affirmed, becomes the final decision of the Commissioner of Social Security. At no point in this process does the Social Security Administration make an appearance. Thus, at no point, does claimant's counsel have any opportunity to negotiate an outcome short of hearing. In effect, the absence of the Social Security Administration as a party from the hearings process signals the inability of the agency to reach any result in a pending claim short of hearing, mandating a hearing for each claim made, exacerbating the hearings backlog. Complicating the process, the Appeals Council may engage in "own motion review," examining a decision even if no appeal has been taken.⁷⁴ A final decision of the Commissioner is appealable to the United States courts for review under Title 42 U.S.C. § 405(g).⁷⁵

Evidence of the 1940's worldview remains apparent within the regulatory scheme, largely in the form of weak procedural mechanisms. Consider Title 20 C.F.R. Part 404 § 935, styled, "SUBMITTING EVIDENCE PRIOR TO A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE." Section 935 purports to govern that which stands at the heart of every disability adjudication: submission

nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. Subject to the limitations on Appeals Council consideration of additional evidence (see §§404.970(b) and 404.976(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review. [45 FR 52081, Aug. 5, 1980, as amended at 51 FR 300, Jan 3, 1986; 51 FR 8808, Mar. 14, 1986; 52 FR 4004, Feb. 9, 1987].

⁷⁴ See 20 C.F.R. Part 404 §969(a), which provides:

General. Anytime within 60 days after the date of a decision or dismissal that is subject to review under this section, the Appeals Council may decide on its own motion to review the action that was taken in your case. We may refer your case to the Appeals Council for it to consider reviewing under this authority.

Id.

⁷⁵ See, *supra* note 4.

of the objective medical and other evidence. The regulation rather weakly provides:

If possible, the evidence or a summary of evidence you wish to have considered at the hearing should be submitted to the administrative law judge with the request for hearing or within 10 days after filing the request. Each party *shall make every effort* to be sure that all material evidence is received by the administrative law judge or is available at the time and place set for the hearing.⁷⁶

Section 935 provides no certitude, sets no deadlines, gives no authority to the judge to set any timeframe within which to produce the requisite evidence, and essentially leaves, without any means of enforcement, the submission of evidence entirely to counsel; whose fee increases the greater the gap between the alleged onset date and the date of decision. This deficit is compounded by Section 944, which *requires* the judge look “fully into the issues,” interpreted as creating an affirmative duty of inquiry,⁷⁷ even though no mechanisms exist to require counsel to, in fact, produce such evidence. Indeed, review of the regulatory scheme reveals few deadlines; and while the judge presides over the course of the hearing, she has few, if any procedural mechanisms, which allow her to expedite the hearing process.⁷⁸ Even setting the hearing date does not guarantee an expeditious result, as there is no regulatory mechanism to close the record after hearing.

⁷⁶ 20 C.F.R. Part 404 § 935.

⁷⁷ *Sims v. Apfel*, 530 U.S. 103 (2000).

⁷⁸ For example, section 950(d)(2) provides for a request to issue a subpoena not later than five (5) days before a scheduled hearing. As a pragmatic matter the likelihood of a return on the subpoena within such a short period is slim; with the attendant result being further delay after the hearing, with the possibility of a supplemental hearing to address the evidence submitted in response to the subpoena. Few other regulations set deadlines. Notice of hearing is governed by Section 938(a) and provides for at least 20 days’ notice. Following a failure to appear at the time and place of the hearing, Section 957(b)(2)(ii) provides that the administrative law judge is to give the claimant notice within ten (10) days to show cause for the non-appearance. This has been interpreted to allow the claimant ten (10) days to respond. Section 957(c)(4) provides a sixty (60) day window for any other person adversely affected by the dismissal to make a showing of good cause. Section 961 provides that a prehearing conference may be held at the request of a party or at the judge’s behest upon seven (7) days’ notice. Section 968 provides for appeal to the Appeals Council within sixty (60) days after the date of notice of a decision or dismissal.

The Social Security Administration has long known of these issues and despite the mounting body of evidence, has been manifestly ineffective in addressing, much less resolving the growing number of disability appeals that now form what is termed “the backlog.”

Adjudicasaurus Rex seems destined to follow the paths of his reptilian cousins.



VI. WHAT IF, REVISITED

As optimistic as bureaucratic predictions of success often are, they have not, in this instance, been accurate regarding the growing backlog. Reports from the GAO, the Government’s agency watchdog, tell the tale:

- In 1999, the GAO observed that “SSA’s disability claims process, which has not changed fundamentally in over 40 years, is inherently complex and fragmented.”⁷⁹

- Some four years later, the GAO found that despite widespread understanding of coming insolvency, little had been done, saying, “Our January 2001 report . . . identified the long-term solvency and sustainability of the social security system as one of the most urgent policy challenges facing the nation and SSA . . . *However, as the time approaches when Social Security’s expenditures will exceed its income, there is still no consensus on a plan for reforming the social security system.*”⁸⁰

- In 2005 the *status quo* remained as the GAO again recounted the impending crisis marked by expenditures in disability payments which had at that point quadrupled between 1982 and 2002. The GAO again observed that while “the number of disabled workers

⁷⁹ *SSA Disability Redesign: Actions Needed to Enhance Future Progress*, GAO/HEHS-99-25, UNITED STATES GEN. ACCOUNTING OFFICE (March, 1999), <http://www.gao.gov/assets/160/156504.pdf>.

⁸⁰ *Major Management Challenges and Program Risks: Social Security Administration*, GAO-03-117 UNITED STATES GEN. ACCOUNTING OFFICE (Jan., 2003), <http://www.gao.gov/assets/240/237056.html>

receiving benefits under SSA’s Disability Insurance (DI) program doubled from 2.6 million to 5.5 million . . . payments quadrupled from about \$14.8 billion to \$60 billion. *Moreover, these disability programs are poised to grow even more as baby boomers reach their disability-prone years.*⁸¹ (Emphasis added).

- In 2005 the GAO in 2005 also stated that “[o]ver the past several years, GAO, in reporting that the largest federal disability programs were mired in outdated concepts of disability, has identified the need to reexamine and transform these programs to better position the government to meet the challenges and expectations of the 21st century.” (Emphasis added).⁸²

- By fiscal year 2006, cases on appeal to Social Security administrative law judges “rose dramatically [from 12,000 cases in 1999] to over 415,000 claims by the close of fiscal year 2006 and constituted about 72 percent of all SSA backlogged claims that year.”⁸³

- “Since September 2009, SSA has reported progress toward eliminating its hearings-level backlog—defined as reducing the number of pending cases to SSA’s target of 466,000.”⁸⁴

- “In March 2010, SSA reported that pending cases were down to 697,437 from 760,000 in fiscal year 2008.”⁸⁵

While SSA claims to be successful in reducing backlogged cases, the raw numbers tell a different story – one of a rising backlog, with a progression in 2006 of 415,000 pending appeals to 466,000 in 2009 and 697,000 in 2010. In 2007, the GAO pointedly observes that “management weakness as evidenced by a number of initiatives that were not successfully implemented have limited SSA’s ability to

⁸¹ *Federal Disability Assistance: Wide Array of Programs Needs to be Examined in Light of 21st Century Challenges*, GAO-05-626, UNITED STATES GEN. ACCOUNTING OFFICE (June, 2005), <http://www.gao.gov/new.items/d05626.pdf>.

⁸² *Id.* at 21.

⁸³ *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs*, GAO-08-40, UNITED STATES GEN. ACCOUNTABILITY OFFICE (Dec., 2007), <http://www.gao.gov/new.items/d0840.pdf>. [hereinafter GAO-08-40]

⁸⁴ *Id.*

⁸⁵ *Social Security Disability: Management of Disability Claims Workload Will Require Comprehensive Planning* UNITED STATES GENERAL ACCOUNTABILITY OFFICE, GAO-10-667T (April 27, 2010), <http://www.gao.gov/assets/130/124523.pdf>.

remedy the backlog.”⁸⁶ The GAO report continues, noting that “[s]everal initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the “Hearings Process Improvement” initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.”⁸⁷

The problems are not new. As early as 1970 concern was being voiced that the system was in trouble. “The total volume of work has been onerous and has tended to increase each year. For fiscal year 1970 . . . almost 800,000 worker disability claims were filed in district offices . . . across the nation; 1971 claims exceeded this number by almost 150,000.”⁸⁸ The writer accurately warns against a rising caseload:

Although the number of disability claims subject to administrative adjudication and court litigation has been high, the current volume may prove to be only the warning tip of the iceberg. If, in addition to the black lung legislation, Congress enacts the extensive welfare reforms embodied in H.R. 1, the Social Security Amendments of 1972, the combined effect of these two plans, plus the natural growth rate in the original disability program, will yield further substantial increases in the number of disability claims filed with the SAA.⁸⁹

Dixon levels criticism of the adjudicatory process, predicting accurately its future course:

Thus, in the interest of fairness and equality, hearings and appeals are instituted, and the welfare recipient, in his economic life, almost unavoidably tends to become a “federal case.” A level of fairness, equality of treatment, and “correctness” of decision which would be unmanageable in the private sphere is sought – indeed, is constitutionally mandated because “state action” is involved. The long range question is at what point of volume and complexity a high level of decisional formality and review of each resource allocation

⁸⁶ GAO-08-40, *supra* note 83 at 3.

⁸⁷ *Id.*

⁸⁸ Robert G. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 683 (1972).

⁸⁹ *Id.* at 685.

determination becomes unworkable in the welfare system because decisions on claims cannot be produced with sufficient speed, fairness and consistency.

Against this backdrop, and facing the insolvency of the Disability Insurance Program in 2016, the Acting Commissioner of the Social Security Administration, appeared before the House Committee on Oversight and Government Reform on June 11, 2014.⁹⁰ As recounted in-part, above, no specific ideas were voiced apart from increasing FICA withholding or linking the DIB Trust Fund with the Retirement Fund; neither idea well received.

Assume a different dialogue than that originally had with the Committee Chair, Mr. Darrell Issa (D-California), then U.S. Representative Mr. James Lankford (R-Oklahoma)⁹¹ and Mr. Jim Jordan (D-Ohio). What if there was a dialogue with a hypothetical Commissioner of Social Security, this time about saving *Adjudicasaurus Rex*?



VII. REWINDING THE CLOCK

Unleash H.G. Wells and consider the words of Rod Serling, “*You're traveling through another dimension, a dimension not only of sight and sound but of mind; a journey into a wondrous land whose boundaries are that of imagination. Your next stop...the Twilight Zone.*”⁹²

What could have been discussed between Chairman Issa and the Commissioner? Consider a hypothetical conversation between Chairman Issa, the members of the House Committee on Government Oversight and Reform, and a hypothetical Commissioner of Social Security.

⁹⁰ Dixon, *supra* note 60 at 687.

⁹¹ Mr. Lankford has since been elected to the United States Senate, as junior Senator from the State of Oklahoma.

⁹² Rod Serling’s opening monolog 1961-1962 Seasons, *The Twilight Zone*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The_Twilight_Zone_\(1959_TV_series\)](http://en.wikipedia.org/wiki/The_Twilight_Zone_(1959_TV_series)).

*Framing the Issues***Chairman Issa:**

Do you believe that Congress needs to give greater authority, not greater money, greater authority, to fire, to reform, to review if you are in fact going to represent the American People's best interest of their tax dollars?⁹³

The Commissioner:⁹⁴

We agree that the best interests of the American people lie in reforming the current system of disability assessment and appeal. By this, I mean we must re-examine what it means to be "disabled" in the year 2016. This examination embraces a substantive review of the criteria by which one is adjudicated "disabled." It also means that we must bring our current system of disability appeals into the 21st Century. It is no longer 1956. Unlike the circumstances extant in those bygone years, more than 80% of all claimants are now represented by either attorneys or certified non-lawyer representatives. Television advertisements crisscross the airways as national disability firms have sprung into being, seeking to take advantage of a growing disability economic infrastructure embracing some \$200 billion annually.⁹⁵ This represents more than 5 million Title II disability insurance (DI), and Title XVI supplemental security income (SSI) claimants annually filing for such benefits in 2013 alone.⁹⁶

⁹³ See supra, note 7.

⁹⁴ The dialogue set forth in this and in succeeding paragraphs is solely a fictional creation of the author and not the then-Acting Commissioner or any other official within the Social Security Administration.

⁹⁵ Avik Roy, *How Americans Game the \$200 Billion-a-Year 'Disability Industrial Complex*, FORBES (April 8, 2013), <http://www.forbes.com/sites/theapothecary/2013/04/08/how-americans-game-the-200-billion-a-year-disability-industrial-complex/>.

⁹⁶ The following "Workload" chart prepared by the Social Security Administration, *Fast Facts & Figures About Social Security, 2014*, SOC. SEC. ADMIN., 4, http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2014/fast_facts14.pdf, shows more than 5 million DI and SSI disability claims combined:

Chairman Issa:⁹⁷

There is still the issue, represented by the actions of some 185 administrative law judges, who decide appeals, reversing underlying administrative denials at rates of 85% or greater. Clearly, these judges who represent a little over 10% of sitting administrative law judges in Social Security's Office of Disability Adjudication and Review, do not represent the majority, and yet should we not take steps to ensure against such outliers?⁹⁸ Should we not impose some sort of control over decision-making gone awry and thereby seek to protect the American people from actions, which imperil the Disability Insurance fund?

The Commissioner:

Mr. Chairman, you raise several issues which have no simple answer. Let me address each in turn. First, the agency has been accused of encouraging decisionmaking by administrative law judges, which serve to "pay down the backlog."⁹⁹ The most egregious example of this is the 2011 West Virginia action. My review of the circumstances surrounding the 2011 West Virginia incident leads me to conclude that there are instances wherein the agency should have taken action more expeditiously to curb judicial activity which contravened established agency policy, particularly as

Workload, Fiscal Year 2013 (in millions)

<u>Type of filing</u>	<u>Number</u>
OASI claims	5.0
DI claims	3.2
SSI applications	2.6

⁹⁷ The dialogue set forth in this and in succeeding paragraphs is solely a fictional creation of the author and not Chairman Issa.

⁹⁸ *The Social Security Administration's Review of Administrative Law Judges' Decisions, A-07-12-21234*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN. (March, 2012), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-12-21234.pdf>.

⁹⁹ See, e.g., Stephen Ohlemacher, *Judges Tell Lawmakers They are Urged to Approve Social Security Disability Claims*, THE WASHINGTON POST (June 27, 2013),

https://www.washingtonpost.com/politics/judges-tell-lawmakers-they-are-urged-to-approve-social-security-disability-claims/2013/06/27/ea990a7e-df66-11e2-b2d4-ea6d8f477a01_story.html.

regards assignment of cases. Not to say that I mean we should have curbed judicial decision-making under the Administrative Procedure Act, nor that we should or could have encouraged any particular result in a judicial hearing, but rather that an investigation should have been initiated far earlier than was the case. In this, our critics are correct, for the net effect of agency inaction in 2011 was to encourage decision-making behavior violative of agency policy which otherwise assures a claimant due process of law.

Chairman Issa:

Without imposing any limit on your response to my earlier question, how would such reform be implemented?

The Commissioner:

Thank you Mr. Chairman. We need to change our institutional culture. The success of SSA's mission depends upon our employees. There is a time-tested adage in the lessons of naval leadership which deserves our attention and, I think, our immediate implementation: "*Loyalty down begets loyalty up.*"¹⁰⁰ We have been guilty of tunnel-vision – focused on achieving a results-oriented outcome, bound to an outdated adjudicatory process, failing to look first to infrastructure reform. In so doing, I fear we have demanded 'loyalty up' without the reciprocal expression of 'loyalty down.' By this I mean, we failed, in a most fundamental way, to respect the professionalism, dedication and insight of our employees – and, yes, our judges.

Speaking to the West Virginia incident, my review leads me to conclude that local and regional leadership became focused, almost to the exclusion of all else, upon resolving the local "backlog."¹⁰¹ That meant we looked the other way, endorsing heightened decisionmaking no matter the cost – in that case, disproportionately large numbers of decisions by a single judge. In maintaining a numbers-driven focus, we did not hear, nor did we respect, the persistent and long-standing warnings of our employees.¹⁰² In failing

¹⁰⁰ CAPT. MALCOLM E. WOLFE, U.S.N. (RET.), *NAVAL LEADERSHIP*, 140-41 (U.S. Naval Institute Press, 1959).

¹⁰¹ See, *supra* note 53.

¹⁰² 60 Minutes, *Disability USA*, CBS (Oct. 10, 2013), <http://www.cbsnews.com/news/disability-usa/>.

to do so, the local and regional chief judges fundamentally forfeited their respective leadership roles. By ignoring the warnings of our own employees we erroneously, if all-but-unintentionally, embraced the old proverb, *'silence is golden.'*

West Virginia painfully reminds us that management is not leadership, and that good managers must first and foremost be good leaders. In the end, Mr. Chairman, and in answer to your question, implementation of needed reform is not simply a matter of continuing education or leadership training videos, but instead, begins with voicing and adoption of a new corporate message. The focus of our collective activity should, in the first and last instance, always be *service*, not production quotas, numbers or goals. We should be first concerned with the quality of our service to the American people and not find our motivation in the wringing of hands over the continuing backlog. If we serve the American people effectively, I am confident we will eliminate the hearings backlog.

To be successful, however, I emphasize again, we must be effective, and effective service starts by changing our corporate culture, respecting the voices of our employees – and most certainly of our judges. In doing so, we must work toward creation of an environment in which leadership, and not management, is the lifeblood of our activity.

Chairman Issa, deferring to Mr. Lankford of Oklahoma:¹⁰³

Thank you Mr. Chairman. I am nonetheless concerned, Commissioner, that some 10% of Social Security administrative law judges are reversing between 85% and 100% of their assigned disability appeals, creating, in a less dramatic fashion, essentially the same result found in West Virginia.¹⁰⁴ Judges who compromise their

¹⁰³ The dialogue set forth in this and in succeeding paragraphs is solely a fictional creation of the authors and not then-Representative Lankford.

¹⁰⁴ Damian Paletta, *Disability Claim Judge has Trouble Saying 'No,'* THE WALL STREET JOURNAL (May 19, 2011), <http://www.wsj.com/articles/SB10001424052748704681904576319163605918524> . who writes:

The average disability-benefit approval rate among all administrative judges is about 60% of cases. But . . . [i]n the first half of fiscal 2011, 27 judges awarded benefits 95% of the time, not counting those who heard just a handful of cases. More than

integrity, who fail to properly implement their sworn duty, and who, in so doing, imperil the well-being of the citizenry do not deserve to remain in their respective positions. Surely, Commissioner, there must be a solution to this problem? And, surely, you do not condone a reversal rate in which 85% to 100% of appeals are granted, resulting in a payment of disability benefits when the average reversal rate for the majority of administrative law judges is between 40% and 60%? Just as certainly, would you not advocate for a change, either in the authority of the agency to discipline or regulate judicial decisionmaking; or, even in the elimination of such judges altogether?

I yield the floor back to Chairman Issa.



VIII. A NEW JURISPRUDENCE

The Commissioner:

Thank you Congressman Lankford. I appreciate your question, not because it may be interpreted by some as implicit permission for action to be taken against these judges, and in some way freeing my hands politically to do so; but because it highlights critical shortcomings in the current system of disability appeals. Do we need federal administrative law judges? The answer is unequivocally, yes. I do not wish that we replace these judges with other decisionmakers of lesser standing, for it is important that the American people know, understand, and be assured that their interests in this critical arena are in the hands of capable professionals. Our government has entrusted these serious decisions to federal administrative law judges -- individuals who have been carefully screened, literally chosen from

100 awarded benefits to 90% or more of applicants, according to agency statistics.

Id.

among thousands of applicants, and whose credentials rival those of their counterparts in the federal judiciary.¹⁰⁵ We, as Americans need to be able to place our trust, faith and reliance in the professionalism of those who serve in this critical role.

That being said, the current system by which such judges are now employed, is flawed. We should not look to the decisionmaking of these few judges, and in so doing, make an argument that the position of administrative law judges must change. Neither should we conclude that there is somehow a need for greater authority over such judges. Rather, the evidence you cite is indicative of a system whose hallmarks, design and structure has been overtaken by the passage of time, a result of a fundamental changes in the legal landscape. It is not that administrative law judges are flawed or that they have ignored their duty, but rather, I am satisfied from my review, that it is the legal landscape of disability appeals that has changed around them. The upshot has been an ever-increasing potential for legal conundrums, with the sometime contrary result illustrated by the statistics you've cited.

Just as the central character ("the Time Traveler") in H.G. Wells' famous story, *The Time Machine*, found himself stymied by the application of 19th Century conventions in the far future world of the *Eloi* and the *Morlocks*, so, I suggest, are administrative law judges now faced with a much different world than was contemplated when the current judicial/adjudicatory infrastructure was designed. Time has passed the current system of disability appeals by. The result is that we now seem to be trying to force a round peg into a square hole. The consequent delay in attempting to force-fit the round peg has resulted in an ever-growing backlog of disability appeals. Our current system embraces a 1950's culture whose tenants were formed in the legal culture of that era.

Congressman Issa:

I have asked you to speak plainly here, and I have not hesitated to do so myself because of the critical nature of the issues before us; so, let me ask you this: How is it you say the legal landscape has changed with a resultant failure of the disability appeals system to properly function, when, the judicial system, represented by the Third

¹⁰⁵ Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 UNIV. TULSA L.J. 203, 212 (Winter 1996).

Branch of our government remains largely unchanged and seemingly unaffected by the passage of time through the course of our nation's history? What has happened and understanding that, how can the present system be fixed?

The Commissioner:

Mr. Chairman, I'm not a legal scholar, but I have asked myself that same question. Here's what I have learned. Our nation's current system of adversarial jurisprudence is part of our rich heritage – a legacy from our historical foundation as a British colony. The American judicial system is grounded upon, and adheres to, the fundamental tenants of due process of law, providing fair and impartial resolution of disputes. Our system of laws has been hailed as the finest in the world, enabling each party to their 'day in court,' governed by the Constitution, statute, and regulation as well as by formal rules of evidence and procedure. It contemplates an adversarial jurisprudence.

In this, there are unique differences between the American judicial system and the Social Security administrative appeals process. Among the differences, the Social Security administrative appeals system is non-adversarial – a critical distinction, setting it apart from the traditions of the Anglo-American system.

Chairman Issa:

Madam Commissioner, you make a fine distinction, but the question now is, should this distinction, this critical difference, be set aside? Faced with rising costs and delay, the federal courts in 1990 participated in a grand experiment under the Civil Justice Reform Act,¹⁰⁶ bringing to the table a variety of dispute resolution practices, ranging from arbitration to summary jury trials to mediation. The experiment brought about the ADR Act of 1998,¹⁰⁷ mandating each federal district court have an alternative dispute resolution mechanism in place, effectively converting the federal court to a multi-door courthouse – where disputes can be resolved traditionally, or through alternative means. In addition, greater control over the life of a case was given the judge, removing from the parties the

¹⁰⁶ The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (2013).

¹⁰⁷ The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651.

control which so often led to delay as one side sought to gain advantage over the other, even in the procedural aspects of the case.

As a result of these actions, the federal courts have largely resolved the issues of cost and delay. Isn't it time that the 'distinction' in the Social Security appeals process be brought into conformity with the American system of justice – a system which has shown itself to be flexible, able to meet the demands of a growing and ever more diverse society?

The Commissioner:

Mr. Chairman, the American legal system stands as one of the most significant accomplishments in human history. Bringing its principles to the Social Security appeals process – the largest administrative adjudicatory system in the world – is a laudable goal. It is important, however, when undertaking such a task that we understand the genesis of the disability appeals process as we know it today.

Interestingly, when first passed, the Social Security Act did not contemplate the presence of claimant's counsel. In fact, when enacted in 1935, the Social Security Act made no provision for representation of claimants. In 1939, four years after the passage of the original Social Security Act, Section 206 was added. The legislative history behind that section explained that “. . . it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims . . .”,¹⁰⁸ but a provision was nevertheless finally made to provide for representation and regulate attorney fees. As you can see, even in 1939, it was not thought likely that claimants would require representation. This is because it was thought that the Social Security Administration was brought into being to *assist* the American people – not stand as an adversary. Indeed, even more than a quarter century after the passage of the Social Security Act, representation of claimants was low. For example, statistics show that “[b]etween January 1966 and July 1967 claimants were represented by attorneys in about 19% of the cases decided by [then] Hearing Examiners.”¹⁰⁹

¹⁰⁸ Robert M. Viles, *The Social Security Administration Versus the Lawyers . . . and Poor People Too, Part II*, 40 MISS. L. J. 25, 75 (1968).

¹⁰⁹ *Id.* at 75.

But, all this changed over time. In fiscal year 2006 a September 2007 report by SSA's OIG shows that of the 559,000 claims heard by Administrative Law Judges, 439,000 were represented by attorney and non-attorney representatives, representing claimants in almost 80% of all claims appealed. Examined another way, the OIG notes, '[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR.' In a period of 40 years the statistics have virtually become mirror-images of one another. Where 80% of all persons were unrepresented in 1968, by 2006 80% of all persons are represented.¹¹⁰

Chairman Issa:

And, the significance of these numbers?

The Commissioner:

Put simply, Mr. Chairman, 'This is not your father's Oldsmobile.' The 1988 General Motors ad sought to reinvent a brand whose time had come and, in 2004, went. It's not a matter of tweaking the operation. We've tried that. It's now a question of fundamental reform.

You asked what we need.

To answer your question, I need authority for reform. Not authority to discipline or control judges; but authority to reform the adjudicatory system in which our judges work. The statistics regarding claimant representation signals a fundamental sea-change in the legal landscape – a change we have failed to timely recognize, and as a result continue to suffer a growing backlog of pending appeals.

Chairman Issa:

I yield the floor to my colleague from Ohio, Congressman Jordan.

¹¹⁰ Jeffrey S. Wolfe, *The Times They Are A Changin' - A New Jurisprudence For Social Security*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 515 (2009) (citing A-12-07-17057, *supra* note 16).

Mr. Jordan:¹¹¹

Thank you Mr. Chairman. Madam Commissioner, it strikes me that what you're saying actually touches upon more than, as you say, 'the legal landscape.' Am I correct in that? And if so, would you provide an overview of each proposed reform?

The Commissioner:

In answer to both questions, yes, Congressman. And, when I speak of reform, I am referring to both procedural as well as substantive reforms in the disability appeals paradigm.

To make the disability appeals system begin to work as we have all hoped it would, requires a fundamentally fresh viewpoint. We must set aside the assumptions, pressures, perceptions, and turmoil surrounding the current system of disability appeals and start anew, saving what we can, but changing what we must.

To address the question of procedural reform, we must first look at the foundations of the current system. Why do we have the system now in place? How did it come into being?

The present system of disability appeals was devised during a time when there were comparatively few claims and when even fewer claimants were represented. The role of the then Hearing Examiner, now, Administrative Law Judge, was, as it is today, to preside over a *nonadversarial* proceeding, directed to the question of entitlement. A claimant who was unrepresented was able to rely on the assistance of the judge in developing his or her claim. Under this model, the judge, acting like his or her European inquisitorial counterpart, searches first for all the evidence favorable to the claimant, and then for the evidence which favors the Government. The judge then determines, looking to the whole of the evidence, whether the claimant is entitled to an award of benefits. Examined another way, the Social Security Administration, whether by design or happenstance, devised a unique jurisprudence, founded on both the

¹¹¹ The dialogue set forth in this and in succeeding paragraphs is solely a fictional creation of the authors and not the Honorable James Jordan, Congressman from Ohio.

Anglo-American and European inquisitorial systems – in effect, a hybrid jurisprudence not otherwise employed in the United States.¹¹²

With the passage of time, the problem is self-evident. This hybrid jurisprudence, designed for a time when few persons were represented by counsel, is no longer effective in a milieu in which representation of claimants is now the norm, complete with late-night television advertisements. In a legal system now populated by lawyers, the hybrid jurisprudence hinders the disability appeals process, creating self-sustaining backlogs, a fact now evident over decades.

Mr. Jordan:

Does the current system employ rules of procedure or rules of evidence?

The Commissioner:

Formal rules? It does not Congressman. Our judges have raised this issue, but in our view, implementation of formal rules in the current system would be ineffective. A body of regulations exist which govern the hearings process, but key issues remain unresolved, such as the need to close the hearings record at the conclusion of a hearing – something that can and should be done with the enactment of formal rules.

Mr. Jordan:

You acknowledge the need for such rules then?

The Commissioner

Not under the current system, Congressman. As I indicated, what we ask for are the resources for system-wide reform.

Mr. Jordan Yields to Chairman Issa:

I'd prefer, Madam Commissioner, if you can give us an overview of these 'reforms.'

¹¹² Jeffrey S. Wolfe and Lisa Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 UNIV. TULSA L.J. 293 (1997).

The Commissioner:

Yes, Mr. Chairman, I can. I have prepared some general remarks, outlining the areas of needed reforms.

I think we sometimes lose sight of our priorities; that we first serve the public. And, the public is watching. There has been a longstanding, shall we call it, ‘debate,’ between the Social Security Administration and its corps of Administrative Law Judges. It is a debate which has found its way into the federal courts, before arbitrators, and before those in the media; and as you can see, among those whom we serve. Those of us in ‘management’ sometimes see things differently from those in the corps of administrative law judges – in part, because of our difference in worldview; and in part, because there is a unique tension between independence in decisionmaking and consistency in decisionmaking. But, that being said, it is time to bridge the gap. I am mindful of the words of the Social Security Advisory Board:

The agency has much to gain from the advice and input of the dedicated professionals in the ALJ corps, at the national, regional, and hearing office levels. The ALJ corps, in turn, needs to acknowledge the agency’s legitimate desire to ensure that hearing decisions are made promptly and consistently. There is an understandable and probably inevitable tension between the public’s interest in decisional independence and the public’s interest in consistency and efficiency, but we believe these interests can be reconciled. We urge SSA and its ALJs to work together to develop reasonable procedures to reconcile them.¹¹³

In that spirit, I come before you today to ask for support for needed reforms, which, with your permission, I will outline in the balance of my testimony today.

¹¹³ *The Real Issue . . . And Why Further Restriction of Judicial Independence in Social Security is a Bad Idea*, ASS’N OF ADMIN. LAW JUDGES, 1-2 (2014), https://aalj.org/system/files/documents/the_real_issue_12-19_docx_revision_1-11-14_docx_fourth_finalcut-accepted-_wfc.pdf (quoting. *Improving The Social Security Administration's Hearing Process*, SOC. SEC.ADVISORY BD ,15 (2006), http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/HearingProcess_2006.pdf).

As the President's 'Blue Ribbon Commission'¹¹⁴ on Social Security, the Social Security Advisory Board should not be lightly regarded. I fear, though, that too often my predecessors have ignored this call for unity. I stand here before you today to tell you that I know we cannot ask for your help unless we acknowledge the value of our respective views and agree to work more closely with one another. Only then can meaningful reform take place.

Chairman Issa:

A lofty sentiment Commissioner, but not one that the agency's track record gives us any hope for real change.

The Commissioner:

How shall I say this? Trust me Mr. Chairman, I'm from the Government and I'm here to help.

[laughter]

Chairman Issa:

You may proceed Commissioner.

The Commissioner:

A fundamental needed reform lies in the jurisprudence of our hearing procedures. A change of such magnitude appears costly, but with offsetting costs, we think such a change may not, in fact, be as costly as we once thought. Here's what we propose.

The former jurisprudence must end, replaced by a neutral, collaborative jurisprudence in which the Social Security Administration is a party – an active participant. Reforms include:

- Empowering claimants. Establish within the Office of General Counsel, a "Disability Representative" or D.R., within Social Security's OGC, and who, in turn, supervises ADR's or Assistant Disability Representatives, either attorneys or certified non-lawyer representatives, assigned to work within each Hearing Office. The presence of the "DR" empowers claimants by providing systemic flexibility. Rather than wait stolidity 'in line,' for "your turn" at a hearing, each case proceeding one after the other as if all were cut

¹¹⁴ *Id.* at 2.

from the same cloth, the DR opens the possibility of a resolution tailored to the particular facts of the individual appeal, advancing the case to conclusion at the earliest opportunity. At present there exists a mounting backlog of pending hearings because there is no viable mechanism by which appeals can be individually addressed and resolved early. The overwhelming majority of pending appeals are resolved in order of their filing. Cases which could be resolved early in the appeals life-cycle cannot be systematically addressed at an earlier time. No mechanism exists by which such cases can be so advanced. Instead, 85 – 90% of all cases are heard in order of their filing. In today's system, this same percentage is resolved, only by a full hearing. The result is a growing backlog, inherent in a system which lacks the flexibility to resolve those cases which can be resolved early. The "DR" provides an avenue of communication, injecting into the present system a new "party" – the Agency itself, which has not, heretofore, been present as a "party."

- The Disability Representative is thus charged to advocate for the correct result in any given claim pending before an administrative law judge. Ready access to the "ADR" will enable early resolution of pending claims and balanced development of the administrative record. The establishment of the Office of the Disability Representative acknowledges the Agency as a "party" to the disability hearing, and in so doing returns the judge to her status as a neutral, passive decisionmaker, thus ending the so-called "Three Hat Jurisprudence." To this point the Agency is not, in fact, a "party" to the proceedings before administrative law judges. Thus, should the Agency disagree with a judge's decision to award benefits there is no one present at the hearing who can file an appeal; as the only party generally present is the claimant (who can, as a party, lodge an appeal with the Appeals Council.)

- The DR empowers claimants because he/she becomes an early point of contact, accessible to the claimant's representative, independent of any contact with the judge, early in the life of an appeal. This allows, among other outcomes, early agreed-upon case disposition as permitted by the evidence. Doing so, ends the current system of rigidly scheduled hearings, each case standing in lock-step one behind the other in a frozen line, with little alternative but to hear every case despite its merits, and as history has shown, inevitably expanding the ongoing backlog. The DR remedies this circumstance by offering early alternatives for case resolution, either by enabling

early additional fact finding or discovery; amending the onset date; or limiting the issues to be resolved at a hearing.

- The presence of the Agency as a “party” to the proceedings, through the DR also serves to increase disposition rates, with an attendant reduction in the number of cases requiring a full hearing, enabling fast-track hearings where only limited issues are presented for hearing.

- The presence of the Agency by and through the DR also enables the implementation of multiple hearing tracks, empowering the claimant and the DR to determine the degree of case management necessary, and whether cases may be ‘fast-tracked,’ fostering early case management with counsel where the claimant is represented.

- The presence of the Agency as a party enhances the judicial role and function, enabling an early case-management function with active judicial involvement through the life of the hearings process, all as part of the adoption of a comprehensive rules of procedure. This enables active discussion early in the life of a claim between the judge and the parties, setting deadlines and scheduling suitable to the nature of the claim.

- The presence of the Social Security Administration as a “party” enables burden of discovery and case development to be shifted from the judge (who is now said to act in an inquisitorial role, with a duty to develop the record, much like a party) to the Agency in the person of the DR; returning the judge to her traditional role as an impartial neutral. It is the Agency, then, and not the judge, who bears the burden of ensuring the record is complete. Disagreements between the Agency and the claimant about needed development (such as ordering the claimant to undergo a consultative examination) may then be neutrally decided by the judge, who no longer has a burden of development, akin to that of a party.

- Appellate review is limited to those cases/decisions which raise issues of significant public policy and/or which involve significant issues of statutory/regulatory interpretation affecting the disability program.¹¹⁵

- Both the Agency (acting by and through the DR) and the claimant are thus limited in their right of appeal, such that questions of fact which do not raise issues of significant public policy or

¹¹⁵ Wolfe & Glendening, *supra* note 37 at 580-83.

statutory/regulatory interpretation affecting the disability program are not subject of appeal.

- Similarly, appellate review by the Appeals Council is limited to those cases, which present issues of significant public policy or statutory/regulatory interpretation in matters affecting disability adjudication.

- Today, Appeals Council decisions are not precedential.¹¹⁶ The limitation of appeals to the Appeals Council, should be accompanied by a change in the nature of appellate review, such that Appeals Council decisions establish precedent, thereby ensuring consistency of decision making; adopting principles of appellate review much as an appeals court in the traditional court system. This includes granting deference to the facts found by ‘trial court’ (the administrative law judge), such that appeal is based solely on questions of law, regulation and policy and not a re-weighing of the facts. Such a review will, of necessity, recognize the “harmless error” rule, deferring to the administrative law judge’s findings by a preponderance of the evidence.

- Part and parcel of such reform necessarily includes adoption of a comprehensive set of rules, necessary to govern the hearings process, establishing deadlines, closing the record and provide thereby ascertainable and enforceable benchmarks by which the case advances to conclusion. At present, no such affirmative rules exist.

- Reform monetary expenditures, ending travel reimbursement for counsel and reversing the current “pay-for-delay” contingent attorney’s fee, and establishing a revised contingent fee linked to early case resolution. The current contingent attorney’s fee incentivizes delay. The current attorney’s fee award is 25% of *past due* benefits or \$6,000 whichever is less, so the longer the case decision is delayed, the greater the attorney’s fee.¹¹⁷ Reversing this, so that an attorney is paid more the earlier a case is decided incentivizes early case resolution and will fuel a new ‘reformed’ adjudicatory framework in which the attorney’s motivation is aligned with that of her client.¹¹⁸

¹¹⁶ *Id.* at 582-83.

¹¹⁷ *Id.* at 578 n.240.

¹¹⁸ *See Id.* at 579-80, in which the authors suggest the following alternative to the current “pay-for-delay” attorney’s fee:

Chairman Issa

Commissioner, I would be most interested in exploring each of these potential reforms. My question generally is whether in your opinion implementation of these reforms will, in fact, be effective in 1) reducing the backlog; and 2) decreasing individual case disposition time? Will these reforms take us further from the demise of the disability program?

The Commissioner

In a word, Chairman Issa, “yes.”

One example is a flat fee. Upon an award, an attorney or representative would be entitled to an established fee, regardless of the amount of past-due benefits or the amount of time spent preparing the case. The amount of the fee would be governed by the complexity of the case, much as is the case now with a fee petition.

Adopting the current maximum fee of \$ 6,000, the ALJ would determine whether counsel would receive one-third of the maximum [(\$ 2,000)], two-thirds of the maximum [(\$ 4,000)], or the maximum fee [(\$ 6,000)], dependent upon the complexity of the case. . . .Alternatively, attorney-fees could be time-dependent. Resolution of the claim within six months of filing the Request for Hearing would result in payment of the maximum fee of \$ 6,000. Hearing within twelve months would result in payment of \$ 4,000, whereas any resolution after twelve months would result in a fee of \$ 2,000. The same rules for payment would apply as outlined above. Time-dependent resolution encourages counsel to proceed with the case, which would benefit the claimant, who otherwise stands in need of a timely decision. It is even possible for the two scenarios to be combined, such that the primary determining factor is time, and upon motion of counsel the ALJ may increase an otherwise lower fee based upon complexity of the case [or similar factors per the HALLEX]. . . . Realignment of the fee structure accomplishes a positive realignment of both the claimant's and the representative's interests.

Id.



IX. CONCLUSION

Whether *Adjudicasaurus Rex* survives is a question of will. But how is this to be expressed? Let us assume, in the previous hypothetical dialogue, that Chairman Issa calls yet a further witness, a *systems engineering* expert, called upon to examine the efficacy of the current system of hearings and appeals and to describe, symbolically, the problem now facing the Social Security adjudicatory process/paradigm.

Chairman Issa

I want to explore one additional question. How do we assess the efficacy of the reforms which you have outlined? To answer this question, the process we follow should be clear. I have asked Professor Smith,¹¹⁹ a renowned expert in systems engineering, to speak with us. Professor, would you be so kind as to share with the Committee and the American people, why a systems engineering viewpoint is necessary?

Professor Smith

Thank you Mr. Chairman and members of the Committee. First, let me give you a brief overview of *systems engineering*. “Systems engineering is an interdisciplinary field of engineering that focuses on how to design and manage complex engineering systems over their life cycles . . . Systems engineering deals with work-processes, optimization methods, and risk management tools in such projects. It overlaps technical and human-centered disciplines such as control engineering, industrial engineering, software engineering, organizational studies, and project management.

¹¹⁹ The dialogue set forth in this and in succeeding paragraphs is solely a fictional creation of the authors and not anyone living or dead other than our hypothetical “Professor Smith.”

Systems engineering ensures that all likely aspects of a project or system are considered, and integrated into a whole.”¹²⁰

The disability hearings and appeals process is a system, susceptible to an engineering analysis, while remaining mindful of the overarching human ideals upon which it stands – to provide due process, that is, a full, fair and impartial hearing. In such an analysis, we must be mindful that the system does not overwhelm the ideal.

Analysis of the current Social Security disability appeals paradigm necessarily involves a significant number of systemic variables, focused primarily upon organizational structures and principals of project management. I will not, however, go there today. Instead, I wish to make evident a simple conclusion and in doing so, demonstrate a clear need for a new course – in effect demonstrating an inevitable need for change.

Assume the following, and I apologize for the seeming complexity of the “math,” but here goes. If I may direct your attention to the Smart Board to my left . . .

Using present hearing protocols as followed by ODAR in the hearings and appeals process, I’m going to focus on a set of simple variables to illustrate my point, as follows:

“**R**” represents the number of hearings pending *resolved* by all means.

“**H**” represents the number of hearings pending *decided* by hearing.

“**S**” represents the number of hearings pending *decided* by Senior Attorney Adjudicators without a hearing.

“**D**” represents the number of hearings *dismissed*¹²¹ before hearing.

Assume the following is then true:

R = **H** + **S** + **D**; where the number of pending hearings resolved (“**R**”) is the sum of those decided by means of a full, formal hearing (“**H**”); those decided by Senior Attorney Adjudicators (“**S**”); and those dismissed (“**D**”) before hearing.

¹²⁰*Systems Engineering*, WIKIPEDIA, https://en.wikipedia.org/wiki/Systems_engineering (last visited August 9, 2015).

¹²¹ A dismissal is not a “decision.”

Assume further that **S = 7.3 %**; signifying that less than 10% of pending hearings are decided by Senior Attorney Adjudicators (SAAs) without a hearing.¹²² In considering the SAA number, “7.3

¹²² *Congressional Response Report, The Office of Disability Adjudication and Review’s Hearings Backlog and Processing Times, No. A-12-11-21192*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., (June 2011), file:///C:/Users/Eflow/Documents/Articles/Social%20Security%20Dinosaurs/OIG%20Senior%20Atty%20Dispositions%20A-12-11-21192.pdf, which provides that “[i]n FY 2010, SAAs issued 54,186 OTR [on the record, meaning, without hearing] decisions, representing about 7.3 percent of all dispositions.” *Id.* at 6.

Following is an excerpt from Table 1: OIG Pending Hearings Backlog Projections (Based on FY 2012 Budget). SAA dispositions are shown for Fiscal Year 2010, with projections declining slightly through Fiscal Year 2013. *Id.* at page 3. However, despite the small decline, the number is fairly consistent over time, decisions by “Senior Attorney Adjudicators” (SAA’s) representing the only other alternative by which to decide a case pending hearing before an ALJ.

Workloads/Staffing	FY2010 Actual	FY2011 Projected	FY2012 Projected	FY2013 Projected
SAA Dispositions	54,186	53,200	49,200	48,600

That this is so, is evident from the full Table, shown below. Case dispositions occur only by decisions by Administrative Law Judges, who, by reason of the rigid single-track hearings procedure, may only decide a pending hearing by holding a hearing; or by Senior Attorney Adjudicators who may only decide cases without a hearing, and then, may only decide a pending hearing favorably. See SSA OIG Audit Report, *Effects of the Senior Attorney Adjudicator Program on Hearing Workloads*, A-12-13-23002, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., 1 (June 2013). An adverse decision may only be made by an ALJ, which, as noted, requires a hearing.

Table 1: OIG Pending Hearings Backlog Projections (Based on FY 2012 Budget)

Workloads/Staffing	FY 2010 Actual	FY 2011 Projected	FY 2012 Projected	FY 2013 Projected
Beginning Balance ¹	722,822	705,367	668,104	595,691
Projected Receipts ²	720,161	777,300	751,700	682,600
ALJs Available ³	1,154	1,285	1,319	1,313
ALJ Productivity ⁴	2.38	2.37	2.35	2.34
Total ALJ Dispositions ⁵	683,430	761,363	774,913	768,105
SAA Dispositions ⁶	54,186	53,200	49,200	48,600
Total Dispositions ⁷	737,616	814,563	830,708	826,553
Year-End Pending ⁸	705,367	668,104	595,691	461,586

%,” I make the simple point that even with the SAA activity, a sizeable number of all pending hearings will be decided only after a hearing. Now add in dismissals.¹²³ Using the numbers from calendar year 2011 per the 2012 OIG report,¹²⁴ administrative law judges disposed of 740,000 pending hearings; of which 111,000 were dismissals.¹²⁵ And, while a dismissal is not a “decision,” it nevertheless results in a case disposition. Thus, of the total number of pending hearings resolved by administrative law judges, only 15% were by reason of dismissal, that is, [744,000/111,000 = 15%.]

The point? The equation, $R = H + S + D$ represents an inherent rigidity in the disability hearings process. In effect the adjudicatory process is frozen in place, unable to do more than it presently does, resulting in a continuously rising backlog. In point of fact, the hearings process is quickly submerging under a backlog of more than 1,000,000 pending hearings. It is a path that will bring us to the same crossroads reached by the dinosaurs. Theirs was a path set in the irreversible suction of the tar pits and the slow mire of antediluvian

¹²³ This number does not include dismissals of the *Request for Hearing*, where the claimant withdraws or abandons his/her *Request* or passes away. As noted by the Office of Inspector General in a July 2010, “[w]e found that dismissal rates varied among ODAR’s 10 regions. Specifically, dismissal rates ranged from a low of 14 percent in the Dallas Region to a high of 23 percent in the Kansas City Region . . .” See SSA OIG, Congressional Response Report, *Hearing Request Dismissals, A-07-10-21049*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., 7 (July 2010),

<http://oig.ssa.gov/sites/default/files/audit/summary/html/A-07-10-21049.html>.

More precisely, “[i]n FY 2011, ODAR issued over 793,000 dispositions, of which approximately 740,000 were issued by ALJs and over 53,000 were issued by Attorney Adjudicators . . . Of the 740,000 dispositions issued by ALJs, approximately 629,000 dispositions resulted in an allowance or denial decision and the remaining 111,000 dispositions were dismissals of the hearing request. A hearing request can be dismissed for a variety of reasons, including failure of the claimant to appear at the hearing, the claimant choosing to withdraw the hearing request, or death of the claimant. See 20 C.F.R. §§ 404.957, 416.1457.” See SSA, OIG, Congressional Response Report, *The-Social Security Administration’s Review of Administrative Law Judges’ Decisions, A-07-12-21234*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN. 1 n.3 (March 2012), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-12-21234.pdf>.

¹²⁴ Congressional Response Report, *The Social Security Administration’s Review of Administrative Law Judges’ Decisions*, 1 n. 3.

¹²⁵ *Id.*

bogs. With no ability to adapt to a changing environment they became extinct.

It need not be so for the Social Security Disability hearings and appeals process.

Mr. Lankford

I'm glad to hear you say that Professor. But what can be done? I am interested in a long-term pragmatic solution to the problem. I catch your point. The "system," as you so simply describe it, is, in actuality a hidebound relic from a former age – when, as the Supreme Court noted in the *Perales* case in 1971,¹²⁶ only 20,000 cases were pending on appeal nationwide; when only 19% of all claimants were represented; and when the decision-maker was a "Hearing Examiner," committed to the disability appeals system as an agent of social policy, and not as a "judge" committed to due process.

So, please, if you will, what is the solution?

Professor Smith

Even a quick glance at the formula leads one to conclude that the only way to increase output in this system is to require the actors to work harder – to decide more cases.

But, if we assume that the character of the cases does not change, then "working harder" necessarily means less time on each case. Even more significantly, "working harder" is further limited by the number of hours in a competitive workday. My point – "working harder" is, itself, inherently limited. Given the continuing increase in applications for disability benefits, this equation represents, at best, a temporary solution, not to mention the question whether reducing the amount of time spent on a case is to effectively limit or even negate required due process – an instance of the system overwhelming the ideal.

Thus, $R = H + S + D$ is destined to failure; as there is no external factor inherently a part of the equation which allows for increases in cases resolved beyond "working harder." In other words, there is no way for the current system to close the gap in the backlog, much less stay apace. Close review reveals an interesting bias. $R = H + S + D$

¹²⁶ Richardson v. Perales, 402 U.S. 389 (1971).

is entirely *one-sided*. It effectively describes a closed system. Resolution under this formula is dependent entirely upon activity only able to be initiated by *two ODAR actors* – judges or senior attorneys. For all intents and purposes, there is no decisional pathway from the claimant to the judge, except to have a hearing. More to the point, there is no mechanism in this closed-loop formula which contemplates, much less encourages, case resolution initiated by the claimant’s representative or the agency itself. Herein lies the solution to what is otherwise a self-contained and thence, limited or closed system.

Mr. Lankford

If I follow you, you’re saying that under the current system of hearings before administrative law judges there is an absolute bar to a higher disposition rate absent appointing more judges?

Professor Smith

That’s correct Congressman Lankford. I believe the solution is to update the equation so that it no longer describes a closed system, but an open architecture, embracing the Social Security Administration as a “party” to the hearing before the administrative law judge. In effect, bringing the Agency to the table where it has to this point refused to be seated.

Mr. Issa

Isn’t the Agency a party to the disability hearing now?

Professor Smith

No, sir. It is not. The Agency has no representative at a disability hearing and otherwise has constructed no pathway by which a claimant or a claimant’s representative can communicate with the Agency after a Request for Hearing has been submitted. Indeed, the United States Supreme Court in *Perales*,¹²⁷ noted, the role of the agency is largely that of adjudicator. The increasing presence of lawyers as claimant’s representatives has necessarily changed the hearings and appeals paradigm. As in any adjudicatory system, there must be a mechanism for claims resolution apart from

¹²⁷ Richardson v. Perales, 402 U.S. 389 (1971).

hearing. In the courts, this usually manifests itself in the ability of both counsel to reach resolution by agreement, generally termed “alternative dispute resolution.” This represents a degree of adjudicatory flexibility which serves the much needed purpose of venting steam, relieving pressure on an already overburdened court system. No such relief valve exists in Social Security’s system of hearings and appeals. Simply put, there is no representative of the agency present with whom claimant’s counsel may confer.

Mr. Issa

What about the judge? Isn’t she a representative of the Agency?

Professor Smith

No sir. Under the Administrative Procedure Act¹²⁸ the administrative law judge is a neutral and impartial decision-maker. By definition, should the judge represent the Agency, she cannot be impartial and the supposed neutral role of the judge is transformed into fiction.

Mr. Issa

The bottom line professor?

Professor Smith

The necessity of a hearing in the overwhelming majority of cases, increases the time to disposition, each case proceeding in lockstep with no alternative but a hearing, apart from a Senior Attorney (SAA) decision or judicial dismissal.

This mandate, effectively requiring more than seventy-eight percent of all claims proceed to resolution only after a hearing, marks a dramatic departure from the experience had in the various state and federal court systems of the Nation. While the settlement rate literature emphasizes that “the definition of what constitutes a settlement is “critical” in studying settlement rates,”¹²⁹ it clear from several studies that relatively high settlement rates in the courts (though variable, dependent on the type of case) diverge sharply from

¹²⁸ 5 U.S.C. A. §551(2011), *et seq.*

¹²⁹ Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 J.EMPIRICAL LEGAL STUD. 111, 115 (March 2009).

the single-track disability hearing procedure which, apart from the limited actions of Senior Attorney Adjudicators, signals a hearing in almost seventy-eight percent of all pending hearings.¹³⁰

Specifically, I point to Clermont and Schwab's report.¹³¹ They compiled a "report of settlement rates . . . based on data on federal court case terminations gathered by the Administrative Office of the U.S. Courts (AO) from 1979 to 2006. They reported on both employment discrimination cases and other civil cases and find that about 70 percent of both groups of cases terminated by settlement."¹³² In other words, over a twenty-seven year period the researchers concluded that 70% of civil cases filed in the United States Courts were resolved without trial.

More to the point, the resolution of hearings pending before ODAR is, as a result of an antiquated, inflexible hearing procedure, effectively the mirror image of case resolution before the federal courts. In other words, rather than resolve seventy percent of all cases with no hearing, or with a least a limited hearing, ODAR proceeds to a full hearing in seventy- eight percent of pending appeals. Is it any wonder that there is a mounting backlog of pending hearings?

Mr. Issa

Thank you, Professor. Very insightful. This will conclude the current proceedings.



¹³⁰ This number is reached by subtracting both the SAA OTR rate (7.3%) and the dismissal rate (111,000/740,000 or 15%), leaving a remaining 77.7% of pending hearings that must, for lack of any other pathway, proceed to hearing.

¹³¹ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 1 (2009), cited by Eisenberg and Lanvers, *supra*, note 128 at 44.

¹³² *Id.*

X. AFTERWORD

On October 29, 2015, Congress passed the Bipartisan Budget Act of 2015 (H.R.1314).¹³³ Included within the Act are provisions designed to alleviate the impending insolvency of the Social Security Disability Insurance Trust Fund, scheduled before the Act's passage to exhaust all funds in the fourth quarter 2016.¹³⁴ While seemingly good news, the Act¹³⁵ is but a stopgap. It neither addresses significant underlying substantive issues, nor permanently resolves already critical budget shortfalls.¹³⁶ In a word, the Act "kicks Social Security disability" down the road to the near future, taking what might have been a critical 2016 election-year issue off the political table, avoiding the so-called "Third Rail of American Politics."¹³⁷

¹³³ See The Hon. James Lankford, United States Senator, Oklahoma, *Senator Lankford Offers Real Reforms to Social Security Disability Insurance Program*, LANKFORD SENATE PRESS RELEASE (October 29, 2015), <http://www.lankford.senate.gov/news/press-releases/senator-lankford-offers-real-reforms-to-social-security-disability-insurance-program>.

¹³⁴ See Mark Schleifstein, *Social Security Disability Pressure Eased by Budget Compromise*, THE TIMES-PICAYUNE (October 30, 2015) at http://www.nola.com/politics/index.ssf/2015/10/budget_compromise_includes_need.html, who writes:

But collections at that rate aren't adequate to pay all disability beneficiaries by the third quarter of 2016. And the Social Security trust fund, on which the main Social Security benefit program relies, might be exhausted as early as 2034, according to Congressional Research Service reports."

¹³⁵ The text of H.R. 1314 may be found at: House of Representatives, *House Bill 1314*, U.S. CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/1314>. <http://docs.house.gov/billsthisweek/20151026/BILLS-114hr-PIH-BUDGET.pdf>.

¹³⁶ See, e.g., Robert Pear, *Agreement is Seen as Short-Term Relief for Medicare and Social Security*, NEW YORK TIMES (October 27, 2015), <http://nyti.ms/1KE8O2b>. (Observing, "AARP, a lobby for older Americans, praised the agreement on Tuesday, though it said the legislation 'will not provide a long-term solution to the funding challenge facing the Social Security disability insurance trust fund.'").

¹³⁷ The "Third Rail" of American politics is a descriptor attributed to former Speaker Tip O'Neill, made in response to proposed cuts to the Social Security program by the Regan Administration. William Safire wrote in the New York Times Magazine, saying, "[a]nyone who tries to touch it [Social Security] gets

Rachel Greszler writing for The Daily Signal comments:

Congress has been kicking the can down the road on disability insurance reform for decades, and 2016 should have been the end of the road—time for meaningful reform. Instead, policymakers want to provide a little more roadway for the disability insurance program by whacking off a portion of Social Security’s roadway.¹³⁸

Mike Flynn, writing for Breitbart is equally critical:

Next year, the disability trust fund will be completely exhausted. Over the next ten years, the disability program faces a \$256 billion shortfall.

The . . . budget deal tries to duct-tape this shortfall. The deal agreed to by the House transfers \$150 billion from the Social Security Trust Fund to plug the growing hole for disability payments. Notwithstanding the fact that the Social Security program itself faces serious solvency issues, the House budget again uses the Trust Fund like a slush fund to paper over its own mistakes.

Rather than do the hard work of reforming a disability program that has exploded and evolved into a *de facto* welfare program, the House has chosen to kick the problem down the road.¹³⁹

electrocuted.” William Safire, *Third Rail*, N.Y. TIMES MAG. (February 18, 2007), http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html?_r=0.

See also Tom Keane, *Touching the Third Rail of Politics: Democrats Balk at a New Formula for Calculating Social Security*, BOSTON GLOBE (Apr. 21, 2013), <http://www.bostonglobe.com/opinion/2013/04/20/social-security-third-rail-politics/YWLU4kyHo6y8ivZJabCRMK/story.html> (“Social Security has always been the so-called ‘third rail’ of politics, and Democrats (and a fair number of Republicans) have pandered to crowds for years at the slightest hint of belt-tightening.”).

¹³⁸ Rachel Greszler, *Budget Deal Kicks the Can on Disability Insurance, Robs \$150 Billion from Social Security*, THE DAILY SIGNAL (October 27, 2015), <http://dailysignal.com/2015/10/27/budget-deal-kicks-the-can-on-disability-insurance-robs-150-billion-from-social-security/>.

¹³⁹ Mike Flynn, *House Budget Robs Social Security for Welfare Payments*, BREITBART (October 29, 2015), <http://www.breitbart.com/big-government/2015/10/29/house-budget-robs-social-security-welfare-payments/>. Flynn writes further:

One of the more egregious acts is to take \$150 Billion out of the Social Security Trust Fund to prop up the program’s disability benefits. The Social Security raid will keep the disability program solvent through 2022, at which time Congress is likely to again raid the federal pension program...Unsurprisingly, the disability program is running out

The combined FICA allocation from both employers and employees is 12.4%, each paying 6.2%. Of this, 1.8% is allocated to the Social Security Disability Insurance Benefits Trust Fund.¹⁴⁰ The Bipartisan Budget Act of 2015 takes the current FICA allocation from 1.8% to 2.37% for budget years 2016, 2017 and 2018, reverting thereafter to 1.8%.¹⁴¹ The “fix” is effective in the short run, but leaves open the question of future funding.

Substantive disability reforms were proposed by U.S. Senator James Lankford of Oklahoma, including a proposal to end “double dipping,” which at present allows persons to receive disability benefits predicated on an inability to work, while simultaneously collecting state unemployment benefits, available to those who are looking for a job.¹⁴² Senator Lankford’s amendments (No. 2755),¹⁴³ also include elimination of the “reconsideration” stage of the disability determination process; thereby “speeding up” the appeals process once initially denied.¹⁴⁴ At present, a claimant must make an initial application and if denied, seek “reconsideration” within sixty days of the initial denial. Eliminating this second review potentially shortens the overall appeals process.

Senator Lankford also proposed changes to the hearings and appeals process before federal Administrative Law Judges, including adoption of formal rules of procedure and tougher evidentiary standards.¹⁴⁵ At bottom, however, the 1950’s jurisprudential system remains fundamentally untouched by Senator Lankford’s amendments. Notably lacking is the keystone to needed evolutionary

of money. According to the recent Trustees report on Social Security, the disability program pays out around \$30 billion more in benefits than it collects in taxes. *Id.*

¹⁴⁰ See Mark Schleifstein, *Social Security Disability Pressure Eased by Budget Compromise*, THE TIMES-PICAYUNE (October 30, 2015), http://www.nola.com/politics/index.ssf/2015/10/budget_compromise_includes_nee.html.

¹⁴¹ *Id.*

¹⁴² *Sen. Lankford's SSDI Amendment Continues Progress on Improving the Program*, COMM. FOR A RESPONSIBLE FEDERAL BUDGET (November 2, 2015), <http://crfb.org/blogs/sen-lankfords-ssdi-amendment-continues-progress-improving-program>.

¹⁴³ *Id.*

¹⁴⁴ See CLERMONT AND SCHWAB, *supra* note 130 at 44.

¹⁴⁵ See SCHLEIFSTEIN, *supra* note 133, at 46.

change, establishing a new role for the agency in disability hearings. At present, some 1,500 federal Administrative Law Judges appointed under the Administrative Procedure Act,¹⁴⁶ now preside over *de novo* disability appeals within the Office of Disability Adjudication and Review. Absent a new role – as a “party” in disability hearings – the agency continues its long-standing function as an adjudicator,¹⁴⁷ forsaking all methods of dispute resolution save conduct of a hearing in conformity with an outdated 1950’s quasi-inquisitorial jurisprudence.¹⁴⁸ This configuration effectively ensures an inability to engage in the kind of flexible decisionmaking, discussed *supra*, critical to resolution of the continuing and ever-growing backlog of disability appeals from underlying administrative denials.

Simply put, it is the absence of jurisprudential flexibility which effectively hobbles the current hearings and appeals process. Senator Lankford’s amendments are important first steps, signaling the need and the willingness for modernization of the current jurisprudence. Social Security is no longer the “*Third Rail of American Politics*.” It has become the “*Magnet for American Reform*,” preserving in its recasting, a lifeline for millions. The alternative is found among the bones on display in museums across the nation.



¹⁴⁶ 5 U.S.C. A. §551(2011).

¹⁴⁷ Richardson v. Perales, 402 U.S. 389 (1971).

¹⁴⁸ EISENBERG AND LANVERS, *supra* note 128, at 44. As noted *supra* note 113, the agency’s Senior Attorney Adjudicator program only allowed for disposition of favorable claims, but, served only to dispose of some 7.3% of pending claims.