Title

Inquisitorial Adjudication and Mass Justice in American Administrative Law

ISBN
9781409469476

Author
Asimow, Michael

Publication Date
2013

INQUISITORIAL ADJUDICATION AND MASS JUSTICE IN AMERICAN ADMINISTRATIVE LAW

Michael Asimow[*]

Abstract [not in original publication]: The U.S. justice system in general and administrative adjudication in particular is generally perceived as adversarial, meaning that decisions are made in proceedings consisting of trial methods that are largely controlled by the parties rather than the administrative judge. However, inquisitorial methods in U.S. administrative adjudication are actually quite common, particularly in Social Security and veterans' claims adjudication. In those mass justice systems, inquisitorial approaches are consistent with (and perhaps even compelled by) the fundamental idea that the government should assist every eligible beneficiary to receive the benefits to which they are entitled. Moreover, these overburdened systems simply could not afford the inefficiencies associated with adversary trials. Beyond those calculations, it may be that in mass justice, and perhaps in many other administrative and judicial systems as well, inquisitorial methods may be more acceptable to the parties than adversarial methods.

I. ADVERSARIAL AND INQUISITORIAL MODELS OF ADJUDICATION

The American[1] legal system embraces the adversarial model and rejects the inquisitorial model. By the adversarial model, I mean one largely controlled by contending lawyers rather than by judges and in which the hearing or trial is considered to be separate from the investigation. By the inquisitorial system, I mean one largely controlled by judges rather than by lawyers and in which the hearing or trial is considered to be part of the investigation.

The paradigm case of adversarial adjudication is an American criminal jury trial. The prosecution and defense are each responsible for investigation of the case. At trial, the lawyers frame the issues, choose the witnesses, and control the presentation of evidence. The trial consists mostly of oral testimony and argument and is separate from the previous criminal investigation conducted by the police without judicial supervision. The judge is neutral and

[*] Visiting Professor, Stanford Law School; Professor of Law Emeritus, UCLA School of Law. Many thanks to those who assisted me with this article, particularly Sasha Baglay, John Crowley, Gene Elrod, Jill Family, David Hill, Laverne Jacobs, Amalia Kessler, James Ridgway, Ron Smith, and Dan Solomon.

[1] The term "American" here and in the title refers to the United States of America, not to any other North or South American country. This inexact usage is adopted for convenience.

relatively passive, exercising such functions as ruling on evidence, keeping order, and instructing the jury. A lay jury decides the facts. It can consider only the information produced at the trial, not its own knowledge. The jury states no reasons for its conclusions. Because of the widespread use of juries, the U. S. criminal justice system may be more adversarial than that of any other country. American civil litigation is, if anything, even more adversarial than criminal litigation, because it is characterized by costly and protracted discovery (controlled solely by lawyers) and extensive motion practice that depends on lawyer initiatives.

By contrast, in a purely inquisitorial proceeding, such as criminal prosecution in many civil law countries, the hearing or trial is the final phase of the investigation. While there are countless variations, most of the evidence is contained in a written dossier assembled by the judge. The judge supervises the investigation and interviews the defendant and other witnesses. Before the trial, the judge has concluded that the defendant is likely to be found guilty (otherwise the judge would have dismissed the case prior to trial). The judge controls the presentation of evidence at the trial, the primary purpose of which is to assist the judge in deciding on an appropriate penalty.

Thus one might imagine a spectrum between a purely adversarial approach (like the American criminal jury trial) and a purely inquisitorial approach (like the civil law criminal trial). One might array civil, criminal, or administrative proceedings in any country along the spectrum between purely adversarial and purely inquisitorial. Most proceedings, of course, contain elements of both systems and lie somewhere along the spectrum rather than at the poles.

I doubt whether the American model of adversarial adjudication delivers the best mix of accuracy, efficiency, and acceptability, when compared to the systems of criminal and civil adjudication used in other countries.[2] Partly, I believe that its survival is based on path dependence―it has always been done that way―plus public ignorance of other approaches to justice. How else to explain polling data in which Americans condemn their justice system, but overwhelmingly believe it to be the best in the world?[3] Or data that indicates that the public

---

[2] Michael Asimow, "Popular Culture and the American Adversarial Ideology," in Law & Popular Culture (Michael Freeman, ed.) 606-37 (2005) (hereinafter *Adversarial Ideology)*; Michael Asimow, "Popular Culture and the Adversary System," 40 Loyola L.A. L. Rev. 653, 654-68 (2007). For further discussion of the balance of these three factors, see text at note 70.

[3] Asimow, *supra* note 2, 40 Loyola L.A. L. Rev. at 657, citing a 1999 ABA survey in which only 30% of respondents were either extremely or very confident in the U. S. justice system, yet 80% agreed or strongly agreed to the statement "in spite of its problems the American justice system is still the best in the world."

detests lawyers and trusts judges, but prefers a system in which lawyers rather than judges control the justice system?[4]

II. ADVERSARIAL AND INQUISITORIAL METHODS IN AMERICAN ADMINSTRATIVE ADJUDICATION

The federal government and every state have enacted administrative procedure acts (APAs). A reader of these APAs would conclude that American administrative adjudication is a world of judicialized and highly adversarial proceedings. Indeed, most formal trial-type hearings mandated by the APA, which are presided over by administrative law judges (ALJs), are indeed quite adversarial. However, I intend to argue that the world of administrative adjudication is much less adversarial and judicialized than would first appear.

A. JUDICIAL AND INSTITUTIONAL APPROACHES TO ADMINISTRATIVE ADJUDICATION

There is a longtime controversy in American administrative law about the costs and benefits of judicial as opposed to institutional approaches to adjudication. The judicial and institutional approaches are competing ways to think about how an agency should organize its resources in order to make policy or exercise discretion through adjudication. There is a close relationship between the judicial approach and the adversarial model and between the institutional approach and the inquisitorial model. However, the two dichotomies are not entirely congruent.

Someone who favors the judicial model of administrative adjudication draws on the criminal and civil litigation models sketched above. The starting point is that agency adjudication should resemble criminal and civil trials as closely as possible, even when an agency is making policy or exercising discretion. Advocates of judicialized methods are mostly concerned with fairness to private parties, independence and neutrality of the presiding officer, and restricting off-the-record communications to decisionmakers. Judicial model supporters are relatively indifferent to efficiency arguments and resist viewing adjudication as a species of policymaking. Thus agency adjudicatory procedures based upon the judicial model are likely to be much closer to the adversarial end of the spectrum than the inquisitorial end.

Advocates of the institutional approach to administrative adjudication do not take criminal or civil trials as their starting point, since such trials usually settle disputes having

[4] Asimow, note 2, 40 Loyola L. A. L. Rev. at 654, citing a survey in which only 14% of the public were extremely or very confident in lawyers and 42% were slightly or not at all confident in lawyers. In contrast, 32% were extremely or very confident in judges and only 22% had slight or no confidence in judges. Space limitations preclude further discussion of the reasons why Americans so strongly prefer the adversarial approach to justice, but the topic is pursued in the book chapter and article cited in note 2.

importance only to specific private parties. Administrative law, on the contrary, is concerned with implementing wide-ranging statutory schemes, exercising broad discretion, and vindicating the public interest. While rulemaking may be the preferred modality for agency policymaking, case-by-case adjudication is often used for that purpose as well. In matters like individualized ratemaking, land-use planning, or initial licensing, the agency must use individualized adjudication rather than rulemaking, even though its role is heavily discretionary, future-oriented, and policy-driven.

Advocates for the institutional approach argue that the entire staff of an agency should be viewed as part of a team working together to produce the best possible result for the public interest.[5] There is no place in the world of institutional adjudication for restrictions on communications between agency staff and decisionmakers or between outsiders and decisionmakers. Private litigants should have ample opportunity to furnish inputs into the process, whether in writing or orally, but the process should be viewed as one designed to gather information and analysis from everyone who has something to contribute. Methods of trial (such as cross-examination of experts) may be highly inefficient when used for this purpose. Institutional advocates observe that an agency has many obligations aside from adjudicating specific cases and nearly always suffers from budgetary and staffing constraints. In short, an adjudicatory process based on the institutional approach is likely to be much closer to the inquisitorial end of the spectrum than the adversarial end.

Nevertheless, the judicial/institutional approach and the adversarial/inquisitorial models do not always function together. For example, the decisions of individual cases in the mass justice benefit distribution schemes described in the second half of this paper do not utilize institutional methods and seldom involve policy-making or discretion, yet they use inquisitorial procedures. Agencies that adjudicate cases involving policy-making or discretion often use adversarial decisionmaking procedures, although these seem relatively inefficient.

B. FORMAL ADMINISTRATIVE HEARINGS—APA AND NON-APA

[5] See, e.g., 1 Richard J. Pierce, Jr., Administrative Law Treatise 726 (5th ed. 2010). Pierce writes: "The role of a typical agency's staff is much greater than the role of the staff of a trial court or of an appellate court…[When the case reaches the agency head level] staff members may also present their analysis of the case to the agency heads, who are also usually free to consult any staff members except those who have participated in investigating or prosecuting in the particular case…The decision tends to be an amalgam of the views of the agency heads and the staff. The institutional decision often reaches a level that is higher than that attainable by the ablest of administrators or judges who are cut off from sources of expert advice…The institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate by considering the judgment of each other, each contributing his or her own particular knowledge and skills." Similarly, see Ralph F. Fuchs, "The Hearing Officer Problem—Symptom and Symbol," 40 Cornell L. Q. 281, 289-90.

APAs are ubiquitous in U. S. state and federal administrative law.[6] Most of the provisions of the federal APA relate to adjudication (since rulemaking was much less important than adjudication as a policymaking format when the APA was adopted in 1946). The adjudication provisions of the APA tilt strongly in the direction of the judicial approach and the adversarial model. It describes only one form of adjudication, often referred to as "formal adjudication."

1. Formal hearings under the APA are judicialized and adversarial

An APA formal hearing must be conducted by an Administrative Law Judge (ALJ).[7] ALJs work for the agencies for which they conduct hearings (I refer to this arrangement as "captive ALJs"). Agencies have very little choice in hiring ALJs, since the hiring process is conducted by a separate agency, the Office of Personnel Management, or OPM. OPM does not consider experience in the regulatory scheme administered by the agency but is required to give preference to military veterans. ALJs cannot be assigned to tasks other than judging, are highly compensated, are assigned to cases in rotation, are protected from discharge without cause, and (along among federal employees) are exempt from performance evaluations. Thus ALJs enjoy substantial de jure and de facto independence from the agencies for which they decide cases.

In APA formal hearings, lawyers (private and staff) tend to control the framing of the issues. Each side offers testimony from its own witnesses and cross-examines the opponent's witnesses.[8] The record is exclusive, meaning that decisionmaker is confined to the written record in finding the facts.[9] Ex parte contacts with outsiders are forbidden.

State APAs generally follow the federal model on these points. In more than half of the states, ALJs are employed by a central panel, rather than by the agency responsible for the

---

[6] The Federal Administrative Procedure Act was enacted in 1946 and has achieved almost quasi-constitutional status. 5 U.S.C. §551 et. seq. (hereinafter cited as *APA* and without the prefatory 5 U.S.C.) While the APAs of the various states differ, they mostly resemble the federal APA. The National Commissioners on Uniform State Laws recently recommended that the states consider adoption of a new Model State APA of 2010, available at http://www.law.upenn.edu/bll/archives/ulc/msapa/2010_final.htm .

[7] There are around 1500 federal ALJs. See generally American Bar Assoc., A Guide to Federal Agency Adjudication, ch. 10 (2d ed., forthcoming, 2012); Russell L Weaver and Linda D. Jellum, "Neither Fish Nor Fowl: Administrative Judges in the Modern Administrative State," 28 Windsor Y.B. Access Justice 243 (2010).

[8] The APA guarantees that a party can present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." APA §556(d).

[9] APA 556(e). Official notice of non-controversial facts is permitted but the opposing side must have a rebuttal opportunity.

decision. If anything, central panel ALJs are more independent in their outlook than captive-ALJs.

2. Departures from the default rule of formal agency hearings

However, this account of APA adjudication is radically incomplete. ALJs usually render only proposed decisions; the agency heads (who are responsible for investigation, prosecution, and policy-making) make the final decisions.[10] This arrangement, of course, departs sharply from the judicial approach. Agency heads often receive ex parte advice from agency staff members (other than staff members who have played an adversarial role in the particular case). On judicial review, the courts review the decision of the agency heads, not those of the ALJ.

Even in formal hearings, the APA permits substantial deviations from the judicial method. The rules of evidence are not followed.[11] In addition, cross-examination is not an absolute right but only if "required for a full and true disclosure of the facts." In certain cases (including claims for benefits and initial licensing), the agency may "when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." [12] Separation of functions is not required in determining applications for initial licenses[13] or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.[14] The members of the agency head can engage personally in investigation and prosecutorial activities, then decide the case, and can engage in ex parte consultations with staff who have not been involved in the prosecution or investigation of the particular case.[15] All of these features seem institutional rather than judicial.

3. Adjudication outside the APA

---

[10] APA §556(b).

[11] APA §556(d).

[12] *Ibid.* However, in determining claims for money or benefits or applications for initial licenses, "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." *Ibid.* See Citizens Awareness Network v. United States, 391 F.3d 338, 354-54 (1st Cir. 2004). The *Citizens Awareness* case upheld procedural rules adopted by the Nuclear Regulatory Commission that dispensed with full rights of cross-examination in nuclear reactor licensing cases. These cases are often quite contentious and involve participation by interveners opposed to granting the licenses. Under the new rules, a party seeking to cross-examine a witness must first seek permission from the hearing officer and must establish that cross is "necessary to ensure the development of an adequate record for decision."

[13] APA §554(d)(A)

[14] APA §554(d)(B)

[15] APA §554(d)(C). See Michael Asimow, "When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies," 81 Colum. L. Rev. 759, 765-70 (1981).

The APA does not apply to a huge swatch of cases decided by federal government agencies.[16] In the world of non-APA federal adjudication, it is possible to divide the proceedings between relatively formal and relatively informal. Numerous agencies provide hearings that are just about as formal as those provided under the APA, except that the agency does not use ALJs. There about twice as many non-ALJ federal presiding officers as there are federal ALJs. Agencies that provide adversarial hearings outside the APA include those engaged in adjudication of disputes concerning immigration and deportation, government contracts, civil penalties of various kinds, federal personnel, and many other areas.[17]

There remains a vast universe of non-APA informal agency adjudication. An agency engaged in informal adjudication can structure its decisionmaking process to suit itself.[18] Informal adjudication is often much closer to the inquisitorial end of the spectrum than the adversarial. Verkuil studied 43 informal adjudication programs in four large cabinet-level agencies to ascertain whether these programs were adversarial or inquisitorial.[19] In each case, he looked for ten indicia of adversarial procedure and counted how many of them were present. Most of the programs had less than half of the adversarial ingredients.[20] In short, the world of federal administrative adjudication is thoroughly mixed between procedures that employ inquisitorial and adversarial methods.

III. INQUISITORIAL METHODS AND MASS JUSTICE—SOCIAL SECURITY AND VETERANS' BENEFITS

This section considers the decisional process used by the Social Security Administration and Veterans Administration in resolving benefit disputes. The administrative process in these systems is much closer to the inquisitorial end of the scale than the adversarial end. The number

---

[16] The APA applies only to adjudication "required by statute to be determined on the record after opportunity for an agency hearing…" APA §554(a). Numerous relatively formal hearing schemes do not meet that standard and thus fall outside §554(a). See Michael Asimow, "The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute," 56 Admin. L. Rev. 1003, 1004 (2004).

[17] There are about 83 case-types that fall into the category of non-APA formal adjudication. See Asimow, note 16, 56 Admin. L. Rev. 1003, 1005-08 (2004).

[18] In some cases, the requirement of procedural due process in the 5th and 14th amendments to the U.S. constitution imposes constraints on the decisional process, but due process seldom requires adversarial procedures. Normally it requires only "some kind of hearing" conducted by an impartial adjudicator. Goss v. Lopez, 419 US 565 (1975).

[19] Paul R. Verkuil, "A Study of Informal Adjudication Procedures," 43 U. Chi. L. Rev. 739, 757-79 (1975).

[20] Courts may not require adversarial procedures such as formal hearings, even if such procedures would facilitate judicial review. Pension Benefit Guarantee Corp. v. LTV Corp., 496 U.S. 633 (1990).

of cases resolved by these two immense systems dwarfs the output of agencies that conduct the remainder of federal administrative adjudication.

A. Social Security Disability

The Social Security disability program is said to be the largest system of adjudication in the western world.[21] In December, 2009, about 10.1 million people were receiving benefits under this system and the annual payments exceeded $100 billion.[22] A related program, Supplemental Security Income (SSI), provides additional payments for disabled persons who meet poverty standards.

To qualify for disability benefits, a claimant must be totally and permanently disabled, meaning unable to engage in any gainful activity.[23] This standard calls for a great deal of difficult medical and vocational decisionmaking. There are four stages in determining eligibility: initial decision, reconsideration, ALJ hearing, and Appeals Council.[24] The initial decision is made by a state-level agency called Disability Determination Services (DDS). In 2008, DDS processed 2,327,000 claims and granted about 56%.[25] A claimant rejected at the DDS level can seek reconsideration by a Federal Reviewing Official (FRO), a staff attorney who must develop the file by obtaining all available evidence.[26] The FRO issues a written decision but does not conduct a hearing. About 12.2% of claims were successful at the FRO level in 2009.

A claimant rejected at the FRO level can request an APA hearing before an ALJ. In 2009, 1057 ALJs worked for Social Security (about 75% of the total number of ALJs on the federal payroll).[27] ALJs received 662,851 new cases in 2009 and had 722,822 pending at year

---

[21] Jerry L. Mashaw, Bureaucratic Justice 18 (1983).

[22] Annual Statistical Report on the Social Security Disability Insurance Program, 2009, http://www.ssa.gov/policy/docs/statcomps/di_asr/ , Tables 1, 13.

[23] 42 U.S.C. §423(d)(1)(A).

[24] See Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, "Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications," 25 Cardozo L. Rev. 18-28 (describing process) (hereinafter *Two Proposals*).

[25] Annual Statistical Report, note 22, Table 59.

[26] 71 Fed. Reg. 16424, 16432-34 (2007). Social Security recently created the FRO procedure to provide a non-adversarial representative to develop the record prior to the ALJ hearing. See Frank S. Bloch, "Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings," 59 Wash. U. L. Q. 349, 399-407 (1981).

[27] Social Security Administration, Key Workload Indicators, Table 2/F8 http://www.ssa.gov/policy/docs/statcomps/supplement/2010/2f8-2f11.html

end.[28] About 70% of claimants are represented by attorneys and an additional 18% are assisted by lay representatives.[29]

The final step is an appeal to the Appeals Council.[30] The Appeals Council consists of about 28 judges who are not ALJs. If the appeal fails, the claimant can seek judicial review in a federal district court. Under a set of procedural reforms introduced in 2007, SSA plans to phase out the Appeals Council in favor of a new body called the Decision Review board (DRB) which will review selected ALJ decisions.[31] The DRB is a quality control and management tool, not an appellate remedy for claimants.

The adjudicatory system in Social Security disability cases is deeply troubled. There are lengthy delays in the decisionmaking process, during which disabled and often poverty-stricken claimants must wait, often for years, to start receiving the benefits to which they are entitled. This backlog will grow worse as the number of claims increases because of retirement of baby-boomers and for other reasons.[32] Social Security has experienced great difficulty in managing its ALJ corps. There are serious problems of consistency of decisions as well as productivity.

Many aspects of this immense adjudicatory system are inquisitorial in nature.[33] SSA has an obligation to develop the record once a claimant supplies basic information. It will obtain medical records from the claimant's identified sources and pay for the records it requests. It frequently orders (and pays for) additional medical examinations. The record remains open during the entire administrative process, right through the Appeals Council. Thus a claimant can add additional materials to the file at each of the four administrative stages.[34] The open record approach seems inquisitorial, since an inquisitorial system treats the hearing as phase of the investigation (rather than being sharply separated from the investigation). The ALJ has an affirmative responsibility for developing the record by calling additional witnesses or securing

[28] *Id.* Table 2F.9. The average ALJ disposed of 49 cases per month and had 575 cases pending.

[29] *Two Proposals*, note 24, at 6.

[30] The Appeals Council received 106,965 cases in 2009 and had a backlog of 80,040 at the end of the year. Key Workload Indicators, note 27, Table 2F.11.

[31] 71 Fed. Reg. 16424, 16437- 40 (2007)

[32] See *Two Proposals,* note 24 at 1, 5.

[33] See generally Jon C. Dubin, "Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings," 97 Colum. L. Rev. 1289, 1300-06 (1997).

[34] See *Two Proposals,* note 24, at 28-36, 59-62. Under reforms introduced in 2007, the claimant must submit evidence no later than 5 business days before the hearing except in unusual circumstances. See 71 Fed. Reg. 16424, 16434-37 (2007).

medical reports when the claimant fails to do so. This obligation to assist the claimant applies even if the claimant was represented by a lawyer or a lay advocate.[35]

The most important inquisitorial element in the Social Security adjudicatory scheme is that ALJs are responsible for developing the case both for and against the claimant, then deciding the case. The government is never represented. The Supreme Court upheld this inquisitorial decisionmaking method under due process in *Richardson v. Perales*:

> Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.[36]

Subsequently, in *Sims v. Apfel*,[37] the Supreme Court excused a claimant's failure to exhaust issues before the Appeals Council because of the inquisitorial nature of Social Security hearings. The Court remarked:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking … the SSA is perhaps the best example of an agency that is not…The most important of the SSA's modifications of the judicial model is the replacement of normal adversary procedure by ... the 'investigatory model'… Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits…and the [Appeals] Council's review is similarly broad. The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council…. The Council, not the claimant, has primary responsibility for identifying and developing the issues...[38]

B. Veterans claims

1. The sluggish system of VA claims adjudication

---

[35] See, e.g., Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996).

[36] Richardson v. Perales 402 U.S. 389, 410, 91 S. Ct. 1420, 1432 (1971). From 1982-87, SSA experimented with a system in which SSA was represented in ALJ hearings if the claimant also had representation. The experiment was abandoned after a dubious court decision determined that it violated due process. Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986). See *Two Proposals,* note 24 at 42-52.

[37] 530 U.S. 103 (2000)

[38] *Sims,* supra, 530 U.S. at 110-12 (citations and internal quotation marks omitted).

The Veterans Administration (VA) decides a vast number of benefit claims. As described in greater detail below,[39] the adjudicatory process begins at a VA regional office (RO) and ends with a decision by the Board of Veterans Appeals (BVA). The caseload is rising steadily because of the aging of Vietnam veterans and changes in evaluation of certain claims, such as Agent Orange injuries or post-traumatic stress disorder (PTSD). In the future, the Iraq and Afghanistan wars will vastly expand the number of claims that the benefit system must resolve. The number of new claims currently exceeds one million per year, but this figure understates the caseload since each "claim" usually seeks several different benefits.[40] There is a crushing backlog of unresolved claims.[41] Nearly everyone is unhappy with the sluggish process of veterans' claims processing and adjudication, but there is no consensus on how the system should be reformed.[42] Recently, the Court of Appeals for the Ninth Circuit held that delays in

---

[39] See text at notes 57-65.

[40] See James D. Ridgway, "Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims," 1 Vet. L. Rev. 113, 145-50 (2009) (hereinafter *Why So Many Remands)*. Each unrelated benefit in a claim is referred to as an "issue." Ridgway observes that 22% of disability claims had at least eight issues. *Id.* at 146. He estimates that the number of different benefits sought is at least double and probably more than triple the number of claims that VA receives each year.

[41] The backlog of unresolved claims is currently around one million and is expected to increase to 2.6 million by 2015. Michael Serota & Michelle Singer, "Veterans Injustice: Unconstitutional Delay at the Department of Veterans Affairs," 89 Nebr. L. Rev. __ (2011), ms. p.4 The VA takes an average of around 183 days to process a claim at the regional office level. It takes somewhere between three to four and one half additional years to process a claim through the entire administrative process. See Veterans for Common Sense v. Shinseki, 2011 U.S. App. Lexis 9542 at pp. 10-12 (9th Cir. 2011) (holding these delays deny claimants due process); James D. Ridgway, "The Veterans' Judicial Review Act Twenty Years Later," NYU Ann. Survey of Amer. Law.118 (2010) (hereinafter *Twenty Years Later).* These are average figures and many claims (particularly those involving PTSD) take much longer to resolve.

[42] The fundamental question is whether to modify and improve the veterans' claims system incrementally or scrap it entirely. For a summary of such proposals, see Paul R. Verkuil & Jeffrey S. Lubbers, "Alternative Approaches to Judicial Review of Social Security Disability Cases," 55 Admin. L. Rev. 731, 770-71 (2003). Linda Bilmes believes that the VA claims process should be abandoned in favor of one modeled on the IRS—grant all applications and conduct audits to discover errors. Testimony to the House of Representatives Veterans Affairs Committee, March 13, 2007, http://www.hks.harvard.edu/news-events/news/testimonies/linda-bilmes-testifies-before-house-subcommittee-on-veterans%E2%80%99-health-care-costs. Others advocate a merger of the VA process with Social Security or the use of ALJs in lieu of the BVA. James T. O'Reilly, "Burying Caesar: Replacement of the Veterans Appeals Process is needed to provide fairness to claimants," 53 Admin L Rev 223 (2001) (advocating merger of VA claims system with Social Security); William T. Fox, "Deconstructing and Reconstructing the Veterans Benefits System," 18 Kan. J. of Law & Pub. Pol. 339 (2003). But see Rory E. Riley, "The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme," 2 Vet. L. Rev. 77, 106-14 (2010). Riley argues that replacing the system would abandon the pro-veteran bias built into the existing system; in addition, the transition would be costly and would not solve the underlying problems of unmanageable caseload. Reilly argues for modifications such as better incentives and better use of electronic instead of paper-based systems. The VA Claims

the adjudication of veterans' claims violated the constitutional norm of due process and remanded the case to the trial court to remedy the situation.[43] This far-reaching decision harshly criticized the VA decision-making process; it triggered a sharp dissent and will probably be reviewed by the U. S. Supreme Court.

Claims for service-connected disability (by far the most common claims) require complex medical judgments. The claimant must suffer from a current disability that is connected to a disease or injury received during service (the "nexus" requirement). VA must assign a rating (from 10% to 100%) to the disability.[44] It is estimated that around 88% of claims for disability compensation are granted, at least in part.[45]

2. The VA claims process is inquisitorial and paternalistic

The adjudicatory process for resolving VA claim disputes is uniquely inquisitorial and paternalistic.[46] There is no statute of limitations on making a claim (which is consistent with the idea that the hearing in an inquisitorial process is simply a phase of an ongoing investigation). The RO (which is responsible for the initial decision on a benefits claim) is subject to elaborate requirements of notice. It must notify claimant of any information or evidence that is necessary to substantiate the claim and furnish all necessary assistance to the claimant in obtaining evidence and obtaining medical opinions.[47] Like the Social Security rule that an ALJ must assist

---

Processing Task Force recommended abolition of remands by the BVA. Report to the Secretary of Veterans Affairs 34-37 (2001).

[43] Veterans for Common Sense v. Shinseki, 2011 U.S. App. Lexis 9542 (9th Cir. 2011). The decision also held that the V.A.'s procedures for providing medical care to veterans claiming mental impairments such as PTSD violated due process.

[44] Over 4,000,000 veterans and survivors were receiving financial benefits at the end of fiscal year 2010, 87% of which related to service-connected disabilities. See the 2010 Annual Benefits Report of the Veterans Benefits Administration, http://www.vba.va.gov/REPORTS/abr/2010_abr.pdf.

[45] Ridgway, *Twenty Years Later,* note 41 at 116.

[46] Historically, veterans' benefits have been considered gratuities rather than entitlements, based on the nation's moral obligation toward its veterans. The system was based on discretion rather than rights and the procedures employed were highly informal and stacked in the claimant's favor. See Richard E. Levy, "Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefit System," 13 Kansas J. of L. & Pub. Pol. 303, 304-15 (2003) (distinguishing the paternalistic or charitable model from the social insurance model applicable to more modern benefit programs).

[47] See 38 U.S.C.§§5102(b) and 5103(a) (imposing obligations to notify claimant of any information needed to complete the application or to substantiate the claim); §5103A (imposing on the VA an obligation to exercise reasonable efforts to assist the claimant in obtaining evidence and records and in providing medical examinations and opinions). See Shinseki v. Sanders, 129 S.Ct. 1696, 1704-06 (2009) (simplifying rules of prejudicial error when VA fails to give notice required by regulations).

a claimant,[48] the VA's obligation to assist the claimant seems more consistent with inquisitorial than adversarial adjudication. An inquisitorial system is intended to find out the truth rather than to serve as the vehicle for combat between the two sides.[49]

The various procedural rules of VA claims practice are heavily paternalistic and reflect inquisitorial rather than adversarial process. No government official appears at RO or BVA hearings to oppose the granting of benefits. Decisionmakers must fully develop any possible claims that arise from documents or testimony even if the claimant has not pressed them. At all levels, the VA must give the veteran the benefit of the doubt if the positive and negative evidence is approximately balanced.[50] This benefit-of-the-doubt rule is highly paternalistic. A veteran may "reopen" a rejected application by presenting "new and material evidence" and some cases are reopened on multiple occasions. The ability to reopen the case is consistent with an inquisitorial approach to adjudication, since the entire process is visualized as a continuing investigation.

VA practice is delawyered. Veterans are usually accompanied at both the RO and BVA levels by lay representatives supplied free by a veteran service organization (VSO) such as the American Legion. Veterans are seldom represented by lawyers because statutes prohibit compensation of lawyers before the judicial review stage.[51]

The VA's inquisitorial system of fact determination and decisionmaking is rooted in the long and convoluted history of veterans' benefits.[52] These benefits were regarded as gratuities, not entitlements, and the bureaucratic structure that delivered the benefits was wholly paternalistic. In a paternalistic system, there is no place for lawyers or for adversarial procedures like administrative trials. Today, veterans' benefits have become an entitlement rather than a gratuity, but the older paternalistic decisionmaking process has survived.

---

[48] See text at note 35.

[49] The idea that an agency should render assistance to an unrepresented litigant has developed as an element of an enabling or proactive approach to administrative justice in the UK and Canadian administrative justice systems. See the chapters by Thomas and by Green & Sossin in this volume.

[50] 38 U.S.C. §5107(b).

[51] In 2009, 81% of claimants were represented by VSO lay representatives, plus 2% by other lay representatives. Attorneys represented 8% of claimants. 9% had no representation. See The 2009 BVA Annual Report, p. 21. http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. The ban on compensation of attorneys was upheld by the Supreme Court in Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985). The Court believed that the presence of attorneys would be detrimental to the paternalistic and inquisitorial VA claims adjudication system.

[52] For a detailed account of the history of veterans' benefits, see James D. Ridgway, "The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review," 3 Vet. L. Rev.135 (2011).

Historically, there was no judicial review of VA claims decisions. In 1988, under the Veterans' Judicial Review Act (VJRA),[53] an adversarial system of judicial review in the Court of Appeals for Veterans Claims (CAVC) was superimposed on the VA's inquisitorial fact finding system.[54] CAVC decisions frequently change the procedural law of benefit claims, always to increase protection of veterans, not to lessen it (since only veterans, not the VA, can appeal to the CAVC).[55] The addition of judicial review to an informal, inquisitorial system has produced a large number of remands from the CAVC to the VA because of failure to comply with notice requirements or incomplete or inadequate documentation in the record.[56]

3. The VA claims process

A more detailed account of the VA's adjudicatory system runs as follows. A claim is processed by various teams at the RO, but the decision is the responsibility of a single lay adjudicator (referred to herein as a "ratings specialist").[57] The file includes the detailed medical opinions submitted by the claimant (such as reports of personal physicians) and by the VA medical staff as well as by independent physicians consulted by the VA.

Claimants dissatisfied with the RO decision file a Notice of Disagreement (NOD). The claimant can obtain a review of the case by a Decision Review Officer (DRO), a senior RO adjudicator who has not previously been involved in investigation of the case.[58] The DRO may seek additional evidence. At the veterans' request, the DRO will provide an informal hearing. If the claimant remains dissatisfied with the RO decision after DRO review, the RO prepares a statement of the case (SOC) which contains detailed findings and an explanation of the decision.

---

[53] Pub. L. 100-687, 102 Stat. 4105 (1988) See generally *Twenty Years Later*, note 41 at 101.

[54] Even the CAVC process has paternalistic elements. By statute a claimant must file an appeal with CAVC within 120 days after mailing of the BVA's decision. This deadline is not "jurisdictional," so it is subject to extension based on equitable considerations. The paternalistic nature of VA benefits was an important factor in the Supreme Court's decision on this point. "What is most telling [of Congress' intent in imposing the 120-day rule] are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefit claims. The solicitude of Congress for veterans is of long standing…And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions…" Henderson v. Shinseki, 131 S.Ct. 1197, 1199 (2011) (internal citations and quotation marks deleted). *Henderson* pointed out that the same rule applies to the inquisitorial Social Security disability system—the deadline for obtaining review of SSA benefits decisions in district court is not jurisdictional.

[55] Ridgway *Twenty Years Later*, note 41 at 107.

[56] See *Why So Many Remands*, note 40, which analyzes the problem of CAVC remands in depth.

[57] 38 CFR §3.103(c)(1).

[58] 38 C.F.R. §3.2600.

Within 60 days from the mailing of the SOC, the veteran must file Form VA-9 to perfect the right of appeal to the BVA.

The BVA's decision is based primarily on the written record.[59] Thus it is an appellate process rather than an initial decision. However, claimants frequently seek to introduce new evidence at the BVA level. If the claimant waives remand to the RO to evaluate the new evidence, the BVA judge considers this evidence and decides the case accordingly.[60] BVA has no organized written record from which to decide the case, only a disorganized case file that may run to hundreds or thousands of pages.[61] It is required to consider and decide every possible issue or claim raised by the record.[62]

The BVA has about 60 Veterans Law Judges and about 300 staff counsel.[63] It decides about 48,000 cases per year (about 800 for each judge). BVA hearings are quite informal and are conducted by single Board members either in person or by video-conference.[64] Requesting a hearing considerably prolongs the BVA decisional process, so many claimants waive the hearing.

In 2009, a stunning 37% of BVA cases were decided by remanding the case to the RO (usually because of efforts to introduce new evidence or because of insufficient medical opinions or errors by the RO in giving proper notice or assisting the veteran). Reconsideration of

---

[59] 38 U.S.C. §7104(a); 38 C.F.R. §19.4.

[60] 38 C.F.R. §§19.9(b)(3), 20.1304(c) (new evidence can be introduced before BVA if appellant waives the right to have it considered by the RO or if the Board believes that the new evidence will enable it to award benefits). See Ridgway, *Twenty Years Later*, note 41 at 125-27. BVA Judge John Crowley told the author that the BVA usually considers the new evidence and that claimants usually waive their right to remand. Telephone conversation, Feb. 25, 2011.

[61] The VA is in the process of converting its paper-based system to an electronic data system, but the conversion process has been troubled. Conversion is very costly and far from completed. Ridgway, *Twenty Years,* note 41, at 129-31.

[62] See *Why So Many Remands*," note 40, 1 Vet. L. Rev. at 136-38.

[63] BVA judges have far less independence than ALJs. See Levy, note 46, at 319-20 (questioning the procedures for appointment and removal of BVA judges).

[64] See the BVA's pamphlet "How Do I Appeal?" http://www.bva.va.gov/docs/Pamphlets/010202A.pdf. According to the pamphlet, "Personal hearings with a Board Member are informal. They are not like the courtroom hearings you see on TV or in trials...You will be given a chance to make sure any information you think is important is heard by the Board Member…If you have a representative [usually a lay advocate from a VSO] the representative will ask you questions to help you explain your claim. If not, the Board Member will ask you to tell him or her about your claim…You can add evidence to your claim at the hearing…the Board Member will be holding as many as nine other hearings that day!"

remanded cases is a major contributor to the RO's backlog and delays. Of the remainder, 24% of the appeals were allowed and 36% were denied.[65] Decisions are written by staff members, based on the transcript of the personal hearing, and signed by the member responsible for the case.

4. Judicial review made the VA process more adversarial

Cases decided by the CAVC after enactment of VJRA in 1988 made the VA process more adversarial. For example, prior to 1988, decisions at the RO level were made by a panel consisting of a physician, a legal specialist, and an occupational specialist. The panel based its decisions on its own expertise or its own research and did not consider itself limited to evaluating the medical data in the files. A claimant was not required to submit medical opinions or other evidence since the panel was able to make its own judgments.

In *Colvin v. Derwinski,*[66] the CAVC required RO and BVA decisionmakers to base their decision exclusively on the medical evidence in the file or on textbooks, rather than on their own medical judgment. *Colvin* was driven by the court's need to conduct on-the-record review of the VA's decision. As a result, claimants are now required to submit elaborate and complete medical opinions to substantiate their claims. The expert panel was replaced by the lay ratings specialist. Similarly, the BVA judges cannot make decisions based on their own expertise but must confine their decisions to the material in the record. These changes vastly increased the formality of VA decisionmaking and substantially contributed to VA backlogs.[67]

Prior to 1988, BVA opinions were brief and non-technical, so they could be easily understood by lay people such as the claimant. As a result of the 1988 reforms, BVA's decisions must be lengthy and detailed, so that they can withstand on-the-record judicial review (even though only a tiny percentage of BVA decisions are actually appealed to CAVC). Medical conclusions must be thoroughly explained.[68] In the past, BVA decisions did not comment adversely on the credibility of the claimant or of various witnesses; now the decisions must evaluate the credibility of each witness, including the claimant and his family. In the opinion of the former Chairman of the BVA, Charles Cragin, the net effect of implanting an adversarial judicial review process on top of an inquisitorial, informal and paternalistic claims process, has

[65] BVA Ann. Report, note 51, p 21. About 3% were categorized as "other" dispositions.

[66] Colvin v. Derwinski, 1 Vet. App. 171, 175 (CAVC 1991). *Colvin* was overruled on another ground by Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1999).

[67] Charles L. Cragin, "The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals," 46 Maine L. Rev. 23 (1994).

[68] *Why So Many Remands,* note 40, 1 Vet. L. Rev. at 136-37; *Twenty Years Later,* note 41, 2010 NYU Ann. Survey at 123-25

been quite negative. He believes that it is one of the most important causes of the delays and backlogs in the existing system.[69]

IV EVALUATING INQUISITORIAL METHODS IN MASS JUSTICE ADJUDICATION

1. Inquisitorial system is appropriate in many benefit schemes

The fundamental point about Social Security and veterans' benefits is that the government's responsibility is not to fight every claim but to make sure that all claimants receive the benefits for which they are eligible. The programs are entitlements and all approved claims must be paid without regard to budgetary ceilings. For that reason, both programs are deliberately structured to aid and assist claimants, not to make the process more difficult for them. In such systems, inquisitorial methods of dispute resolution seem more appropriate than adversarial combat. In contrast, other federal benefit programs (such as programs providing benefits for victims of black lung disease or for injured longshore workers) involve a clash between an employee and a private employer. Adversarial methods may be more appropriate in these adjudicatory systems.

2. Balancing efficiency, accuracy, and acceptability

A conventional methodology for evaluation of administrative systems is to balance efficiency, accuracy, and acceptability to participants.[70] Obviously, these criteria point in conflicting directions. Making the process more efficient by speeding it up, for example, may well impair the ability to make accurate determinations and may make the system less acceptable.

In mass justice systems, efficiency is of paramount importance. When literally millions of complex claims must be adjudicated, the procedures should be as cheap as possible to the claimant and to the government and decisions should be rendered as quickly as possible. Inquisitorial processes, involving informal conferences between judges and claimants, can be

---

[69] "Because of the increasing complexity and rapidly evolving state of the law, BVA decisions are lengthier, more complex, and require more time to prepare than ever before. As a consequence, speedy justice in VA claims adjudication has become an elusive target. No decision of the court [CAVC] has yet resulted in an improvement in decision productivity or timeliness anywhere in the entire VA adjudication system. Many decisions have had the exact opposite result." Cragin, note 67, at 31. Similarly, Ridgway says: "Judicial review has fundamentally reinvented the process in a way that requires many more steps to complete and that demands VA show each step was completed properly…Increased complexity, such as these new requirements, has become a major issue for the adjudication system…" *Twenty Years Later,* note 41 at 126-27. BVA judge John Crowley told the author that there was virtually no backlog in deciding veterans' claims cases before the 1988 reforms, whereas today there is a crushing backlog. Phone conversation of February 25, 2011.

[70] See Asimow, Adversarial Ideology, note 2, at 609-21 for a more detailed balancing of these three factors as between adversarial and inquisitorial approaches to criminal jury trials.

accomplished quickly and inexpensively. BVA judges often schedule nine hearings a day and usually can get through their docket.[71]

Both the Social Security and VA claims processes are plagued by heavy caseloads and huge backlogs. They cannot afford to slow down for lengthy formal hearings and adversarial combat. Moreover, the extra costs of adding a government representative to argue against the claimant in VA and Social Security hearings would be staggering. These mass justice systems are already laboring under severe personnel shortages and are plagued by delays and backlogs. Indeed, the imposition of an adversarial judicial review system atop the inquisitorial VA system appears to have made the process of claims adjudication slower and less efficient.[72]

Accuracy means determining the correct answer to disputed questions of fact, such as deciding past events or determining a claimant's medical condition. In disability-based benefit systems, most of the evidence comes in the form of medical opinions, but such opinions often conflict. Someone must resolve the conflict. Credibility of the claimant is also important, particularly in cases involving complaints like back pain or psychological disabilities like PTSD.

Many in America believe that adversarial combat (particularly cross-examination) is the best way to reveal the truth. However, for the adversarial system to work, there must be a rough equality between the contending sides in terms of lawyer skills and resources. Often, however, this kind of equality is conspicuous by its absence. One side frequently has more experienced lawyers and much greater financial resources.

In mass justice systems, these disparities are quite significant. Many claimants cannot afford a lawyer or none is available. Social Security claimants may wish to proceed without a lawyer to avoid paying a large contingent fee. Claimants in either system may have a lay representative or represent themselves. They would be at a huge disadvantage if they were pitted against a government lawyer. Thus there are distributional advantages to the inquisitorial approach because the judge can take responsibility for development of the record when a claimant is unrepresented or poorly represented.

Even apart from differences in lawyer skills and resources, few attorneys believe that adversarial combat is an effective way to determine the truth about past events or medical conditions.[73] Lawyers tend to scoff at "the truth" and stress that it is unknowable if such a thing

---

[71] Telephone conference with BVA Judge John Crowley, Feb. 25, 2011.

[72] See text at notes 66-69.

[73] See Jula Hughes, "Home Truths About the Truth Commission Processes—How Victim-Centred Truth and Perpetrator-Focused Adversarial Processes Mutually Challenge Assumptions of Justice and Truth, Ch. XX in this volume.

even exists. Finding out and revealing the truth is not their job. Instead, lawyers view the adversarial system as a vehicle to deliver a desired result for a client. Often, that objective requires an attorney to confuse the issues or obscure the truth. In my opinion, a process managed by a competent judge who is responsible for and dedicated to finding the truth seems more likely to deliver accurate results than lawyerly combat.

The third factor in the equation is acceptability of the process to the parties. This factor is intended to be a surrogate for fairness, but acceptability can be measured whereas fairness remains in the eye of the beholder. The conventional wisdom, based on a famous series of experiments by Thibaut and Walker,[74] is that people prefer an adversarial system in which they were represented by their own attorney to an inquisitorial system in which they had no attorney and the proceedings were conducted by a judge. This held true whether the respondent won or lost the case). I do not question the fundamental insight of Thibaut and Walker and many subsequent studies that procedural justice matters greatly. People are deeply concerned that decisionmakers seem neutral, unbiased and honest as well as fair, polite and respectful.[75]

However, I do not believe that the Thibaut-Walker findings are easily translated to the administrative process, particularly to mass justice situations. The Social Security and VA claims processes are inquisitorial, but they are quite different from the Thibaut-Walker experiments. Claimants have the right to be (and usually are) represented by their own advocates—either lawyers or lay representative which was not the case in Thibaut and Walker's experiments. Indeed, a follow-up study by Thibaut and Walker involved a system in which each side could choose its own representative; the variable was whether the judge or the lawyers asked the questions.[76] Here the subjects were equally satisfied with both approaches. This result suggests that an inquisitorial system controlled by the judge is acceptable to litigants provided they can have their own advocate who will articulate their point of view.

Moreover, in real life, people have to pay their lawyers and have a lot at stake. In the Thibaut-Walker experiments, the subjects were students who had nothing at stake; they did not have to pay their lawyers or wait years for a result. The students did not have to contend with depositions or harsh adversarial trials at which they would be cross-examined by their opponent's lawyer. I believe that most normal people (lawyers excepted) are terrified by adversarial process and find an informal inquisitorial proceeding more comfortable. Confronted with these rather unpleasant realities of adversarial litigation, it may be that most people would prefer inquisitorial methods.

[74] John W. Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis, ch. 8 (1975).

[75] See Tom Tyler, Why People Obey the Law ch. 11 (1990).

[76] Thibaut & Walker, note 74, ch. 10.

Those who oppose the importation of inquisitorial methods into the American justice system stress that European judges are carefully selected right out of law school, are well trained, and pursue judging as a career track. In contrast, American judges are often appointed for political reasons rather than merit. They may be poorly trained, incompetent to decide difficult cases, and subject to an electoral check that may impair independent judgment. However, in administrative law, these arguments are less persuasive. ALJs (who decide Social Security cases) are carefully selected through a merit system and typically devote lengthy careers to administrative judging. They specialize in the type of cases heard by their own agency. Their independence is zealously guarded. In the VA, the BVA judges lack some of the legal protections of independence enjoyed by ALJs, but they are specialized and highly experienced in judging veterans' claims. Most important, they are sympathetic to the claimants and intellectually and legally charged with helping them make their case. For all these reasons, people may be more comfortable with proceedings controlled by administrative judges than by judges in the judicial system.

V. CONCLUSION

The U.S. justice system in general and administrative adjudication in particular is generally perceived as adversarial. This paper has shown that inquisitorial methods in U.S. administrative adjudication are actually quite common, particularly in Social Security and veterans' claims adjudication.

In those mass justice systems, inquisitorial approaches are consistent with (and perhaps even compelled by) the fundamental idea that the government should assist every eligible beneficiary to receive the benefits to which they are entitled. Moreover, these overburdened systems simply could not afford the inefficiencies associated with adversary trials. Beyond those calculations, however, it may well be that in mass justice, and perhaps in many other administrative and judicial systems as well, inquisitorial methods may be more acceptable to the parties than adversarial methods.