Less Due Process Than Terrorists: An Analysis of the Eric C. Conn Fiasco

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1 J.D. expected 2019, University of Kentucky College of Law; B.A., 2015, Morehead State University. I dedicate this Note to the loving memories of my mother and father, Lula Frances Conn and Clyde Vernon Conn. I also dedicate this Note to the attorneys, law students, and other individuals who have worked tirelessly to advocate for Conn’s clients.

* My mother, who had a tenth-grade education, was a client of Eric C. Conn. She chose Conn as her attorney for his reputation of efficiency in the community. She had no knowledge that any fraud was being committed by Conn when she chose him as her lawyer. In 2015, she was one of the clients that received a redetermination letter from the Social Security Administration, but she was lucky because her benefits were not immediately suspended. Upon her redetermination hearing with an Administrative Law Judge, she was determined to be disabled and continued to receive her benefits. The volunteer attorney that represented her at her redetermination hearing was provided through AppalRed Legal Aid and Defense Fund, a nonprofit organization in Eastern Kentucky that has worked tirelessly to recruit lawyers to provide representation to Conn’s clients facing benefit deprivation. My mother worked over 25 years to provide for our family but was unable to work after suffering through heart attacks, congestive heart failure, diabetes, high cholesterol, not being able to walk properly due to injuries suffered in an automobile accident, and the after effects of numerous strokes. She passed away on September 18, 2017. Her story is a testament that many of Conn’s clients are truly disabled individuals, who are caught up in a fraud scheme that has upended their lives and caused a humanitarian crisis in Eastern Kentucky.
INTRODUCTION

“He gets the job done” was the slogan of Eastern Kentucky attorney, Eric C. Conn. Across Eastern Kentucky, Conn publicized himself as “Mr. Social Security” and the “ONLY Social Security Disability Specialist in Kentucky.” Conn’s advertisements spanned from the cover of telephone books, supermarket flyers, and newspapers to jingles on television commercials and radio shows. He even showed up at many public events in Eastern Kentucky with women he had hired and deemed, “The Conn Hotties,” who wore tank tops with Conn’s name and phone number. The advertisements did not stop there. Fluorescent neon yellow billboards were plastered up and down Highway 23 with life-size mannequins of Conn perched on top. The world’s second largest seated Abraham Lincoln statute, mirroring the Lincoln Memorial and totaling $500,000, sat in the parking lot of Conn’s former law office. To say the least, Conn’s advertisement of his law practice was extravagant, and he was everywhere. It is no surprise that disabled eastern Kentuckians hired the man who claimed to be the only disability specialist in Kentucky to represent them in their disability cases.

In May 2015, however, the lives of disabled former clients of Eric C. Conn in Eastern Kentucky and West Virginia took a negative turn. About nine hundred social security disability recipients who were former Conn clients received letters from the Social Security Administration informing them that their benefits were suspended pending a review to determine whether their cases were “fraudulent.” In addition, around six hundred more of Conn’s clients were told that the SSA would be reviewing their cases to determine whether they were “fraudulent,” but their benefits were not immediately suspended. The SSA discovered that between 2007 and 2011 at least 1,787 former Conn clients had submitted template medical forms.

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3 Id.

4 Eric Conn, 3D Lawyer Ad Eric C. Conn, YOUTUBE (Dec. 12, 2010), https://www.youtube.com/watch?v=qXFczr8T2zc [https://perma.cc/8YKJ-PVZ2].


6 Id.


8 Id. at 25.


10 Id.

and quickly award benefits. The Justice Department claimed that Conn had funneled more than $550 million in fraudulent claims into Appalachia. Clients had no idea that Conn was involved in a fraudulent scheme to award benefits, and clients felt betrayed because they trusted Conn. But, it was Conn’s clients—not Conn—whose lives were first affected by the suspicion that Conn had committed fraud.

This Note examines the impact ofConn’s fraud scheme on disabled eastern Kentuckians, highlighting the statutes and internal regulations that govern the SSA’s redetermination process and the federal district court’s review of the alleged due process violations of Conn’s clients by the SSA’s redetermination procedure. Part I of this Note examines the fraudulent behavior of the Conn law firm. Part II discusses the SSA’s response to the evidence of fraud by the Conn law firm and its treatment of Conn’s clients. Part III discusses how federal district courts have handled lawsuits brought by Conn’s clients to restore their benefits against the SSA, the problems with applying the Mathews v. Eldridge balancing test to such cases, and how the test should apply to Social Security “fraud” cases in the future. Part IV offers solutions to the due process violations of future Social Security claimants who have been accused of “fraud,” and argues that the legislature should amend the SSA’s fraud statutes to safeguard the due process rights of disability recipients, as the SSA’s interpretation of the statutes violates the Constitution.

I. SSDI AND SSI CLAIMANTS IN EASTERN KENTUCKY TURNED TO ERIC C. CONN FOR LEGAL ASSISTANCE DUE TO HIS AGGRESSIVE ADVERTISING

Eric C. Conn operated the third most lucrative disability practice in the United States through “exploit[ing] key vulnerabilities in a critical federal safety net program” in a poverty-stricken area of Appalachia. Major socioeconomic disadvantages and health disparities exist in the coal mining regions of Appalachia. With few economic opportunities, depressed areas of Appalachia have turned to

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14 Galofaro, supra note 12.

15 See Estep, supra note 9 (highlighting how the prospect of losing benefits has negatively impacted former Conn clients).


17 CONN REPORT, supra note 7, at 1.

disability benefits as a form of income maintenance. Conn’s law office was located in Floyd County, Kentucky, where 30.4% of individuals live in poverty and 23.8% of individuals under sixty-five have a disability. Through Conn’s aggressive advertising, he managed to represent numerous claimants seeking Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). SSDI benefits are meant for individuals who are unable to continue previous work and cannot, considering “age, education, and work experience,” engage in any other kind of substantial gainful work which exists in the national economy. SSI benefits are meant for individuals who are low-income with few resources and are either disabled, sixty-five or older, or blind. To obtain these benefits for his clients, however, Conn resorted to a fraudulent scheme, unbeknownst to his clients, that involved multiple doctors and an administrative law judge.

A. Conn Colluded with Multiple Doctors to Falsify Medical Evidence

To be determined disabled, Conn’s clients had to meet the SSA’s definition of “disability,” defined as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” An individual cannot be deemed disabled “unless he furnishes such medical and other evidence of the existence” of a medical impairment. When Conn’s clients received their letters from the SSA, the letters stated that there was reason to believe fraud was involved in their disability application because medical evidence in their case supplied by doctors hired by Conn may have been “fraudulent.”

To obtain favorable medical evidence, Conn scheduled appointments primarily with four doctors, Frederic Huffnagle, David Herr, Bradley Adkins, and Srinivas Ammisetty, that were favored by his law firm. These doctors had a history of disciplinary actions and malpractice claims, and they were purposefully recruited by Conn. Conn advertised that clients could see one of these doctors at his law office.

21 CONN REPORT, supra note 7, at 24.
24 CONN REPORT, supra note 7; Galofaro, supra note 12.
26 Id. § 423(d)(3)(A).
27 Estep, supra note 9.
28 CONN REPORT, supra note 7, at 58–72.
29 Id. at 58.
30 Conn, supra note 4.
In fact, Conn had a “medical suite” in his office where one of these doctors, Dr. Frederic Huffnagle, “examined” patients.\textsuperscript{31} The doctor would examine each client for “as little as 15 minutes,” and the doctor would examine “up to 35 claimants in a day.”\textsuperscript{32} Though Conn’s clients also had previous medical evidence, Conn disregarded the previous evidence and furnished the doctor with template medical forms that he had already filled out, and, “allegedly,” the doctor would sign the forms without examining the client.\textsuperscript{33} These forms at times would contain information that conflicted with other evidence in the client’s file.\textsuperscript{34}

For example, the SSA requires that each claimant submit a Residual Functional Capacity (RFC) form when a medical determination is necessary in their case, and other conditions are met, such as the “individual has a severe impairment.”\textsuperscript{35} The RFC form is used to measure the claimant’s “ability to meet the physical, mental, sensory, and other requirements of work.”\textsuperscript{36} Conn had several versions of the RFC form with information already filled out.\textsuperscript{37} The only fields left blank on the form were the client’s name and social security number.\textsuperscript{38} According to the Senate testimony of a former employee of The Conn Law Firm, Jamie Lynn Slone, the RFC form would then be assigned to clients randomly, and Dr. Huffnagle would sign the RFC form.\textsuperscript{39} Therefore, numerous clients had identical RFC forms in their files.\textsuperscript{40} Conn’s grand jury indictment stated that Conn also fabricated radiological images, including X-ray images, that depicted his client with a limitation deemed a disability by the SSA.\textsuperscript{41} A fabricated opinion of the image was also provided to Dr. Huffnagle for signature.\textsuperscript{42} From 2006 until 2010, Huffnagle received $979,782 from Conn in consultation fees.\textsuperscript{43}

\textsuperscript{31} \textit{CONN REPORT, supra note 7}, at 5, 60.
\textsuperscript{32} \textit{Id. at 5}.
\textsuperscript{33} Hicks v. Colvin, 214 F. Supp. 3d 627, 631 (E.D. Ky. 2016).
\textsuperscript{34} \textit{CONN REPORT, supra note 7}, at 5.
\textsuperscript{35} \textit{SOC. SEC. ADMIN., DI 24510.001, PROGRAM OPERATIONS MANUAL SYSTEM, RESIDUAL FUNCTIONAL CAPACITY (RFC) ASSESSMENT-INTRODUCTION} (2017), \url{https://secure.ssa.gov/poms.nsf/lnx/0424510001} [https://perma.cc/5A8V-4PVU].
\textsuperscript{36} 20 C.F.R § 404.1545 (2018).
\textsuperscript{38} \textit{Id}.
\textsuperscript{39} \textit{Id. at 41–42}.
\textsuperscript{40} \textit{CONN REPORT, supra note 7}, at 62.
\textsuperscript{41} Indictment at 14, United States v. Conn, No. 5:16-CR-22-DCR (E.D. Ky. Apr. 1, 2016), 2016 WL 9453534.
\textsuperscript{42} \textit{Id.}; \textit{CONN REPORT, supra note 7}, at 56.
Psychologist Alfred Bradley Adkins also signed forms that contained false information regarding Conn’s clients’ mental health. When the SSA requested medical documentation, Conn solicited Adkins to sign pre-completed medical evaluation forms. Earlier on, Adkins allegedly would sometimes change his assessments of Conn’s clients to make them appear more disabled, but later on Adkins would sign forms without any change. The government found that 74% of the mental RFC forms signed by Adkins were one of just five different forms. Routinely, finding two identical RFC forms “should be next to impossible,” as different individuals have a unique set of abilities. Furthermore, Adkins signed the same RFC form for Conn’s adolescent clients as he did for Conn’s adult clients. For example, one form for a seven-year-old boy rated the child “fair” regarding his ability to follow work rules and relate to co-workers. Adkins earned almost $200,000 for signing fraudulent medical forms.

B. Conn Colluded with Administrative Law Judge David Daugherty to Quickly and Fraudulently Award Benefits

In 2011, the Wall Street Journal first exposed public concern about the relationship between Conn and Administrative Law Judge David Daugherty. The article asserted that Daugherty “decided 1,284 cases and awarded benefits in all but four” in 2010. While cases are supposed to be assigned randomly, judges and staff in the Huntington, West Virginia office complained that Daugherty assigned Conn’s cases to himself, including cases assigned to other judges.

Furthermore, former SSA employees filed an action under the False Claims Act against Conn. The former SSA employees alleged that Conn and Daugherty manipulated the assignment of disability cases and granted awards to “undeserving clients.” They alleged that Daugherty would conduct “sham proceedings” or award benefits without a hearing. The Wall Street Journal examined Daugherty’s court proceedings and found that he often made decisions without a hearing or an examination of the evidence.

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46 Id. supra note 44.
47 Hearing, supra note 37, at 7 (statement of Sen. Tom Coburn).
48 Id.
49 CONN REPORT, supra note 7, at 71.
50 Id.
51 Press Release, U.S. Dep’t of Justice, supra note 45.
53 Id.
54 Id.
56 Id.
57 Id.
schedule for February 22, 2006, and found that Daugherty held “20 hearings spaced 15 minutes apart for Mr. Conn and his clients.”

By 2011, Daugherty and Conn had devised a scheme that allowed Daugherty to approve benefits in "assembly-line fashion." Beginning in 2006, Daugherty would send Conn the “DB List,” a list of clients that Daugherty planned to approve for benefits that month. Daugherty called a Conn employee, provided the list, and indicated whether the claimant needed to provide additional physical or mental evidence of impairment. The claimants would schedule appointments with one of Conn’s doctors, who would conclude that the claimant was disabled, and the doctor signed and dated a medical form already filled out by Conn’s office. Daugherty would then receive the medical evidence he requested and would overturn agency denials in order to award benefits. Daugherty relied entirely on Conn’s doctors’ medical evidence when awarding benefits. The entire process took as little as thirty days. While nationally, and within the same Huntington office, individuals seeking disability benefits waited well over a year.

After Conn’s clients received benefits, he would submit forms to the SSA to receive fees for his representation. Conn paid Daugherty an average of $8,000 a month. In the end, “Daugherty received more than $609,000 in cash from Conn for deciding approximately 3,149 cases.” Daugherty was sentenced to four years in prison for his role in the fraud scheme.

II. THE SOCIAL SECURITY ADMINISTRATION’S RESPONSE

Conn’s clients were targeted for wrong-doing before Conn was, even though there was no evidence that his clients “knew about or took part in alleged fraud.” In fact, criminal charges had not yet brought against Conn when his clients first received their suspension and redetermination letters. It was roughly a year after

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58 Paletta, supra note 52.
59 CONN REPORT, supra note 7, at 2.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id. at 80.
65 Id. at 2.
66 Id.
69 Id.
70 Id.
72 Bill Estep, Government Moves to Suspend Disability Payments to Many in Eastern Kentucky, Citing Suspected Fraud, LEXINGTON HERALD-LEADER (Nov. 13, 2015, 12:10 AM),
clients received their suspension letters before Conn was charged with a crime.73 Moreover, the SSA did little to stop the abuses of the disability program by numerous judges, lawyers, doctors, and agency officials.74 The agency was aware of Daugherty’s conduct for years, yet ignored it.75 The agency, however, was quick to condemn Conn’s clients.

After the SSA sent letters to Conn’s clients and terminated their benefits before their redetermination hearings, a class action lawsuit was filed against the SSA,76 and U.S. Representative Hal Rogers met with SSA representatives to discuss the agency’s decision to suspend benefits.77 The SSA then agreed to reinstate benefits to the nine hundred individuals who received suspension notices.78 The claimants, however, could not use any of the evidence supplied by Conn’s doctors in their redetermination hearings.79 The U.S. Department of Justice asserted that evidence claimants had submitted to Conn was lost or destroyed.80 Claimants, therefore, were left to testify about their health at the time that they first applied for benefits, without reliance upon any evidence in their initial file submitted by Conn.81 An examination of the redetermination process highlights the procedure that Conn’s clients went through to retain their benefits. Furthermore, a discussion of how the SSA’s actions caused a humanitarian crisis in Eastern Kentucky will provide insight into how the Mathews Court underestimated the individual interest involved when it failed to recognize that disability recipients were dependent on their benefits for survival.

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74 CONN REPORT, supra note 7, at 95.
75 Id. at 108.
77 Estep, supra note 71.
78 Id.
80 See Press Release, U.S. Dep’t of Justice, Retired Judge, Attorney and Psychologist Indicted in $600 Million Social Security Fraud Scheme (Apr. 5, 2016), https://www.justice.gov/opa/pr/retired-judge-attorney-and-psychologist-indicted-600-million-social-security-fraud-scheme [https://perma.cc/W59E-4S17] ("Conn . . . destroyed and directed others to destroy evidence, including federal reports, a computer tower and other electronic hardware and media located at his law firm."). Recent evidence has come to light that contradicts the Department of Justice’s assertion that the records were lost or destroyed. Shawn Allen & Marissa Silver, Video Apparently Showing Thousands of Eric C. Conn Client Medical Files Discovered, WYMT (Jul. 7, 2018, 5:17 PM), https://www.wymt.com/content/news/Video-apparently-showing-thousands-of-Eric-C-Conn-client-medical-files-discovered--4875063 11.htm [https://perma.cc/KXS7-WESM] ("Video showing thousands of client medical files in Eric C. Conn’s office [has] been recently discovered.").
81 Hicks, 214 F. Supp. 3d at 632.
As soon as the Office of Inspector General (OIG) has reason to believe that fraud is involved in an individual’s case, the information regarding the individual shall be referred to the SSA. The Commissioner of Social Security then has to “immediately re-determine the entitlement of individuals to monthly . . . benefits if there is reason to believe that fraud . . . was involved in the” individual’s application. Evidence submitted by the claimant is disregarded if there is reason to believe fraud was “involved in the providing of such evidence.” The SSA can consider new and material evidence that does not involve fraud that is “related to the period being redetermined.” For Conn’s clients, however, the medical evidence in their cases was supplied by Conn’s doctors. Therefore, they had no medical evidence that related back to their initial claim for benefits. Furthermore, Conn’s clients were only given ten days to locate medical evidence that related back to the period when they first applied for benefits. With the urging of Representative Hal Rogers, the SSA gave clients thirty days, which was still not enough time for a layperson to obtain records without legal assistance.

Though many clients had recertification of their disability within the past year, the recertification decision could not be used in their redetermination hearing. Another obstacle in the way of obtaining further medical evidence, aside from Conn’s purported destruction of client files, was that individuals would have to pay to obtain their records; some hospitals charged $1 per page. Without original doctor’s reports from the period when the individual first filed for benefits, their cases were “doomed.” If the SSA had conducted the redetermination based on its own finding of fraud, and not the OIG’s findings, the individual could appeal “whether SSA should have disregarded evidence.” Conn’s clients could not appeal whether the evidence provided in their disability claims was, in fact, fraudulent because the OIG referred the evidence of fraud in their cases to the SSA. The OIG,
therefore, had the final word on whether the evidence in the individual’s file was fraudulent.95

If it is determined that an individual did not qualify for benefits after their redetermination hearing, the benefits paid may be treated as overpayments.96 An individual may appeal the SSA’s “determination that after disregarding evidence, the remaining evidence does not support that individual’s entitlement to or eligibility for benefits and results in termination of such entitlement or eligibility.”97 The individual may also appeal any overpayments the SSA assesses “based on such evidence.”98 Out of the nearly sixteen hundred Conn clients who had to participate in a redetermination hearing, eight hundred have lost their benefits.99 These individuals could be truly disabled, but, because they hired a lawyer who took shortcuts and supposedly did not properly preserve their medical records, they could not submit evidence to prove their disability.100 The eight hundred individuals, therefore, may be liable for overpayments.

B. The SSA’s Actions Caused a Humanitarian Crisis in Eastern Kentucky

Individuals initially determined disabled by the SSA grew dependent on their disability income, as it was their only source of survival. For example, the family of Tim Dye, a former coal miner, “grew entirely dependent” on his disability income.101 Dye was denied benefits at his redetermination hearing, as a “vocational expert told the judge Dye’s back problems wouldn’t prevent him from working a desk job.”102 The definition of one’s disability is tied to their age, education, and work experience.103 It was unlikely that Dye would receive a desk job with only a high school diploma, experience in coal mining, and an “eight-year gap on his résumé.”104 With Dye’s wife laid off from her government job, they could not afford their water bill.105 The Dyes relied on “a system of runoff hoses and barrels to collect” water.106 To keep their home from being foreclosed on, the Dyes sold almost all of their furniture and personal items.107 Many of Conn’s clients, like the Dyes, “ha[d] no

95 Id.
97 Id. at 13438.
98 Id.
101 Galofaro, supra note 12.
102 Id.
104 Galofaro, supra note 12.
105 Id.
106 Id.
107 Id.
savings to fall back on." This left many scrambling to afford food, housing, medication, and other life necessities. For instance, one client now sleeps in his pickup truck, another retained only her camping gear and lives with her child in the woods, and another client lost his “house and everything in it.” It is speculated that three individuals committed suicide after receiving suspension letters, events that weighed on the SSA’s decision to reinstate benefits. Ned Pillersdorf, an attorney who has lead the fight for Conn’s clients, and has advocated relentlessly for them, stated that the SSA’s “strategy is to punish the most vulnerable folks in the most economically distressed area of our nation.” The hardships and experiences of Conn’s clients have largely been ignored by the media, while Conn’s actions have been documented extensively.

III. THE MATHEWS TEST AND JUDICIAL RESPONSE TO CONN’S CLIENTS’ DUE PROCESS ALLEGATIONS

The Fifth Amendment Due Process Clause states that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” Procedural due process is violated when a law “is enforced through an unfair process that impairs a liberty or property interest.” The Supreme Court altered the law of procedural due process when it developed the Mathews v. Eldridge balancing test. The test balances three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.

These factors are balanced to determine what process is due when the government interferes with an individual’s property interests. The test can be thought of as a cost-benefit analysis because it balances adequately protecting the individual against the costs the government might incur. Conn’s clients filed lawsuits claiming that the SSA violated their due process rights. Indeed, a federal
court found that Conn’s clients’ Fifth Amendment Due Process rights were violated by the SSA’s predetermination process. The court’s opinion in Hicks v. Colvin is instructive on the problems with the Mathews test, and it is also instructive on why the legislature needs to reevaluate the SSA’s redetermination statutes.

A. Hicks v. Colvin

The very first sentence of the court’s opinion stated that Conn’s clients were “afforded less due process” than terrorists. Amy Jo Hicks’s case detailed the typical scenario that Conn’s clients were faced with following receipt of their termination letters. Hicks was one of the approximately fifteen hundred clients who received a letter and underwent a redetermination hearing in 2016. The relevant period for Hicks’s hearing was September 1, 2007, through July 2, 2008—the period in which she initially applied for benefits. All of the evidence that Hicks submitted had to apply to that period, and any evidence submitted by Conn’s doctors could not be considered. Any medical evidence that Hicks had supplied to Conn was reportedly lost or destroyed. Without the evidence that she supplied to Conn, Hicks was left to testify about her health ten years prior, which was even more burdensome for Hicks because she received disability benefits due to “mental deficits” that affected her ability to recall information. After the redetermination hearing, the Administrative Law Judge (ALJ) concluded that Hicks did not have enough evidence to support her claim for benefits. Hicks appealed the ALJ’s decision, but the SSA declined to review it, and “Hicks no longer receives disability payments.”

The judiciary had varying responses to Conn’s clients’ due process claims. The courts in Perkins v. Colvin and Carter v. Colvin held that claimants were not denied due process because they “were given a full opportunity to supplement and/or develop new evidence to substitute for the excluded evidence.” The court in Hicks v. Colvin held that claimants were denied a meaningful hearing in violation of the

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120 Id.
122 See Hicks, 214 F. Supp. 3d 627.
123 Id. at 632.
124 Id.
125 Id.
126 Id. Between “6,000 to 8,000” files have been located at Conn’s law office. The files may contain medical evidence that can help claimants prove that they are actually disabled. Yet, claimants are still struggling to get access to the discovered files. Don’t Re-victimize Eric C. Conn’s Clients. Social Security Should Allow Time for Them to get Their Records., LEXINGTON HERALD-LEADER (Sept. 25, 2018, 8:59 PM), https://www.kentucky.com/opinion/editorials/article219030325.html [https://perma.cc/JFC5-52VA].
127 Id.
128 Id. at 633.
129 Id.
130 Perkins v. Colvin, 224 F. Supp. 3d 575, 579 (E.D. Ky. 2016); Carter v. Colvin, 220 F. Supp. 3d 789, 797 (E.D. Ky. 2016); see also id. at 804 (“Because plaintiffs are given a meaningful opportunity to substitute for the excluded evidence, they have not been deprived due process.”).
Due Process Clause and the *Mathews* balancing test. The court reasoned that Conn’s clients could not gain new records because the SSA removed the only records they could reasonably access. Therefore, in the court’s view, Conn’s clients could not develop new evidence to substitute for the excluded evidence.

All meaningful hearings have to provide “a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.” In Hicks’s case, the government never allowed her to dispute whether the medical forms were fraudulent, or regardless of the purported fraud in her forms, “whether the forms had some data worth considering.” Hicks also could not gain any new evidence because the SSA removed the only medical evidence Hicks could reasonably access ten years after her initial hearing. While *Mathews v. Eldridge* allows the agency to give a hearing after the termination of benefits, the hearing must be meaningful, and that was not the case for Hicks because she could not contest the OIG’s finding of fraud. In this sense, “the timing of the hearing may [change], but the quality of the hearing [must remain] the same.”

The court tried to avoid using the *Mathews* balancing test, until the SSA argued that giving Hicks additional process—that is allowing Hicks to challenge whether her records were fraudulent—would be too expensive. While relying on the *Mathews* test, the court also criticized it, asserting that “due process included certain features that cannot be bargained away.” The court contended that this principal should be the starting point and if a party wants additional process then the *Mathews* test can apply, “[o]therwise the government could simply remove fundamental procedures . . . just because they might be costly or ineffectual in a particular line of cases.”

The court held that Hicks had a significant interest at stake because she would be destitute without her disability payments, satisfying the first prong of the *Mathew’s* test—the private interest involved. The SSA argued that Hicks had no interest in a better redetermination process because she could file a new application or request the SSA waive her repayment of past benefits received. The court, however, disagreed because filing a new application or defending past payments would be burdensome on Hicks, and the point of *Mathews* was that Hicks must have a meaningful hearing where she can challenge the information the government used against her. Additionally, there was a risk that the SSA had

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131 Hicks, 214 F. Supp. 3d at 636–37.
132 Id. at 638.
133 Id. at 637–38.
134 Id. at 633 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004)).
135 Id. at 637.
136 Id. at 638.
137 Id. at 642.
138 Id. at 635.
139 Id. at 641, 644.
140 Id. at 643 n.8.
141 Id.
142 Id. at 641.
143 Id. at 642.
144 Id.
erroneously deprived Hicks of her interests in her benefits because the OIG could have incorrectly decided that Hicks’s medical forms were fraudulent because the template forms could have been “accurate as to her.” Further, the government did not have a significant reason for denying Hicks additional process because the SSA would not have to conduct hundreds of “mini-trials” as the government contended, and the burden of giving Hicks additional process was not “heavy enough to tip the Mathews scales.” The court suggested that an adequate hearing could proceed as follows:

The SSA calls an OIG agent to the redetermination hearing. The agent testifies about how he came to believe that there was fraud in part of Hicks's file. Hicks cross-examines the agent and presents evidence to show why her forms were all true. After this exchange, the ALJ can decide for herself whether to consider the template form, and, if so, how much weight to give it. No mini-trial necessary. In fact, this process would look much like a Rule 5.1 preliminary hearing in a criminal case.

The court further reasoned that the SSA’s own interpretation of the redetermination statute, that evidence must be disregarded when the OIG has “reason to believe” it is fraudulent, violates the Constitution. The court reasoned that it is one thing to exclude fraudulent evidence, but that forming a reason to believe the evidence is fraudulent is another. In the end, the court ordered an “administrative law judge to conduct a supplementary hearing for Hicks where she could discuss the medical evidence that Conn submitted on her behalf a decade ago,” and “[i]f the administrative law judge conclude[d] that the evidence ‘deserves some weight,’ then he must reconsider the decision to end Hicks’s benefits.”

B. The problems with the Mathews Test: Is it time for a new due process test?

The Supreme Court in Mathews v. Eldridge held that a Social Security recipient had no right to an evidentiary hearing before their disability benefits were terminated. Welfare recipients, however, are entitled to a hearing, where they have the opportunity to confront and cross-examine witnesses before termination of their benefits. In Mathews, the Court reasoned that “[e]ligibility for disability payments is not based on financial need.” Although an individual whose benefits are erroneously terminated may experience hardship, “[t]he potential deprivation . . . is generally likely to be less than [a welfare recipient’s]” because individuals will have

145 Id. at 643 (highlighting that even if Hicks’s form was fraudulent, the form could still contain other truthful information that was helpful to her).
146 Id. at 645.
147 Id. at 644–45.
148 Id. at 639.
149 Id.
149 Id.
150 Cheves, supra note 100.
153 Mathews, 424 U.S. at 321.
private resources and can turn to government assistance.\textsuperscript{154} The Supreme Court, therefore, contended that disability recipients do not get the same heightened interest that welfare recipients do.\textsuperscript{155}

Legal scholars have criticized the Mathews decision for its disrespect of the "value of protecting through fair procedures an individual's interests in dignity and equality of treatment."\textsuperscript{156} The dissent in Mathews argued that it was speculative of the majority to determine that disability recipients would only suffer "limited deprivations."\textsuperscript{157} The dissent highlighted that a foreclosure proceeding was brought against the home of George Eldridge, the plaintiff in Mathews, and his family's furniture was repossessed, "forcing Eldridge, his wife, and their children to sleep in one bed."\textsuperscript{158} The humanitarian crisis experienced in Eastern Kentucky further sheds light on the problems with the Mathews test, as Conn's clients have displayed a strong interest in keeping their disability benefits; receiving benefits is a matter of life or death. Just like Eldridge, they have lost their homes, their belongings, and their families have suffered.\textsuperscript{159} There is no doubt that the majority in Mathews was merely being speculative when the court stated that disability recipients would only suffer minimally.

When Mathews was decided, it was inaccurate to say that disability recipients did not rely on their benefits in the same way that welfare recipients did or that their mental anguish was not as severe,\textsuperscript{160} and the same is true now. When an individual is "poor or mentally or physically impaired," the "emotional trauma" benefit deprivation causes is "exacerbated," and the "emotional trauma" of facing significant debt cannot be remedied by the SSA's subsequent reinstatement of benefits.\textsuperscript{161} Conn's clients were left destitute without their benefits much in the same sense that welfare recipients would be left destitute if their benefits were terminated.\textsuperscript{162} Conn's clients were confronted with the dilemma of either going without income or trying to obtain employment, which would automatically disqualify them for benefits regardless of whether they were physically or mentally impaired.\textsuperscript{163} Furthermore, public assistance is not likely to cover a family's basic expenses, and that assistance is not a guarantee as many individuals will not receive such assistance.\textsuperscript{164} Immediate obtainment of public assistance is also not as easy as the Court suggested.\textsuperscript{165} Conn's clients struggled to provide food and shelter for themselves and their families, and

\textsuperscript{154} Id. at 341–42.
\textsuperscript{155} See id. at 343.
\textsuperscript{157} Mathews, 424 U.S. at 350 (Brennan, J., dissenting).
\textsuperscript{158} Id.
\textsuperscript{159} See supra Section II.B.
\textsuperscript{161} Lawrance, supra note 164, at 636.
the gravity of losing disability benefits that individuals relied on for their only financial support drove three individuals to commit suicide. In this sense, Conn’s clients scrambled to survive, much in the same way the Court in Goldberg v. Kelly believed welfare recipients would if they did not get pre-termination hearings. This mirrors the experience of Eldridge when the Court refused to allow him a redetermination hearing.

The Supreme Court in Mathews “greatly underestimated both the scope and the extent of the individual interest involved,” by failing to recognize that disability recipients depend on their benefits for their very means of survival. Surely, the Dye Family, who have gone without running water in their home, and other Conn clients who lost their homes or family members to suicide, would agree that disability benefits were a vital source of income for their families, and the hardships they have suffered from the termination of benefits have been extraordinary. It was clearly erroneous for the Supreme Court to determine that disability recipients were not entitled to the same heightened interest that welfare recipients were because disability recipients whose benefits are terminated suffer hardships that are arguably equal to those suffered by welfare recipients.

Moreover, the balancing test used in Mathews concluding that disability recipients are not entitled to the same heightened interest as welfare recipients has received much criticism. Do balancing tests reach a reasoned resolution, or are they arbitrarily based upon a judge’s own values? Can an individual’s due process rights even be balanced away? In Mathews, the Court asserted that “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.” “But, the Government’s interest,” and, therefore, the public’s interest, “in conserving... resources is a factor” that the court must weigh. In the end, the Supreme Court concluded that an evidentiary hearing was not required. Thus the Court’s perception of the differences between welfare recipients and disability recipients tilted the “balance” in favor of the government.

Earlier Supreme Court decisions “after Mathews . . . identified the three-factor framework as merely a useful tool of analysis,” rather than describing the framework as a test. The Court subsequently began using the Mathews framework as a test, which is “a tool for reaching decisions rather than simply for expressing in legal language the rationale for decisions reached through an assessment of basic fairness.” Today, the Mathews test is generally treated as

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166 Galofaro, supra note 12.
168 Kubitschek, supra note 115, at 72.
169 Galofaro, supra note 12.
170 id.
172 id.
173 id.
175 id.
“outcome-determinative.” Legal scholars argue balancing tests are only effective when weighted items can actually be tilted one way or another “eliminating any human thought to control the result.” Legal balancing can rely on a judge’s personal beliefs, instead of the actual weighted evidence.

The influence of judge’s personal beliefs was evident in the different conclusions reached in *Hicks v. Colvin* and *Carter v. Colvin*. Both courts applied the *Mathews* test to Conn’s clients due process claims yet reached different results. In *Carter*, the Court held that the risk of erroneous deprivation was minimal because Conn’s clients had a “meaningful opportunity to substitute for excluded evidence.” Therefore, the government’s interest in swift termination of benefits following the redetermination process outweighed any additional procedures the plaintiffs might be entitled to. Analyzing Conn’s clients’ cases through the experience of Amy Jo Hicks, the court in *Hicks* reached the opposite conclusion. The court reasoned that the probable value of Hicks receiving “additional procedural safeguard[s]—specifically a chance to contest the OIG’s fraud assertion,” was high and, as previously noted, Hicks did not have a meaningful opportunity to gain new evidence. The court held that the SSA failed to identify any governmental interests that additional process would upset, finding the redetermination process unconstitutional. This reveals how a judge’s own perception of a case can affect the outcome.

Ultimately, one must agree that there is a core of due process that cannot be balanced away. Balancing tests leave much to the judge’s own discretion and personal values. As the court noted, “[w]hen the naked eye can see that process falls short of the mark, courts need no measuring tape.” Thus, when there has been an inherent violation of the Due Process Clause, it must be recognized in fairness before the *Mathews* test is applied. Courts could easily turn to legal precedents to remedy a supposed due process violation. Indeed, the court in *Hicks* took the reader on a tour of the legal precedents through the years to reach the decision that the redetermination process was unconstitutional, without even having to weigh the *Mathews* factors.

The *Mathews* test, therefore, should not be outcome determinative. It should be thought of as a useful tool of analysis to determine what process is fair based on legal precedents and not a judge’s arbitrary balancing of factors, which was originally conceived to be its purpose by earlier Supreme Court cases. As seen in the above example, on the same set of facts, one judge could understand the government’s interests

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176 *Id.* at 22.
177 *Id.* at 290–91.
178 *Id.* at 291–92.
181 *Id.* at 804.
182 *Id.* at 802–04.
183 *Hicks*, 214 F. Supp. 3d at 646.
184 *Id.* at 644.
185 *Id.* at 646.
186 *Id.* at 641.
187 *See id.* at 634–38.
188 *Id.*
189 *See Lawson et al., supra* note 174, at 21.
in cost and efficiency as being superior, while another could view the private interest and risk of erroneous deprivation as greater. This arbitrary balancing of factors leads to results based on an individual judge’s values and perception of whether the government or individual had the strongest legal argument.

As scholars have argued, when Mathews is used as a decision-making tool and “decisional accuracy” is considered most important, “the value that individuals place on being heard” is disregarded, and, without personal participation, there is “a loss of the dignity and self-respect that society . . . deems valuable.”190 Indeed, Mathews does not weigh the individual’s value in process, that is, knowing why the government acted against them.191 As seen in Amy Jo Hicks’s case, there was no mention of what exact evidence in her file caused her to be subject to fraud proceedings, other than mention that there may have been template medical forms in her file authored by Conn’s doctors.192 Hicks, however, was never given the opportunity to challenge the assertion that her entire file was fraudulent.193 If courts rely exclusively on the Mathews test, important individual values are entirely disregarded.

Finally, the Mathews holding may disincentivize the legislature to correct “deficiencies in the procedures of . . . governmental programs.”194 It is unavoidable that Supreme Court cases affect future legislative acts, but another flaw in the Mathews test is that it does not take this factor into consideration. The Supreme Court’s holding that “only welfare recipients” suffer “grievous loss” “relieves legislative bodies and administrative agencies” from identifying recipients of governmental benefits who actually “face serious loss if denied a presuspension hearing.”195 The Court’s holding may also discourage improving “agency procedures for cases [involving] termination of disability benefits.”196 Legislatures may even be better prepared to balance interests because they represent “social groups and speak to the issue in a representative capacity.”197 In the case of Conn’s clients, the SSA failed to properly safeguard their due process rights because it did not allow them to challenge the OIG’s assertion of fraud. The legislature may be better suited to ensure that individual’s due process rights are protected by agency actions.

IV. THE LEGISLATURE SHOULD AMEND THE SSA’S REDETERMINATION STATUTES TO SAFEGUARD DISABILITY RECIPIENTS CONSTITUTIONAL RIGHTS

As referenced above, if the OIG believes that there is fraud in an application, the OIG forwards the application to the SSA.198 The SSA then must immediately redetermine an individual’s entitlement to benefits.199 The Social Security Administration Hearings, Appeals, and Litigation Law Manual (HALLEX) lays out

190 Id. at 22–23.
191 See Hicks, 214 F. Supp. 3d at 641 n.7.
192 See id. at 632.
193 Id. at 637.
194 Lawrence, supra note 164, at 650–51.
195 Id. at 642–43.
196 Id. at 643.
199 Id. § 1383 (e)(7)(A)(i).
the procedures that the SSA follows when redetermining an individual’s entitlement to benefits.\textsuperscript{200} The HALLEX specifies that the statutes calling for OIG referral to the SSA and the SSA’s immediate redetermination of benefits do not allow adjudicators the discretion to reconsider the issue of “whether the identified evidence should be disregarded based on an OIG referral.”\textsuperscript{201} Disability recipients, therefore, cannot challenge an assertion of fraud in their medical evidence if the SSA’s action was based on the OIG’s referral.\textsuperscript{202} The OIG’s finding of fraud is final.\textsuperscript{203} But, a “procedural law that is not supported by logic, fairness, and efficiency considerations, one that has no reason other than to deprive the individual of life, liberty, or property, one that doesn’t serve any individual or societal interest, violates due process.”\textsuperscript{204} The SSA’s interpretation does not serve any valuable purpose, and works only to deprive an individual’s property interests in their disability payments and their liberty interests in a fair and meaningful hearing.

Moreover, the HALLEX contends that individuals can appeal whether evidence should have been disregarded if the SSA conducted the redetermination based on their own finding of fraud.\textsuperscript{205} Why does the SSA insist that the law be different in these two circumstances? Why is there a denial of an appeal to disregard evidence if the OIG referred the case to the SSA? The SSA offers no explanation for why the OIG’s findings are given such weight, other than the HALLEX interprets the statutes as not allowing reconsideration of the OIG’s referral. As an agency manual, the HALLEX has “not gone through the notice-and-comment process, and thus ‘lack[s] the force of law.’”\textsuperscript{206} The only plausible argument as to why the OIG’s referral cannot be challenged is that of efficiency. Yet one fails to see how allowing Hicks the opportunity to cross-examine the OIG’s agent and present evidence to show that her forms were true is any less efficient. There is no societal or individual interest in not allowing an individual to challenge the government’s factual assertions that affect their rights. For that reason, the court in Hicks v. Colvin refused to accept the SSA’s interpretation of the redetermination statute.\textsuperscript{207}

The OIG could have been wrong to exclude some of Conn’s clients medical evidence, but because the OIG’s finding of fraud cannot be challenged per the SSA’s interpretation, one would never know if Conn’s clients’ medical evidence contained nonfraudulent information beneficial to their claims. The SSA argued in Hicks v. Colvin that it could not give claimants any more process than what Congress allows them.\textsuperscript{208} The SSA’s interpretation of Congress’ intent was erroneous. Claimants are not afforded due process when they cannot challenge the OIG’s determination of fraud in their cases. Surely, Congress would not intend an interpretation that violates an individual’s constitutional rights.

The SSA’s interpretation of the redetermination statute has negative implications for

\textsuperscript{200} Hicks v. Colvin, 214 F. Supp. 3d 627, 631 (E.D. Ky. 2016).
\textsuperscript{201} HALLEX, supra note 85, § 1-1-3-25(C)(4)(a).
\textsuperscript{202} Hicks, 214 F. Supp. 3d at 631–32.
\textsuperscript{203} Id.
\textsuperscript{204} Grossi, supra note 114, at 158.
\textsuperscript{205} HALLEX, supra note 85, § 1-1-3-25(C)(6).
\textsuperscript{206} Hicks, 214 F. Supp. at 639 (quoting Christensen v. Harris City., 529 U.S. 576, 587 (2000)).
\textsuperscript{207} Id. at 645–46.
\textsuperscript{208} Id. at 639.
future claimants if the OIG suspects fraud in their cases. While awaiting sentencing, Conn fled from home detention. He was located in Honduras six months later. After his capture, about 2,000 more clients were notified that the SSA would hold redetermination hearings to determine whether they are eligible to continue receiving benefits, despite an ongoing case “challenging the agency’s right to review their eligibility on several grounds, including that the agency didn’t act quickly enough and that the process is not fair because they can’t challenge the evidence against them.” The lives of nearly 3,500 individuals have been affected by the SSA’s actions, and Eastern Kentucky has been hit like “a nuclear bomb.” After years of investigation, there is still zero indication that Conn’s clients knew about or took part in any fraudulent activity. Conn’s clients, therefore, are still being targeted for fraud that they did not commit, without any recourse for determining whether the evidence they submitted was actually fraudulent.

The legislature should not be deterred from improving the SSA’s procedures for evaluating fraudulent claims. On its face, the statutes are not unconstitutional as they do not explicitly say that the OIG’s assertion of fraud cannot be challenged. The SSA has failed to safeguard constitutional rights, and it may be necessary for the legislature to step in and amend the statute to clarify its intent. The legislature may make it expressly known through statute that individuals can appeal the OIG’s determination of fraud, for it is nonsensical and unconstitutional to allow an appeal of the SSA’s determination and not the OIG’s.

CONCLUSION

The scenario in Conn’s clients’ cases sheds light on how the Mathews court failed to properly understand how disability benefits play an integral part in an individual’s livelihood, and how balancing tests can leave much to a judge’s own discretion and values. Mathews should not be thought of as an outcome determinative test, rather it should be used by judges as a useful tool of legal analysis—its original intent. In the end, one must agree that there is a core of due process that courts cannot balance away. Further, the SSA’s interpretation of the redetermination statutes is unconstitutional, and the legislature, as a representation of the people, should step in and amend the statute to safeguard vital due process rights.

210 Id.
212 Id.
213 Id.