Testimony of Jeffrey S. Lubbers
Before the Social Security Subcommittee
House Ways and Means Committee
June 27, 2012

Chairman Johnson and Members of the Committee:

I am pleased to testify before the Subcommittee at today's hearing—the fourth in a series on "Securing the Future of the Social Security Disability Program."

I am Professor of Practice in Administrative Law at American University's Washington College of Law, where I have taught since 1996. As noted in my biography, from 1975-1995 I worked as an attorney and then as Research Director at the Administrative Conference of the United States (ACUS) and am now also serving as Special Counsel at the revived ACUS. However, I want to emphasize that the views I am expressing today (unless otherwise noted) are my own as an administrative law professor and should not be ascribed in any way to ACUS. Even more specifically, although as part-time Acting Research Director from January 1–June 15, 2012, I helped ACUS launch its current, SSA-requested study of ways to reduce the decisional inconsistency of SSA ALJs, the researchers are still engaged in preliminary fact-finding, and my testimony today is not informed by that study in any way, nor have I formed any conclusions about that study.

I. Growth of the SSA Adjudication System

The growth of the SSA disability adjudication program has been phenomenal. In 1973, the President of the Association of Administrative Law Judges (ALJs) in the Department of Health, Education and Welfare (HEW), made a presentation to a Civil Service Commission Advisory Committee on Utilization of Administrative Law Judges in which he said, "Administrative Law Judges in the Department of HEW have experienced a dramatic increase in the number of disability proceedings reaching the hearing level. There were 27,972 proceedings in 1969, 34,901 in 1970, 40,712 in 1971, and by fiscal year 1972 the total had jumped to an unbelievable 56,346."[1] A July 30, 1974 report of that Civil Service Commission indicated that the Social Security Administration (SSA) employed 430 ALJs at the time, and that the per-judge disposition rate had fluctuated between 114.1 and 143.6 cases per year between 1969–1973.[2]

A few years later, in 1978, a team of scholars led by Jerry Mashaw, studying the SSA disability adjudication system described the SSA Bureau of Hearings and Appeals as "probably the largest

[1] Statement of Frank B. Borowiec, presented to the Advisory Committee on Utilization of Administrative Law Judges, Civil Service Commission at 5 (July 11, 1973).

[2] U.S. CIVIL SERVICE COMMISSION, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES 58 (July 30, 1974).

administrative adjudication agency in the western world" with its 625 administrative law judges (ALJs) disposing of 180,000 cases in fiscal year 1976.[3]

Today those numbers seem miniscule. The SSA Commissioner has said that he expects the caseload to reach 832,000 in fiscal year 2012 with about 1400 ALJs.[4] One obvious by-product of this huge influx of cases is that the per-judge disposition rate has more than quadrupled from 114 per year in 1969, to 288 per year in 1976, to 594 in 2012.

This rise in the caseload will likely continue as higher number of "baby boomers" retire,[5] (2) the economic downturn drives unemployed workers to seek other sources of income,[6] and (3) private insurance companies increasingly require, as a condition of payments, that claimants pursue offsetting SSA disability benefits.[7]

II. The Legal Context

A. The Constitutional dimension

The Disability Insurance program was authorized in 1956 by Title II of the Social Security Act to provide benefits to disabled insured workers who no longer can work, and it was supplemented in 1972 by the Title XVI Supplemental Security Income (SSI) program for aged, blind, or disabled persons whose income and resources fall below a certain threshold. These programs thus have created statutory "entitlements" of benefits for eligible claimants, which means of course that the government cannot terminate benefits without due process. See *Mathews v. Eldridge*, 424 U.S. 319.[8]

But it is not so clear, based on Supreme Court caselaw, whether due process applies to *initial* applications and denials of benefits. In fact, "the Supreme Court has never held that an applicant

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[3] JERRY L. MASHAW, ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 1 (1978).

[4] Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the House Committee on Ways and Means, Subcommittee on Social Security and the House Committee on the Judiciary Subcommittee on the Courts, Commercial and Administrative Law (July 11, 2011), *available at* https://www.socialsecurity.gov/legislation/testimony_071111.html.

[5] Baby Boomers began to reach the age of 65 in 2011 and will finish reaching 65 in 2030. When they begin to retire in 2011, there will be 40.4 million seniors (or 13% of the population) and will grow to 70.3 million (20% of the population) by 2030. *See* Press Release, U.S. Census Bureau, Census Bureau Projects Doubling of Nation's Population by 2100 (Jan. 13, 2000).

[6] It is well known that while the disability program is not an employment scheme, applications rise when the economy falters. In April 2000, the national unemployment rate was 3.8%; today it is 8.3%.

[7] *Cf.* D. Gregory Rogers, *The Effects of Social Security Awards on Long-Term Disability Claims*, 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1117, 1117 (July 2001).

[8] *See id*. at 332: "The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment." (citation omitted).

for public benefits possesses a property interest protected by due process."[9] In the social security context, in *Richardson v. Perales*, 402 U.S. 389, 406-407, an applicant for benefits contended that SSA violated due process by relying on the written reports of examining physicians who were not available for cross-examination, but the Court was not convinced that he, as an initial applicant, had such a claim. In dicta, the Court said:

> Perales relies heavily on the Court's holding and statements in *Goldberg v. Kelly*, . . . particularly the comment that due process requires notice "and an effective opportunity to defend by confronting any adverse witnesses * * *." 397 U.S., at 267–268. *Kelly*, however, had to do with termination of AFDC benefits without prior notice. It also concerned a situation, the Court said, "where credibility and veracity are at issue, as they must be in many termination proceedings.". . . The *Perales* proceeding is not the same. We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice.

Even in *Mathews*, where the beneficiary's benefits were being terminated due to a "continuing disability review"(CDR), the Court found that, unlike in the welfare context of *Goldberg v. Kelly*, a pre-termination hearing was not constitutionally required. Congress, of course, has elected to continue allowing pre-termination ALJ hearings in initial denial cases.

B. Applicability of the Administrative Procedure Act (APA)

One often debated issue is whether the formal adjudication provisions of the APA are applicable to SSA disability adjudications. Twelve years ago I was asked to facilitate a session of the SSA's Executive Leadership Conference[10] on this very issue and a set of materials on this issue was prepared for this occasion by the organizers, which I would be happy to share with the Committee. I will provide some background about this issue, but will not dwell on it because, while an interesting legal and historical question, I think it is somewhat beside the point—because ultimately the issue of the APA's applicability is up to Congress, and moreover, even if the APA's procedures continue to be required in these cases, the APA itself gives both Congress and the agency sufficient flexibility to provide for hearings and hearing officers suitable for deciding such cases.

This issue arose in *Richardson v. Perales* because the claimant also claimed "that the Administrative Procedure Act, rather than the Social Security Act, governs the processing of claims and specifically provides for cross-examination."[11] The Court's response was, "We need not decide whether the APA has general application to social security disability claims, for the

[9] AM. BAR. ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION, 2D ED. 25–27 (Jeffrey B. Litwak, ed. 2012). Many courts of appeals have so held, however; *see* Jeffrey S. Lubbers, *Giving Applicants For Veterans' And Other Government Benefits Their Due (Process)*, 35 ADMIN. & REG. L. NEWS 16 (spring 2010).

[10] The session was held on November 2, 2000 in Berkeley Springs, WV.

[11] 402 U.S. at 408.

social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act."[12]

The SSA Act, 42 U.S.C. § 405(b), sets forth the hearing provision applicable to disability cases:

> The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual . . . the Commissioner shall give such applicant and such other individual reasonable notice *and opportunity for a hearing* with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. . . . The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure (emphasis supplied).

Under prevailing administrative law doctrine, unless Congress clearly requires the use of a formal APA adjudication, by using "magic words" such as "hearing on the record," agencies are free to interpret the simple "hearing" requirement as not triggering the APA's formal procedures.[13] Under this principle, based on the above language alone, SSA would be allowed to interpret the Act as allowing less formal procedures than the APA and use of non-ALJ adjudicators. However, some related legislative history cuts the other way. This is the story of the saga of the hearing officers appointed to hear the new cases created when the SSI program was enacted in 1972.[14]

Originally, when SSA requested the authority to hire additional ALJs to hear these cases, the Civil Service Commission (CSC, OPM's predecessor) determined that SSI hearings did not require APA-appointed ALJs to hear such cases. The Department of HEW (within which SSA operated at the time) challenged this view and the Chairman of the CSC "granted SSA's request to establish registers for [ALJs]." A group of ALJs "from 'old line' agencies" objected and was granted a hearing before the CSC. The then-SSA Commissioner "urged that full APA

[12] *Id.* at 409.

[13] *See* AM. BAR. ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION, 2D ED. 41–45 (Jeffrey B. Litwak, ed. 2012).

[14] The following recounting is drawn from Comm. Staff Report on the Disability Program, House Comm. on Ways and Means, 93d Cong., 1st Sess. (1974)

procedures be applied under SSI as under SSA." But the CSC Chairman reversed his position once more again finding that ALJs were not required in SSI hearings, because that program is not under the APA."

In January 1976, Congress then acted to confer "temporary ALJ" status to these SSI hearing officers for two years.[15] The saga ended when, in December 1977, Congress enacted legislation "deeming" these temporary ALJs to be full-fledged, permanent ALJs.[16]

This legislative history does seem to indicate that Congress, and this Subcommittee specifically, clearly expressed its intent that hearing officers presiding over SSA DI and SSI cases be Administrative Law Judges. Obviously, however, this decision is up to Congress to make or maintain, and, as I will mention below, the APA itself specifically provides that Congress can specially provide for other types of designated presiding officers, even in APA proceedings.

III. SSA DI Adjudication Reform Proposals

As this committee well knows, there are four levels of administrative decisionmaking for Social Security claims—and for most claims, they must pass through all four before a decision is subject to judicial review.[17] The process begins at local SSA offices, where the all-important initial disability determinations are contracted out to state-run Disability Determination Service (DDS) offices. SSA, together with the DDSs, makes the initial decision on an application and the initial decision to terminate benefits in CDR cases; in case of appeal, SSA and DDS also handle the first level of review, known as "reconsideration." Further administrative appeals are handled by SSA, but through its Office of Disability Adjudication and Review (ODAR), which houses the Office of the Chief Administrative Law Judge and approximately 1400 ALJs who are responsible for administrative hearings, along with the Appeals Council (with a chair and 70 "Administrative Appeals Judges"),[18] which reviews administrative hearing decisions on appeal by a claimant or, in a few cases, on its own initiative.

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[15] *See* Pub. L. No. 94-202 § 3:

> The persons appointed . . . to serve as hearing examiners in hearings under section 1631(c) of such Act may conduct hearings under titles II, SVI, and XVIII of The Social Security Act if the Secretary of Health, Education, and Welfare finds it will promote the achievement of the objectives of such title, notwithstanding the fact that their appointments were made without meeting the requirements for [ALJs] appointed under section 3105 of title 5, United States Code; but their appointments shall terminate not later than at the close of the period ending December 31, 1978, and during that period they shall be deemed to be hearing examiners appointed under such section 3105 and subject to all of the other provisions of such title 5 which apply to [ALJs].

[16] Pub. L. No. 95-216, tit. III, § 371, 91 Stat. 1559. *See also* Subcomm. of Soc. Sec. of the House Comm. Ways and Means, 96th Cong. "Social Security Administrative Law Judges: Survey and Issue Paper" (Comm. Print 1979).

[17] *See, e.g.,* Johnson v. Shalala, 2 F.3d 918, 920 (9th Cir. 1993) (Social Security Act, 42 U.S.C. § 405(g), "requires each Social Security claimant to exhaust his administrative remedies before appealing to a federal district court"). There are special rules for expedited appeals where the only issue is the constitutionality of an applicable provision of the Social Security Act.

[18] See http://www.socialsecurity.gov/appeals/about_ac.html. These judges are not ALJs and lack the statutory independence and APA protection enjoyed by ALJs.

Over the years, I have supported a number of program-specific improvements to the SSA adjudication process.[19] These are most fully set forth in the study that Paul Verkuil, Frank Bloch and I did originally for the Social Security Advisory Board (SSAB) in 2003.[20]

We were originally asked by the SSAB to examine the options of introducing some form of government representative and closing the record at a pre-ordained time. We decided not to propose a revival of the SSA's experimental program involving a government representative as an advocate. Instead we suggested a somewhat different approach to improving the record for decision at ALJ hearings: introducing a nonadversary "Counselor" into the disability adjudication process whose central role would be to monitor the process of developing the evidentiary record. This Counselor would work closely with all of the key actors—the claimant (and the claimant's representative, if there is one), the ALJ, and SSA (most likely through DDS)—in order to identify any gaps in the record and to fill them as quickly and efficiently as possible. The idea was that these Counselors would remove much of the development work from the ALJ, including the second- and third-hat roles of assuring that the claimant's and SSA's (or DDS's) positions are fully supported, and would serve a much-needed administrative liaison function between the DDS and ODAR.

We also recommended that the Counselors be given the resources and authority necessary to move claims quickly, especially those where benefits can be granted without a full administrative hearing. Consistent with the concept of nonadversarial representation, we noted that SSA Counselors need not—and perhaps should not—be lawyers. Most importantly, they should be qualified and trained to assure that they understand the relevant medical, vocational, and legal issues involved in Social Security disability adjudications.

Another central recommendation was that "SSA should revise its regulations to close the evidentiary record after the ALJ hearing," with a proviso that ALJs may extend the time to submit evidence after the hearing and before deciding the claim, and that claimants be allowed to request a reopening to submit new and material evidence (within a certain time period) if they can demonstrate good cause.[21]

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[19] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, report to the Social Security Advisory Board (March 1, 2002); *available at* http://www.ssab.gov/Publications/Disability/VerkuilLubbers.pdf; *also published at* 55 ADMIN. L. REV. 731 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*, Report to the Social Security Advisory Board (March 2003), *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf; *also published as Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 Cornell L. Rev. 235 (2007).

[20] See *id.*

[21] 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. 1, 62 (2003).

We also made a number of other specific recommendations; I have appended to this testimony the full set of our proposed recommendations.

In 2005, SSA proposed, and in 2006 finalized, a revised set of procedures for disability adjudication known as the Disability Service Improvement (DSI) process.[22] We were pleased to see that a number of our recommendations were incorporated into the DSI process, including the introduction of a Quick Disability Determination (QDD) process for certain types of claims where an initial finding of disability can be made within twenty days; the creation of a Medical and Vocational Expert System (MVES), designed to improve the quality and availability of medical and vocational expertise throughout the administrative process; the addition of a Federal Reviewing Official (FRO) (somewhat similar to our proposed Counselor), who would review appealed initial decisions before such decisions are scheduled for an administrative hearing; and rules implementing the closing of the record at the ALJ stage that were consistent with our recommendation.[23] In addition, the DSI also eliminated the reconsideration level of review following an initial denial of disability benefits; and replaced the Appeals Council with a new Decision Review Board (DRB) charged with broader responsibility for identifying and correcting systemic decision errors. But in a sign that that the agency was not completely confident about these changes, the plan was only implemented in the Boston region to start with.

In our review of the new program, we lauded Commissioner Barnhart for having "undertaken a much-needed, comprehensive reform of the SSA disability adjudication process."[24] We did, however, disagree with aspects of the DSI, most significantly the rule's authorizing the FRO to issue decisions to deny benefits. Our concern was that this would "excessively formalize this stage of the process, canceling out the streamlining provided by eliminating the reconsideration stage."[25]

Since the establishment, in 2006, of the DSI program in the Boston region, however, much of the program has fallen by the wayside. Although the QDD process was implemented nationally in September 2007,[26] shortly after Commissioner Astrue took over, and is apparently working

[22] Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590 (proposed July 27, 2005); Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

[23] *See* Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 Cornell L. Rev. 235, 246 (2007) (explaining that SSA had revised its proposed closing-of-the record rule to "markedly improve" it by "retain[ing] the policy of closing the record after the ALJ stage while allowing the ALJ sufficient discretion—with somewhat more liberal guidelines than the proposed rules—to hold the record open at the time of the hearing or reopen it after the hearing").

[24] *Id.* at 236.

[25] *Id.* at 243.

[26] 72 Fed. Reg. 51,173.

well,[27] he also, about the same time, issued a new notice of proposed rulemaking, proposing to suspend the MVES and FRO provisions of the Boston region pilot DSI procedures.[28]

He explained:

> Our experience over the last year in the Boston region demonstrates that the administrative costs associated with [FRO] and its consequent use of the [MVES] to develop medical and vocational evidence is [sic] greater over the foreseeable future than originally anticipated. We do not yet have sufficient results to fully evaluate the potential improvements in program efficacy that are the goals of the [FRO] and [MVES]. Therefore, we propose to suspend new claims going through the [FRO] and [MVES], so that we can reallocate resources to reduce the backlog at the hearing level, while we evaluate the [FRO] and [MVES] through the processing of claims already received.[29]

When this proposed suspension was finalized, in January 2008,[30] he further explained:

> The staffing levels for these organizations have been approximately 50% of the levels we believed would be needed to handle the Boston region workload. With the reduced staffing at the [MVES office], [the FRO office] has experienced delays in getting required medical evidence, consultative exams, and medical expert input. Budget constraints precluded us from hiring a full staff.[31]

A month after he proposed to end the FRO/MVES program, in October 2007, he also proposed extending the rest of the DSI program procedures nationwide and apply them to hearings on both disability and non-disability matters.[32] Changes were also proposed to the final level of the administrative review process "to make proceedings at that level more like those used by a Federal appellate court when it reviews the decision of a district court, to establish procedures for appeals to that level, and to change the name of the body that will hear such appeals" to "Review Board," and to limit "the circumstances in which new evidence may be added to the record during the appeals process."[33]

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[27] *See, e.g.*, Social Security Administration, notice of proposed rulemaking, Disability Determinations by State Agency Disability Examiners, 75 Fed. Reg, 9821, 9822 n.4 (Mar. 4, 2010) ("Our data demonstrate that the [QDD] model is working as we intend.").

[28] Social Security Administration, notice of proposed rulemaking, Proposed Suspension of New Claims to the Federal Reviewing Official Review Level, Changes to the Role of the Medical and Vocational Expert System, and Future Demonstration Projects, 72 Fed. Reg, 45,701 (Aug. 15, 2007).

[29] *Id.* at 45,702.

[30] Social Security Administration, final rule, Suspension of New Claims to the Federal Reviewing Official Review Level, 73 Fed. Reg, 2411 (Jan. 8, 2008).

[31] *Id.* at 2412.

[32] Social Security Administration, notice of proposed rulemaking, Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Social Security Administration, notice of proposed rulemaking, 72 Fed. Reg. 61,218 (Oct. 29, 2007).

[33] *Id.* at 62,218 (summary).

No further action has been taken on this rulemaking; in fact the agency reversed course in December 2009, by proposing to terminate the DSI program by ending its application in the Boston region.[34] This proposal was partially finalized in May 2011, when SSA issued a final rule eliminating the Decision Review Board aspect of the DSI program in the Boston region.[35] However, that rule did announce SSA was continuing to use the DSI's closing-of-the-record provision, and in fact announced that the October 2007 proposal to extend those specific rules nationally is still alive.[36]

It seems from this history that only the QDD and the closing-of-the-record provisions of the DSI have survived. The rest of the changes, even in terms of the pilot process in the Boston region have not—apparently due to the crush of the caseload and pressures and resource constraints that worsened after 2006. But I continue to believe that the "Counselor" and DRB ideas are good ones and that the closing-of-the-record procedures, that apparently are still alive in the Boston region, should be extended nationally as well.

IV. Current Pressing Problems

Turning to the pressing problems that have at least partially led to today's hearings—the crushing caseload pressure, persistent backlogs, and strikingly inconsistent decisional rates among ALJs, I will first outline the problems:

A. Backlogs

Although there has been some significant recent progress in reducing the pending caseload and concomitant processing delays, the problem is persistent. In March 2010, Commissioner Astrue, announced:

> that the number of disability hearings pending stands at 697,437 cases—the lowest level since June 2005 and down more than 71,000 cases since December 2008, when the trend of month-by-month reductions began. In addition, the average processing time for hearing decisions has decreased to 442 days, down from a high of 514 days at the end of fiscal year (FY) 2008.[37]

The press release mentioned that

> The agency hired 147 Administrative Law Judges (ALJs) and over 1,000 support staff in FY 2009, and has plans to hire an additional 226 ALJs this year. The

[34] Social Security Administration, notice of proposed rulemaking, Reestablishing Uniform National Disability Adjudication Provisions, 74 Fed. Reg. 63,688 (Dec. 4, 2009).

[35] Social Security Administration, final rule, Eliminating the Decision Review Board Reestablishing Uniform National Disability Adjudication Provisions, 76 Fed. Reg. 24,802 (May 3, 2011).

[36] *Id.* at 24,804.

[37] Social Security Administration, News Release, Social Security Hearings Backlog Falls to Lowest Level Since 2005 (Mar. 2, 2010), available at http://www.ssa.gov/pressoffice/pr/hearings-backlog-0310-pr.htm.

> agency now has four National Hearing Centers to help process hearings by video conference for the most hard-hit areas of the country. The agency also has aggressive plans to open 14 new hearing offices and three satellite offices by the end of the year.[38]

However, in September 2011, according to a Syracuse University analysis, "The number of disability cases awaiting a hearing and decision by [SSA] continued to climb during the most recent quarter, from July 1 to September 30, 2011. Pending cases rose to 771,318 at the end of this period, up 9.3 percent from 705,367 one year ago."[39]

B. Inconsistent decisions and high grant rates

There have been widely reported decisional inconsistencies in the SSA disability adjudication system.[40] As the SSA Inspector General reported in a letter to Chairman Johnson of this Committee in February of this year, among the 1,256 ALJs with 200 or more dispositions in FY 2010, the average decisional allowance rate was about 67 percent, but the 12 ALJs with the highest allowance rates averaged between 96.3 and 99.7 percent, and the 12 ALJs with the lowest allowance rates averaged between 8.55 and 25.1 percent.[41] The disuniformity is troubling, but lost in those headlines is the fact that the two-thirds overall national average allowance rate is strikingly high given that in granting claims, ALJs are in effect reversing prior decisions by the decisionmakers at both the DDS and reconsideration levels.

SSA is aware of the inconsistency problem and has commissioned ACUS to study the fairness, efficiency, and accountability issues raised by these inconsistencies; the study is ongoing and I hope that it will ultimately be useful to both SSA and this Committee when it is completed later this year. I am not going to prejudge the ACUS study, but I will note that in today's testimony Professor Pierce makes a good point when he points to perverse incentives that make it easier and less of a "hassle" for ALJs to grant cases than to deny them. But even so, that doesn't account for the rather extreme tails of the bell curve among individual decisionmakers, some of which, at first blush at least, appear to be based on the location of the hearing office. That latter point may be related to a desire for popularity in the community by being known as a "generous" judge. Moreover, claimants' representatives may also have an unfortunate incentive to drag out cases, since their fees are tied to a percentage of the backpay provided to successful applicants in order to cover the time between their claim and the decision. As a *USA Today* editorial noted,

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[38] *Id.*

[39] *See* "SSA Disability Cases Continue to Climb—Rise in Backlog as of September 2011," Transactional Records Access Clearinghouse (Nov. 3, 2011), http://trac.syr.edu/tracreports/ssa/266/.

[40] *See e.g.,* Damian Paletta, *Disability Claim Judge Has Trouble Saying 'No,'* Wall St. J. (May 19, 2011), *available at* http://online.wsj.com/article/SB10001424052748704681904576319163605918524.html.

[41] *Congressional Response Report, Oversight of Administrative Law Judge Workload Trends*, at 4–5, No. A-12-11-01138 (Feb. 2012), transmitted by letter to Hon. Sam Johnson, Chairman, Subcomm. on Social Security, House Comm. on Ways and Means (Feb. 14, 2012), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138_0.pdf.

"This gives the lawyers a potent incentive to drag the process out, to the detriment of everyone but themselves."[42]

V. Possible New Approaches

As mentioned above, I would like to see aspects of the DSI program revived. But since the reason for abandoning many of them was that the apparently longterm and growing caseload problem makes it impossible to devote enough resources to test them properly, it would seem that this fundamental caseload problem needs to be addressed with some new approaches.

1. Doing more rulemaking

While not a new initiative, one that I would at least like to see explored more is the use of rulemaking by SSA to reduce the number of issues that must be heard in individual adjudications. The Supreme Court blessed this approach in *Heckler v. Campbell*, in which the Court upheld agency's use of its "medical-vocational guidelines," which determined "the types and numbers of jobs that exist in the national economy" so that the issue did not have to be re-determined in every individual adjudication.[43] To be sure, the Court also noted that "Respondent does not challenge the rulemaking itself, and . . . respondent was accorded a *de novo* hearing to introduce evidence on issues, such as physical and mental limitations, that require individualized consideration."[44]

The simple question I have is whether there might be other general factual issues that could be resolved as fairly and more efficiently through rulemaking as through case-by-case adjudication.

2. Expanding and enhancing video teleconferencing technology

Another existing initiative that might bear more fruit is the use of video teleconferencing technology ("VTC") to conduct hearings. As reported in the Administrative Conference recommendation urging greater use of VTC:

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[42] USA TODAY, *Editorial: Disability claims swelling in recession* (Feb. 22, 2012), online at http://www.usatoday.com/news/opinion/editorials/story/2012-02-02/disability-Social-Security-recession/52940278/1. But see the opposing letter to the editor responding to this editorial by Jim Alsup, CEO; Allsup Inc.; Belleville, Ill., a nationwide disability representation company:

> According to the OIG, having a representative can help eligible applicants receive an allowance decision earlier in the process. Experienced representatives help claimants navigate the complicated system and avoid common pitfalls that lead to unnecessary delays and denials that later get reversed at an expensive hearing. Claimants analyzed in an OIG report could have saved 500 days by engaging a third-party representative when they applied.

Http://www.usatoday.com/news/opinion/letters/story/2012-02-08/Social-Security-Disability-offshore-investments/53014844/1.USA Today, *Editorial: Disability claims swelling in recession* (Feb. 22, 2012), online at http://www.usatoday.com/news/opinion/editorials/story/2012-02-02/disability-Social-Security-recession/52940278/1.

[43] 461 U.S. 458, 459, 461 (1983). The so called "grid rules" are codified in 20 C.F.R. pt. 404, subpt. P, appx. 2.

[44] *Id.* at 470 n.14.

> [I]n 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately $59 million dollars annually and $596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.[45]

This shows the potential magnitude of savings of time and money in such a huge program. Of course, it is necessary to remain vigilant in maintaining the fairness and acceptability of such hearings and to continue to improve the technology. Moreover, there is at least a hypothesis—worthy of examination—that use of VTC (in the sense of "distance judging") may help eliminate some of the decisional variations among ALJs—especially if an ALJ might otherwise be thinking about his or her popularity within a particular community.

3. Modifying the role of the Appeals Council

Not surprisingly, the caseload of the Appeals Council is growing along with the rest of the adjudicative system. SSA reported that the Appeals Council received over 173,000 requests for review in the year ending September 30, 2011. During that period it processed about 127,000 cases, with an average processing time of 360 days, leading to a pending caseload of 153,000 at the end of that year.[46] Requests for review are up significantly—from 106,965 in FY 2009 and 128,703 in FY 2010.[47]

The DSI process as promulgated in 1996 (only implemented in the Boston region) would have substituted a Decision Review Board for the Appeals Council. This proposal was rescinded in 2011—primarly due to caseload pressures. But it is worth revisiting the announced purpose of the change.[48]

The DRB would have substituted for the appeal process used by the Appeals Council an expanded "own-motion" type of review that covered review of both allowances and denials. Claims were to be reviewed before the ALJ decision was effectuated. The DRB could affirm, modify, or reverse the ALJ's decision or remand the claim to the ALJ.

The DRB was also to be charged with selecting claims for review after the ALJ's decision was effectuated for purposes of studying the decisionmaking process, but in such cases the DRB would not change the ALJ's decision except in limited circumstances.

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[45] ACUS Recommendation 2011-4, "Agency Use of Video Hearings: Best Practices and Possibilities for Expansion" (June 17, 2011), *available at* http://www.acus.gov/acus-recommendations/agency-use-of-video-hearings-best-practices-and-possibilities-for-expansion.

[46] SSA, General Appeals Council Statistics, http://www.ssa.gov/appeals/ac_statistics.html.

[47] Social Security Administration, final rule, Eliminating the Decision Review Board Reestablishing Uniform National Disability Adjudication Provisions, 76 Fed. Reg. 24,802, 24,803 (May 3, 2011).

[48] Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,437–39 (Mar. 31, 2006).

If the DRB did not complete its action within the 90-day time frame, the ALJ's decision would become final, subject to judicial review. The DRB was to apply a substantial evidence standard to questions of fact and to consider only the record that was closed at the time that the ALJ issued the decision (subject to a good cause exception).

The DRB was to be composed of experienced and highly knowledgeable ALJs and administrative appeals judges, serving on a rotational basis, with staggered terms, and supported by a highly qualified staff. To enhance accountability and to provide feedback in the decisionmaking process, DRB decisions that were in disagreement with ALJ hearing decisions were to be sent to the ALJ who issued the decision.

SSA explained that it had decided to have the DRB rely on own-motion review and not to allow claimants to initiate appeals to the DRB (unless the ALJ had dismissed the claim entirely) because claimants already "have two levels of Federal administrative review after the initial determination, and the [ALJ] level of review allows the claimant the opportunity for a face-to-face hearing. Neither the Social Security Act nor due process requires further opportunities for administrative review."[49]

It also said in response to public comments on its proposal that it did not believe the new process would be more complicated for the claimant, because the claimant would simultaneously receive notice of the ALJ's decision and whether the DRB would be reviewing the case. The claimant would not have to take any further action until such time as the DRB issued its decision, although the claimant could submit a written statement to the DRB. SSA concluded that the new process would benefit the claimant by providing an opportunity for further administrative review in problematic cases or, otherwise, with a quicker final decision so that the claimant can proceed judicial review if so desired.

A key to the success of this process, obviously, is appropriate selection of cases for review by the DRB. Although SSA declined in its rule to include "a specific statement regarding the method and range of sample sizes," because "our methods of selecting cases for review will change over time as we gain experience and knowledge in the use of our computer-based tools," it said that it would select cases in different ways so as to "efficiently identify problematic cases without unfairly targeting any specific category of claimant." SSA also pledged not "to review claims based on the identity of the administrative law judge who decided the claim." But it did say that "the claims that the DRB will review may include claims where there is an increased likelihood of error, or claims that involve new policies, rules, or procedures in order to ensure that they are being interpreted and used as intended."[50]

In 2011, when SSA abandoned the DRB in the Boston region, it explained:

> The DRB has not functioned as we originally intended; its workload has grown quickly and become overwhelming. We had intended to use an automated predictive model to select the most error-prone cases for DRB review. However,

[49] 71 Fed. Reg. at 16,438.
[50] *Id.* at 16,437.

> because we were unable to implement this predictive model, the DRB processed 100% of the unfavorable and partially favorable decisions, requiring significantly more resources than we had anticipated.[51]

I think it is unfortunate that the DRB experiment foundered because SSA was unable to implement an appropriate predictive model, though it is understandable that nationwide caseload pressures on the Appeals Council made it difficult to fully carry out its proposal in a single region.

I hope, however, that if the Appeals Council is maintained in its current form, some way can be found to increase the "quality control" review of grant cases, and to use selected Appeals Council decisions as system-wide precedent so that recurrent issues can be settled at that level. This, of course, would also require some mechanism to enforce (or at least strongly encourage) compliance with such precedential decisions at the lower levels.

This is consistent with ACUS's 1987 recommendation, where ACUS recommended an enhanced role for the Appeals Council in making systemic improvements:[52]

> a. Focus on System Improvements. SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:
>
> > (1) Conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and
> >
> > (2) Providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably DDS hearing officers in some cases) by: (a) Issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.

ACUS closed its recommendation by saying: "If the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it."[53]

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[51] 76 Fed. Reg. at 24,803.

[52] ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council" ¶ 1 (Dec. 18, 1987) *available at* http://www.acus.gov/acus-recommendations/a-new-role-for-the-social-security-appeals-council.

[53] *Id.* at ¶ 2.

That statement retains its force and, with the demise of the DRB experiment, it is up to SSA and the Congress to consider something beyond simply increasing the size of the Appeals Council to massive proportion.

4. Considering the Establishment of a Social Security Court

When SSA proposed the DRB, one of the prominent commenters was the Administrative Office of the U.S. Courts, which "thought that the shift of the Appeals Council's functions to the DRB would have an adverse effect on the Federal court system and would result in an increase in the number of cases appealed to the Federal courts."[54]

This is not a new concern; various federal court study commissions have noted the high proportion of SSA cases in the high proportion and burdensome nature of SSA cases in the federal district courts.[55] Not surprisingly, appeals of SSA decisions to the district courts continue to be at high levels in 2011 with 15,705 appeals to the district court (many of which are first handled by Federal Magistrate Judges), and 577 to the courts of appeals.[56]

Another problem is that there is also a lack of uniformity among the district court decisions. A study I worked on found that in FY 2000, there was a wide range of outright allowances (not including the numerous remands) among the 48 district courts that had over 100 appeals, with a high of about 28% and a low of zero.[57]

These problems, along with the seeming ineffectuality of the Appeals Council, led Professor Verkuil and me to recommend the creation of an Article I Social Security Court which would substitute for both the Appeals Council and the federal district courts. Appeals from that Court would then go the regional courts of appeals. Following a suggestion of the Association of ALJs, we also suggested that perhaps the ALJ stage could be reconstituted into a two-tier stage with a possible appeal of a single ALJ decision to a panel of three ALJs in some cases. This is similar to the two-tier bankruptcy judge panels authorized in bankruptcy cases.[58]

We concluded that a Social Security Court would not only reduce the burdens on the federal district courts, but would also produce more uniformity in the decisions, thus providing more guidance to the agency decisionmakers as well. It would also have the potential benefit of being

[54] 71 Fed. Reg. at 16,439.

[55] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 752–54 (2003) (discussing the studies).

[56] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2011 ANN. REPORT OF THE DIRECTOR, tbls. B-IA, C-10, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf. These reflect all appeals, but the vast majority are most are disability cases.

[57] Verkuil & Lubbers, *supra* note 55, at 783-84 (Appendix A).

[58] *See* 28 U.S.C. 158(b), discussed, *id.* at 747-48.

a vehicle for potentially consolidating judicial review of other benefit program decisions into a single court.[59]

5. Introduce Government attorneys/adversarial hearings

SSA cases have traditionally been non-adversary in nature—with no government representative and with the ALJ often having to wear "three hats"—making a decision on the record while also ensuring that the record reflects the best arguments for unrepresented claimants and protecting the overall public interest (the public fisc). This can make the ALJ's job more difficult and there have been some well-intentioned suggestions to institute government representation, especially as claimant representation has increased now to levels of about 80%. SSA experimented with a government representation project from 1982-1986, but it was shut down prematurely after a district court judge issued an injunction against continuation of the program, which for some reason was not appealed by SSA.[60]

Allowing government representation might make sense in some cases. For example, a former President of the Association of ALJs, recommended that adversary hearings be used in (a) all court remand cases and (b) in cases where an applicant seeking SSI funds "has created corporations or other legal devices that might mask his true income."[61] But as a general matter, I am not convinced that the benefits of transforming the program from an inquisitorial to an adversary program would outweigh the considerable costs of doing so. These costs would include: (1) the upfront costs of hiring a cadre of highly paid government litigators, (2) the probable increase in complexity and combativeness of the hearings, and (3) the resulting applicability of the Equal Access to Justice Act's attorney fee provisions to SSA administrative proceedings (which only apply to "adversary adjudications" in which the position of the United States is represented by counsel or otherwise").[62]

For those reasons I continue to prefer the deployment of government "Counselors" to help the ALJ and the parties develop the record instead of assigning government litigators to these cases.

6. Options Regarding ALJs and Specially Designated AJs

As discussed above, in the 1970's, Congress seemed to ratify the SSA's long-standing position favoring the use of ALJs in disability adjudication. Whether that might change if SSA changes *its* position is an open question. But as a legal matter, the APA certainly permits such a re-

[59] For an expansion of this argument and a comparison with the Australian Social Security Appeals Tribunal, see Michael Asimow & Jeffrey S. Lubbers, *The Merits of "Merits" Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS JUST. 261 (2010).

[60] Salling v. Brown, 641 F. Supp. 1946 (W.D. Va. 1986). This project and the injunction that ended it is discussed in Bloch, Lubbers, & Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 45-52 (2003).

[61] Statement of Frank B. Borowiec, presented to the Advisory Committee on Utilization of Administrative Law Judges, Civil Service Commission at 12 (July 11, 1973).

[62] 5 U.S.C. § 504(b)(1)(C). This issue is discussed at Bloch, Lubbers, & Verkuil at 38-42 (estimating a potential additional annual cost of $100 million that would have to come out of SSA's budget).

evaluation. Section 556, after providing for the use of ALJs in formal adjudications, states: "This subchapter does not supersede the conduct of specified classes, of proceedings, in whole or in part, by or before boards or other, employees specially provided for by or designated under statute."

Thus, if Congress became persuaded that circumstances require that the long-standing model of using ALJs is no longer tenable, it could "specially provide for or designate" another type of adjudicator, even as it maintains the APA procedures. Congress has done this occasionally. For example, once was when it designated the temporary SSI judges described above. Another example is the special authority given to the Nuclear Regulatory Commission (NRC) to use Atomic Safety and Licensing Board Panel members (lawyers and scientists) to hear nuclear licensing cases.[63] Of course there are also numerous non-APA hearing provisions (such as immigration cases, public employee disciplinary cases, and government contract appeals) where Congress has specially designated the use of non-ALJ adjudicators.[64]

In the case of the NRC adjudicators, Congress wished to provide the agency with the flexibility to not only use law-trained judges to hear licensing cases, but also scientists. While there might be some basis to open up SSA adjudicators to medical experts, I think the general consensus among commentators is that it is preferable to have legally trained judges in such cases.[65] However, there are well documented problems with the government-wide ALJ program that might lead Congress to introduce more flexibility into the process of hiring SSA judges in the future (of course, any change would almost certainly require the grandfathering in of current ALJs).

Perhaps the biggest frustration for agencies with the ALJ program is the inflexibility in hiring ALJs. While designed as a merit selection program, the OPM process for assembling the register

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[63] 42 U.S.C. § 2241:

> Notwithstanding the provisions of sections 556(b) and 557(b) of Title 5, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

[64] *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65, 70-71 (1996) (regarding use of non-APA judges)

[65] *See e.g.*, ACUS Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations" (Dec 15, 1989), *available at* http://www.acus.gov/acus-recommendations/improved-use-of-medical-personnel-in-social-security-disability-determinations (which notably did not recommend using medically trained adjudicators at the hearing stage, but did urge SSA to "encourage its administrative law judges to call on an independent medical expert in appropriate cases to assess the need for any additional medical evidence and to explain or clarify medical evidence in the record"). *Id.* at ¶ 5.

of eligible applicants and the statutory restrictions on how agencies can hire judges off the register, has led most agencies to hire existing ALJs laterally from other agencies, most often SSA, which employs over 85% of the overall ALJ corps. SSA, for its part, has also experienced frustrations in hiring the large number of ALJs it needs.[66] I have supported some government-wide changes in the ALJ selection program, but given the predominance of SSA in the overall program, I would also support tailoring a special selection process for SSA ALJs. This could be done in two ways—either by ordering OPM to provide for specialized hiring of SSA ALJs, or by specially designating them as "Social Security Judges" and allowing SSA to fashion its own hiring process that uses the OPM process as a model. This latter suggestion is essentially what has happened with the NRC panel members. For example when NRC hires a lawyer member for its panel, it posts a notice of an opening and conducts an OPM-like hiring process.[67] I understand that the two Boards of Contract Appeals also conduct a tailored OPM-like hiring process as well when they hire Administrative Judges.[68]

Creating a specially designated category of Social Security Judges would not require, but could allow for, adding some other specially tailored attributed for these judges as well. For example, given the high degree of importance of caseload management in this huge program, Congress could consider departing from the extant prohibition of performance ratings for ALJs. While I know there are legitimate arguments on the other side of this issue,[69] I have advocated for this in the past for all ALJs[70] and the Administrative Conference has formally so recommended.

I think it is worth quoting in detail the ACUS Recommendation on this point:

> Chief ALJs should be given the authority to:

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[66] See the position paper of Ronald Bernoski, President, Association of Administrative Law Judges, "Recommendations on the Social Security Case Backlog" at p. 30 (January 2008):

> We agree with a statement of the Social Security Advisory Board (SSAB), that "the fact that a new ALJ register has not yet been established in and of itself raises questions about whether the ALJ recruitment process, as currently constituted, serves the best interests of the Social Security program and the public who look to the program for adjudication that is both impartial and efficient." To paraphrase another SSAB conclusion, OPM has shown that it is incapable of providing the American public with the "best qualified" administrative law judges.

Judge Bernoski's proposed solution is to remove the government-wide ALJ program from OPM and give it to a separate ALJ-run conference. I would prefer an approach that is more limited to dealing specifically with the SSA ALJ corps.

[67] See, e.g., the extensive requirements detailed in this job opening notice for a lawyer panel member, http://www.usajobs.gov/GetJob/ViewDetails/2284269#.

[68] See 42 U.S.C. § 7105, providing that the members of the Armed Services and Civilian Boards of Contract Appeals are to be appointed by DOD and GSA using a process that mirrors the one used for ALJs, except that they must have five years of experience in public contract law. They also have their own statutory salary provision.

[69] James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L. J. AM. U. 629, 641 (Fall 1993/Winter 1994).

[70] Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994).

> 1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.
>
> 2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.
>
> 3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of non-adherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.
>
> 4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB) based on such performance reviews.[71]

In the SSA context, it would be appropriate for the Chief ALJ and the Hearing Office Chief ALJs to undertake this role. I would also suggest that once such appraisals are permitted, then probationary status for new ALJs could also be considered as well as bonuses for high-performers—both of which are barred in the overall ALJ program.

Finally, and perhaps even more controversially, I think that it might be possible to establish specialized standards for what constitutes the sort of "good cause" that is necessary for SSA to show before the MSPB can discipline or remove a Social Security Judge. Given the relative fungability of SSA cases, at least over time, "good cause" should encompass unjustified low productivity, and for that matter, repeated failures to follow authoritative agency rules or precedential decisions.

My overall point here is that the SSA ALJ program's size and perhaps the charceter of its cases requires some special treatment, and given the informality and lack of adversarial nature of it, there is ample reason to rethink the role and attributes of these ALJs—at least going forward.[72]

VI. Conclusion

[71] ACUS Recommendation 92-7, "The Federal Administrative Judiciary" ¶ III(B) (Dec. 10, 1992) *available at* http://www.acus.gov/acus-recommendations/the-federal-administrative-judiciary.

[72] This would not be unprecedented. Until the early 1980s, OPM maintained a distinction between GS-15 and GS-16 ALJs with two separate hiring registers. SSA ALJs were in the GS-15 category. *See* Jeffrey S. Lubbers *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112-15 (1981). I note here that a member of the SSAB has advocated limiting SSA ALJs' terms to 15 years "to ensure turnover." Mark J. Warshawsky, *Administrative Problems With Social Security Disability Programs: Some Solutions* at 2, BLOOMBERG BNA PENSIONS AND BENEFITS DAILY (April 2, 2012).

There have been many studies of the disability adjudication process, from the initial claim stage to the judicial review stage and every stage in between. But the dramatic caseload pressures on the process has seemingly overwhelmed the ability or willingness of the Social Security Administration to experiment with procedural reforms. A case in point is the abandonment of most of the recent promising set of reform proposals instituted in 2006 in the Disability Service Improvement project.

I would like to see a renewed effort to implement these process reforms. However, Congress may wish to consider some more fundamental structural reforms due to the caseload pressures which appear to be steadily worsening. It may not be enough or tenable to simply keep enlarging the existing organizational structure of ALJs and the Appeals Council.

Therefore, I have suggested some possible approaches to dealing with these caseload pressures—some incremental, such as increasing the use of rulemaking and video communications technology—and some more fundamental such as modifying the role of the Appeals Council, considering the establishment of a Social Security Court, making SSA hearings adversarial, and creating specially designated Social Security Judges in place of regular ALJs to allow for more flexible and tailored selection and management of the judges in this high volume program.

By providing this menu, with some commentary along the way, I hope I can assist this Committee in performing its historical role of protecting the viability of this historic program.

Appendix to Lubbers Testimony

Recommendations in Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*, Report to the Social Security Advisory Board 76-78 (March 2003), *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf; *also published as Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO. L. REV. 1, 60-63 (2003).

Recommendations Relating to Development of a Complete Record for Decision by the ALJ.

1. SSA should concentrate its efforts in the disability adjudication process on improving the record for decisions.
2. SSA should consider implementing administrative and personnel reforms aimed at identifying and obtaining key information as quickly as possible, such as:
    a) Requiring that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based.
    b) Developing specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity.
    c) Providing adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.
    d) Encouraging ALJs to use their subpoena power when needed to obtain relevant information, and providing the DDSs with comparable mechanisms for enforcing similar requests.
    e) Requiring DDSs and [ODAR] to make the existing record for appealed claims available to claimants and their representatives as quickly as possible, and requiring [ODAR] to set the date for ALJ hearings at least two months in advance.
3. SSA should consider creating a new administrative position, called a "Counselor," with the express mandate of overseeing and facilitating the development of the evidentiary record for decision. As part of this process, the Counselor position should have the following characteristics and responsibilities:
    a) It should be charged with developing a full and complete record as quickly as possible, in cooperation with claimants (and their representatives), DDS, [ODAR], and other SSA personnel.
    b) It should have direct access to key DDS personnel in order to question and clarify the DDS's rationale for its disability decisions.
    c) It should have independent authority to obtain information for the record, including access to any available funds and enforcement mechanisms.
    d) It should have a formal role, either independently or in cooperation with ALJs and other OHA staff, to narrow and resolve particular issues and, when appropriate, to recommend to an ALJ a fully favorable, on-the-record decision.
    e) It should be designated nonadversarial, even if attorneys fill some of the positions.

Recommendations Related to Closing the Record

SSA should revise its regulations to close the evidentiary record after the ALJ hearing, subject to the following qualifications:

1. ALJs may extend the time to submit evidence and/or written argument for a reasonable period after the hearing and before deciding the claim.
2. Claimants may request that the record before the ALJ be reopened for the submission of new and material evidence and a new decision, if the claimant demonstrates good cause for failing to present the evidence before the record closed and if the request is made within one year after the ALJ issued the decision on the claim or before a decision is reached on appeal by the Appeals Council, whichever is later.

Implementing these Recommendations

The above recommendations should be implemented as soon as feasible. This can be done by regulation or other administrative action; no legislation is required. Moreover, the SSA Counselor position can be created without need for experimentation. The regulations should address closing the record at the ALJ stage and articulate a standard for a good cause exception drawn from the current standard at the district court. *See* 42 U.S.C. § 405(g). The regulations relating to the Counselor function should also include a code of conduct that emphasizes the nonadversarial nature of the position.