

NOTES

SOCIAL SECURITY DISABILITY REFORM: STEPS TOWARD ECONOMIC EFFICIENCY AND IMPROVED CLAIMANT CARE

Nate Ghubril

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Table of Contents

I.	Introduction	553
II.	Evolution of Social Security Disability	555
III.	Analysis	557
	A. Removal of Federal District Courts from Appellate Role.....	558
	1. Background.....	558
	2. Substantial Evidence Standard of Review	560
	3. Imprecise Regulations	561
	4. Uninterested Judiciary	562
	B. Restructuring Administrative Review and Beyond.....	563
	1. Critiques of Current System	563

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2. A New Approach in the SSA with a Focus on the Hearing Stage	566
3. Post-Agency Appellate Opportunities	567
4. Modifications for Attorneys	569
IV. Conclusion	570

I. INTRODUCTION

The White House Office of Management and Budget (OMB) projected a \$744 billion deficit between what the United States will receive versus what the United States will spend in 2014.¹ Current OMB projections estimate that this deficit will shrink roughly 41% to \$439 billion by 2022.² While movement in the appropriate direction is to be commended and pursued, it is also critical that the money that is being outlaid is spent wisely. Social Security, defense, and healthcare (Medicare/Medicaid) compose the “Big Three” of government spending. Combined, these Big Three account for roughly 64% of the nation’s projected spending in 2014.³ It must be noted at the outset that while there is quite likely room for improvement in each area of the Big Three (as well as the expenditures that account for the other 36% of the outlays), this note focuses on reforming the Social Security disability benefits⁴ programs. When a nation is faced with an enormously complex and multi-tiered dilemma, then that nation, simply put, has to start somewhere. Further, and critically, the Social Security Trustees have reported that the trust fund for Social Security disability benefits will be depleted by 2016.⁵

For 2013, Social Security is projected to cost \$812 billion, or roughly 22% of total outlays.⁶ Of this figure, approximately \$205 billion will be spent on disability benefits.⁷ In short, the American government—and therefore the American

¹ OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 183 tbl.S-1 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf> [hereinafter OMB BUDGET].

² *Id.*

³ *Id.* at 187 tbl.S-4.

⁴ For the purposes of this note, “Social Security disability” refers to both Social Security Disability and Supplemental Security Income. See discussion *infra* Part II.

⁵ THE BOARD OF TRUSTEES, FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, THE 2012 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 3 (2012) [hereinafter TRUSTEES REPORT]; see also Robert Pear, *Social Security’s Financial Health Worsens*, N.Y. TIMES, Apr. 24, 2012, at A13 (noting that, once the trust is depleted, tax receipts will be sufficient to pay only 75% of promised benefits).

⁶ OMB BUDGET, *supra* note 1, at 187 tbl.S-4.

⁷ SOC. SEC. ADMIN., SOCIAL SECURITY ADMINISTRATION BUDGET OVERVIEW FY 2013, at 32 tbl.3 (2012), available at <http://www.socialsecurity.gov/budget/2013FullJustification.pdf> [hereinafter SSA BUDGET] (note that the \$205 billion figure was reached by adding the estimated outlays for DI to the estimated outlays for SSI in 2013).

people—is spending heavily in the determination and award of Social Security disability benefits. Over 19.5 million persons are projected to receive some sort of Social Security disability benefit in 2013,⁸ accounting for roughly 6% of the United States population.⁹ There are those who argue that Social Security programs (and other “entitlements”) should be entirely scrapped and redesigned.¹⁰ While this author will not go that far, it must be acknowledged that the Social Security program directly affects every American in one way or another, and as such it is critical that such a far-reaching program operate as efficiently as possible.

The backlog of Social Security disability cases is a matter of academic and political discourse and frustration.¹¹ The process is multi-tiered, time-consuming, and financially costly, resulting in at least two major inequities: financial waste in a time when our nation cannot afford it; and the undue delay in the receipt of benefits to claimants who are truly disabled and thereby entitled to benefits under the terms of the Social Security Act.¹² In order to efficiently serve the stated purposes of the Act, wide-scale reform is necessary. The current system includes four levels of administrative review within the Social Security Administration (SSA), followed by the full gamut of judicial review in the federal courts.¹³ This means that a claim could potentially be reviewed by *seven* different bodies when all is said and done, and could take a number of years before final resolution.¹⁴ This alone is indicative of a need for change.

⁸ *Id.* at 34–36 tbls.5 & 7 (note that the 19.5 million beneficiaries figure was reached by adding the total estimated DI beneficiaries from Table 5 with total estimated SSI beneficiaries from Table 7 for 2013).

⁹ See *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Nov. 4, 2012).

¹⁰ See, e.g., Nick Gillespie & Veronique de Rugy, *Generational Warfare*, REASON, Aug.–Sept. 2012, at 26.

¹¹ See, e.g., Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 753–54 (2003); Jeffrey S. Wolfe, *The Times They Are a Changin’: A New Jurisprudence for Social Security*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 515, 516–17 (2009); SSA BUDGET, *supra* note 7.

¹² See 42 U.S.C. § 423 (2006); see also Damian Paletta & Dionne Searcey, *Growing Case Backlog Leaves the Terminally Ill Waiting*, WALL ST. J., Dec. 28, 2011, at A12 (discussing the growing number of claimants who die while their claim is backlogged).

¹³ See discussion *infra* Part II.

¹⁴ See UNITED STATES GEN. ACCOUNTING OFFICE, GAO 02-322, SOCIAL SECURITY DISABILITY: DISAPPOINTING RESULTS FROM SSA’S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 6 fig.1 (2002), available at <http://www.gao.gov/new.items/d02322.pdf> [hereinafter GAO REPORT].

This note highlights some difficulties presented by the current mode of administering Social Security disability benefits, and offers some suggestions for resolution. Part II provides a brief history of Social Security as it relates to disability, and details the current mechanics of its operation. Part III contains the analysis, proposing that the role of the federal courts ought to be significantly limited in the context of Social Security disability review, and that the administrative level of review undergo substantial modification. These modifications, it is suggested, will increase the systematic efficiency of the determination of disability.

II. EVOLUTION OF SOCIAL SECURITY DISABILITY

When the Social Security Act was enacted in 1935, it contained no provisions entitling disabled persons to benefits.¹⁵ At its inception, the Act only provided insurance coverage for unemployed persons and the elderly.¹⁶ This was not because the disabled were viewed as “undeserving” under the Act, but rather because the framers of the Act had difficulty deciding what format disability benefits should take.¹⁷ One of the major concerns was the perceived difficulty in defining “disability” in a manner that would keep the program manageable.¹⁸ History has shown that this was a justifiable concern. Despite these concerns, disability was eventually added as a basis for eligibility under the Act,¹⁹ and in 1956 a definition of disability for the purposes of the Act was reached.²⁰ This definition, which remains largely unchanged today, requires that an eligible person be unable to engage in “substantial gainful activity” and that this inability is due to a “medically determinable physical or mental impairment.”²¹ The definition was intended to serve as a clear line that would distinguish the disabled from the not-disabled.²²

¹⁵ Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 190 (2007).

¹⁶ Barbara A. Sheehy, *An Analysis of the Honorable Richard A. Posner's Social Security Law*, 7 CONN. INS. L.J. 103, 106 (2000–2001).

¹⁷ Bloch, *supra* note 15.

¹⁸ *Id.*

¹⁹ *Id.* at 190–91.

²⁰ See Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807; see also 42 U.S.C. § 423 (2006).

²¹ 42 U.S.C. § 423(d)(1)(A).

²² Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 630 (1999).

This Social Security Disability Insurance (SSDI) requires that a beneficiary was employed for a certain period of time and contributed to Social Security through payment of taxes.²³ In 1972, Supplemental Security Income (SSI) was established as a subsidiary disability program to Social Security.²⁴ Unlike SSDI, a beneficiary of SSI need not have been engaged in prior employment, as it is intended to benefit those who are both poor and disabled.²⁵

As mentioned above, approximately 19.5 million people are projected to receive some sort of Social Security disability benefits in 2012.²⁶ For the purposes of this note, that includes both SSDI and SSI benefits. While recipients of disability-based benefits currently account for only roughly 30% of all Social Security beneficiaries,²⁷ the administrative review and processing of the disability claims accounts for the bulk of the Social Security Administration's workload.²⁸

Regardless of whether a claimant applies for SSDI or SSI benefits, the adjudication process is similar. Initially, a claimant applies for disability benefits at a local SSA office.²⁹ A claimant may apply for SSDI via the internet, phone, postal mail, or in person, whereas SSI requires an in-person application.³⁰ The application is then sent to Disability Determination Services to determine whether or not the claimant is disabled under the terms of the Act.³¹ At this stage, the claimant's medical information is examined, and consultative examining physicians may be utilized by the SSA to assist in the determination.³² If the Disability Determination Services office finds that a claimant is disabled, then benefits will begin to be paid

²³ S. Sandy Sanbar, *Winning Social Security Disability Cases*, 31 J. LEGAL MED. 91, 92 (2010).

²⁴ Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329.

²⁵ Sanbar, *supra* note 23, at 92.

²⁶ SSA BUDGET, *supra* note 7, at 5.

²⁷ *Id.*

²⁸ Bloch, *supra* note 15, at 191-92.

²⁹ Sanbar, *supra* note 23, at 97.

³⁰ *Id.* at 97-98.

³¹ *Id.* at 98.

³² *Id.*

to the claimant.³³ Except in terminal cases, this initial determination process may take several months to complete.³⁴

If a claimant receives an unfavorable determination at this initial stage, he or she has three opportunities to appeal the decision within the SSA.³⁵ First, there is “reconsideration” by an SSA employee who was not involved in the initial determination.³⁶ If unsuccessful, a claimant may request (and will receive) a hearing before an administrative law judge (ALJ).³⁷ Finally, assuming that the ALJ renders an unfavorable opinion, the claimant may appeal that decision to the Appeals Council, which has the final word at the administrative level.³⁸ This Appeals Council, which has been the subject of much critique, is theoretically being slowly phased out and replaced by the Decision Review Board, which serves a similar function.³⁹ After the administrative opportunities have been exhausted, a claimant may file a civil suit in the federal district courts to determine whether “substantial evidence” supported the final decision of the SSA.⁴⁰ Following the district court’s decision, the claimant may seek an appeal to the appropriate circuit court and ultimately the United States Supreme Court. As mentioned in the introduction, the potential exists for a Social Security disability case to be heard by no less than seven adjudicative bodies over a period of many years.

III. ANALYSIS

As the well-being of millions of Americans and the expenditure of billions of taxpayer dollars are at stake with the administration of Social Security disability

³³ *Id.*

³⁴ *Id.* at 98–99.

³⁵ SOC. SEC. ADMIN., SOCIAL SECURITY ADMINISTRATION FISCAL YEAR 2012 BUDGET OVERVIEW 8 (2012), available at <http://www.ssa.gov/budget/2012BudgetOverview.pdf> [hereinafter SSA 2012 BUDGET OVERVIEW].

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ 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). It should be noted that, although the Appeals Council is reportedly being phased out, neither the 2012 nor the 2013 SSA Budget mentions the Decision Review Board. See SSA BUDGET, *supra* note 7; SSA 2012 BUDGET OVERVIEW, *supra* note 35.

⁴⁰ 42 U.S.C. § 405(g) (2006).

benefits, proper consideration and care should be invested in that process. The inefficiencies and inconsistencies that exist within the system will be further explained in the following analysis, wherein some possible solutions will be offered.

A. *Removal of Federal District Courts from Appellate Role*

Federal district courts are intended to be the “trial courts of the federal court system.”⁴¹ For this simple fact alone, the review-oriented role the district courts maintain in Social Security disability cases strikes the author as ill-fitting and improper. Not improper in a constitutional or ethical sense, *per se*, but rather improper from a purely practical sense. The district courts, and the judges and clerks that staff them, are generally engaged in their intended purpose of trial work. While, in all likelihood, the vast majority of district courts are *capable* of fulfilling the “substantial evidence” review of disability cases, that fact does not make it *sensible* for them to do so. An electrician may be perfectly capable of handling some home plumbing issues. But the mere fact of handiness does not make hiring an electrician to replace a water heater a reasonable decision.

It is true that the federal district courts are often called upon to serve this type of “appellate” review role in a variety of contexts relating to administrative agencies. However, no other administrative context has flooded the district courts to the extent that Social Security has.⁴² Further, if the decision of the district court is appealed, the standard of review exercised by the circuit courts of appeal is *identical* to that of the district courts.⁴³ This completely duplicative review structure does not comport with notions of efficiency.⁴⁴

1. Background

In 2011, over 15,000 Social Security disability cases were filed in the federal courts.⁴⁵ While this represents a nominal percentage of the total Social Security

⁴¹ *District Courts*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx> (last visited Mar. 3, 2012).

⁴² See discussion *infra* Part III.A.1.

⁴³ See discussion *infra* Part III.A.2 (for a discussion on the “substantial evidence” standard of review).

⁴⁴ See *California Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1149 (9th Cir. 2009). While this case does not involve Social Security, it provides a useful discussion on the non-desirability of an “entirely duplicative” review process between the district courts and the courts of appeal.

⁴⁵ Docket Search for Disability Insurance Cases and Supplemental Security Cases for Federal District Courts in 2011, *Dockets & Filings*, JUSTIA.COM, <http://www.dockets.justia.com> (last visited Mar. 3,

claims that are filed in a given year,⁴⁶ it represents a significant percentage of the federal court system's workload.⁴⁷ Further, although the relative percentage of disability claims that reach the federal courts is small, judicial review is still a critical element of the Social Security disability system, and certain factors indicate that the percentage will only grow.⁴⁸ Finally, regardless of the size or nature of any given inefficiency, a failure to address it can only serve to exponentially increase a bureaucratic shortcoming.

Some parties insist that the ability to file for what is effectively an appellate review within the federal district courts is critical to Social Security disability. A fear exists that without the recourse to Article III judges, the Social Security Administration will simply be able to "rubber stamp" their initial determinations all the way to the highest level of administrative review, thereby eliminating any genuine efficacy to an appeal.⁴⁹ Further, and perhaps more importantly, there are those such as the Consortium for Citizens with Disabilities who believe that the broad legal background possessed by Article III judges results in a superior form of justice than would be available through mere administrative review.⁵⁰ In short, some perceive that allowing recourse to Article III judges after the exhaustion of

2012) (in "advanced search," the categories were narrowed first for "All Federal District Courts" for *Filed In*, then "Disability Insurance" for *Type*, and finally the dates were constrained to between Jan. 1, 2011 and Dec. 31, 2011. The figures for this search were added to the figures from a search where all things were equal, except that "Supplemental Security Income" was selected for *Type*). It must be noted that there is undoubtedly some overlap in the final figure reached, as many claimants file for both DIB and SSI.

⁴⁶ See SSA BUDGET, *supra* note 7, at 5 (wherein it is noted that roughly 8.1 million Old Age, Survivors, Disability, and SSI claims are projected to be filed in 2013).

⁴⁷ Docket Search for All Suits Filed in Federal District Courts in 2011, *Dockets & Filings*, JUSTIA.COM, <http://www.dockets.justia.com> (last visited Mar. 3, 2012) (in "advanced search," the categories were narrowed to "All Federal District Courts" for *Filed In* and the dates were constrained to between Jan. 1, 2011 and Dec. 31, 2011). The advanced search of all suits filed in the federal district courts in 2011 reveals a figure of over 380,000. The roughly 15,000 Social Security suits, *see supra* note 42 and accompanying text, account for over 4% of the federal district court docket. *See also* Verkuil & Lubbers, *supra* note 11, at 739 (wherein it is noted that Social Security cases accounted for nearly 6% of the federal district court docket in 2000).

⁴⁸ *See, e.g.*, Wolfe, *supra* note 11, at 545–46 (wherein Wolfe argues that greater representation in disability claims is the leading factor in increasing appeals).

⁴⁹ *See* Verkuil & Lubbers, *supra* note 11, at 756.

⁵⁰ *See* Robert E. Rains, *A Response to Bloch, Lubbers & Verkuil's The Social Security Administration's New Disability Adjudication Rules: A Cause for Optimism . . . and Concern*, 92 CORNELL L. REV. 249, 254 (2007).

administrative remedies provides a superior administration of justice than would a system that lacks the current method of judicial review. While this note will not suggest the outright elimination of Article III review, certain practicalities of the current system of judicial review may suggest that the perceived advantages are somewhat illusory.

Social Security disability law is an area of widespread and consequential inconsistency within the federal court system. While variations in how a certain area of law is approached from circuit to circuit are not necessarily uncommon, the inconsistencies in Social Security disability law are suggestive of a larger issue. This issue has at least three apparent causes. The first is a very malleable standard of review. The second is that the regulations promulgated by the Social Security Administration are often imprecisely worded and therefore difficult for the courts to apply. Finally, there are those who argue that the federal district judges do not feel as if reviewing agency disability decisions is aligned with their primary purpose, and therefore do not invest much effort in the process. The malleable standard of review must be addressed first in order to pave the way for the two remaining issues.

2. Substantial Evidence Standard of Review

As previously mentioned, the standard of review with which the district court (and the circuit court, if the case goes that far) reviews Social Security disability cases is a “substantial evidence” test, as mandated by statute.⁵¹ However, this is a fairly flexible standard of review, leaving much room for one particular judge or another to interpret the standard as he or she sees fit given a particular case.⁵² A 1997 circuit-by-circuit comparison of Social Security disability cases reviewed by federal courts revealed that the percentage of cases decided in favor of the Social Security Administration varied from as high as 62% to as low as 22%, with the full spectrum in between.⁵³ While the flexible standard of review may not be the sole—or even most significant—reason for this inconsistency, it certainly permits a judge wide discretion, which can then exacerbate the potential problems caused by unclear regulations and a lack of interest. For example, if a federal judge finds a particular regulation to be unclear, he or she may effectively decide what the regulation means, and then determine whether the ALJ’s decision was properly

⁵¹ 42 U.S.C. § 405(g) (2006).

⁵² See Susan Haire & Stefanie Lindquist, *An Agency and 12 Courts*, 80 JUDICATURE 230, 232 (1997).

⁵³ See *id.* at tbl.1.

supported in light of that construction. Similarly, if a judge finds the task of reviewing disability claims tedious, that judge may potentially reach a desired conclusion, and then affirm the ALJ's decision under the "substantial evidence" standard or remand it under the same. Keeping the standard of review in mind, unclear regulations and a potentially uninterested judiciary must also be addressed when discussing inconsistent rulings in the Social Security disability realm.

3. Imprecise Regulations

The regulations promulgated by the SSA are frequently an area of difficult application for the judiciary. An unclear regulation can result not only in inconsistencies between circuits, but can also lead to confusion within a given circuit. One such example revolves around how the courts are to approach Global Assessment of Functioning (GAF) scores. The GAF scale, as described by the Diagnostic and Statistical Manual of Mental Disorders, is a subjective scale used by mental health professionals in diagnosing the mental condition of adults.⁵⁴ The Social Security Administration's regulations state that the GAF scale has no direct correlation to whether or not a particular claimant is disabled.⁵⁵ However, the regulations also make clear that the medical opinions of a claimant's treating source are of the utmost importance, and will even be given controlling weight in certain circumstances.⁵⁶ Looking at these two regulations together, it would appear that a GAF score given by a treating source, while not controlling as to an ALJ's determination of disability, should still be granted considerable weight. But how much weight? This is left unanswered by the regulations, and has proven to be a difficult area for many judges to navigate.⁵⁷

How to factor a claimant's age into his or her disability determination is another area of unclear regulation. Age is a factor taken into consideration in the determination of disability.⁵⁸ The Social Security Administration uses the Medical-Vocational Guidelines (often called the "grids") as a guideline in determining

⁵⁴ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 34 (4th ed. 2000).

⁵⁵ See Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50746, 50764–65 (Aug. 21, 2000).

⁵⁶ 20 C.F.R. § 404.1527(c)(2) (2012).

⁵⁷ See, e.g., Howard v. Comm'r of Soc. Sec. Admin., 276 F.3d 235 (6th Cir. 2002); Halverson v. Astrue, 600 F.3d 922 (8th Cir. 2010); Pounds v. Astrue, 772 F. Supp. 2d 713 (W.D. Pa. 2011).

⁵⁸ 20 C.F.R. § 404.1563(a) (2012).

disability.⁵⁹ If a claimant has certain characteristics, and is of a certain age, he may or may not be found disabled based on an application of the grids. However, the Social Security Administration's regulations state that:

We will not apply the age categories mechanically in a borderline situation. If you are *within a few days to a few months* of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.⁶⁰ (Emphasis added.)

This regulation creates a murky exception without clearly defining its applicability. How much time, exactly, is "a few days to a few months"? What does this regulation accomplish that could not be accomplished more effectively by simply assigning a specific time limit? Courts have suffered similar confusion at the hands of this regulation.⁶¹

While these two examples are illustrative, they are in no way exhaustive. Of course, the SSA promulgates numerous regulations, and the majority of them are applied by the courts with little difficulty. However, if a court (or the SSA itself) is to effectively apply a regulation, it is imperative that those regulations are crafted with care and revised as necessary.

4. Uninterested Judiciary

Aside from unclear regulations, it has also been posited that the inconsistency in the federal courts' review of disability cases could be due to an uninterested federal judiciary. In 1988, the 100th Congress created a Federal Courts Study Committee to undertake a complete review of the federal court system.⁶² The Committee noted that as disability cases are "factual and technical" in nature, they could be competently handled at the administrative level.⁶³ The Committee

⁵⁹ See 20 C.F.R. § 404.1569 (2012).

⁶⁰ 20 C.F.R. § 404.1563(b) (2012).

⁶¹ See, e.g., *Bowie v. Comm'r of Soc. Sec. Admin.*, 539 F.3d 395 (6th Cir. 2008); *Daniels v. Apfel*, 154 F.3d 1129 (10th Cir. 1998); *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068 (9th Cir. 2010); *Phillips v. Astrue*, 671 F.3d 699 (8th Cir. 2012).

⁶² FEDERAL COURTS STUDY COMMITTEE, 100TH CONG., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31 (1990), available at [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf) [hereinafter FCSC REPORT].

⁶³ *Id.* at 56.

proposed that Social Security disability cases be initially heard by an ALJ, with appeals going to an Article I appellate court, and appeals from the appellate court going to the federal courts of appeals, but “limited to constitutional claims and questions of law.”⁶⁴ Congress has not adopted the recommendations of the Committee, and many scholars continue to espouse the belief that the federal judiciary cares little for its disability review assignments.⁶⁵

In short, it is inefficient to utilize substantial judicial resources in a manner for which they are not designed and for a purpose to which the district court judiciary is not inclined. Even assuming a district court judge with the best of intentions and the sharpest of minds, it cannot be considered a best practice to shoehorn that judge into an appellate role, supply his tool kit with opaquely drafted regulations, and set him to task on a mountain of cases. If the landlord of a high-rise apartment complex were to employ an electrician with a box of wrenches to lay the waterline for the complex, the landlord would be doing a disservice to himself and his tenants alike. Likewise, this inefficient use of judicial resources strikes the author as a disservice to both the taxpayer and those whom the Social Security Act is designed to benefit. While there are those who believe that access to the judiciary is critical for the proper administration of justice, the current system of judicial review does not appear to be the answer.

B. Restructuring Administrative Review and Beyond

While the author is of the opinion that the method of review proposed by the Federal Courts Study Committee would be an improvement over the current system, an even deeper restructuring at the administrative level may be in order.

1. Critiques of Current System

In order to apply for benefits, the claimant must file a form at an SSA office.⁶⁶ The state Disability Determination Services (DDS) then makes the determination of whether or not the claimant is disabled.⁶⁷ If DDS awards benefits, then that claim is closed. If DDS denies benefits, however, the claimant is entitled to three levels of administrative review: reconsideration, a hearing in front of an ALJ, and finally

⁶⁴ *Id.*

⁶⁵ See, e.g., Sheehy, *supra* note 16, at 105; Verkuil & Lubbers, *supra* note 11, at 753.

⁶⁶ 20 C.F.R. § 404.614 (2012).

⁶⁷ 20 C.F.R. § 404.1503 (2012); SOCIAL SECURITY ADMINISTRATION, PUB. NO. 05-10087, A SPECIAL EXAMINATION IS NEEDED FOR YOUR DISABILITY CLAIM (2009), available at <http://www.socialsecurity.gov/pubs/10087.pdf>.

review by the Appeals Council (where it has not yet been phased out) or the Decision Review Board.⁶⁸ If benefits are awarded at any stage in that process, the claim is closed; if benefits are denied, the claim may be appealed to the next level. It is only after these numerous opportunities for administrative review have been exhausted that a claimant may obtain judicial review in the district courts.⁶⁹ There is no lack of criticism for this lengthy process of administrative review.⁷⁰ There may be years upon years of review before a claim has reached a truly final decision, with the inference being that the resources utilized in that process are not operating at the utmost level of efficiency. Further, many people with valid claims are seeking benefits from a system with more than a few clogs in the bureaucratic pipeline.

Although perhaps not a startling fact, it should be noted that if a claimant is denied upon initial consideration, the likelihood of having that decision reversed at the reconsideration level is slim.⁷¹ Continuing in this vein, approximately two-thirds of decisions handed down by ALJs are unfavorable to the claimant.⁷² The Appeals Council may deny review, and they do so with regularity.⁷³ The Decision Review Board may affirm, modify, reverse, or remand the opinion of an ALJ.⁷⁴ The author posits that in light of the backlog and the inefficiency associated with it (financial and otherwise), a more streamlined process is called for. Verkuil and Lubbers suggest that the veterans' disability claims process could be instructive in regards to the determination of Social Security disability claims.⁷⁵ The veterans' disability claims process involves an initial claim determination, followed by an appellate board review, then review by an Article I court created specifically for that purpose, and finally review by a federal court of appeals on questions of law

⁶⁸ 42 U.S.C. § 405(b)(1) (2006); 20 C.F.R. § 404.907 (2012); Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16424-01 (Mar. 2006); Sheehy, *supra* note 16, at 113-14.

⁶⁹ 42 U.S.C. § 405(g) (2006); Sanbar, *supra* note 23, at 104.

⁷⁰ See, e.g., Verkuil & Lubbers, *supra* note 11, at 779-80; Rains, *supra* note 50, at 250.

⁷¹ See Rains, *supra* note 50, at 250.

⁷² Sanbar, *supra* note 23, at 96.

⁷³ 20 C.F.R. § 404.967 (2012); Verkuil & Lubbers, *supra* note 11, at 760.

⁷⁴ Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 2006) (to be codified at 20 C.F.R. 404, 405, 416, and 422).

⁷⁵ See Verkuil & Lubbers, *supra* note 11, at 770-71.

only.⁷⁶ Verkuil and Lubbers acknowledge that many flaws exist within that system as well, such as lengthy delays, but assert that the model is an interesting starting point for the reform of Social Security disability.⁷⁷ Those authors ultimately conclude that an Article I Social Security Court should be created, wherein claimants who receive an unfavorable decision from an ALJ may bring their appeals.⁷⁸ Claimants who remain unsatisfied after the Social Security Court reaches its decision may then bring their appeals to the courts of appeal in their circuit, limited to questions of law.⁷⁹ Verkuil and Lubbers also mention the possibility of the ALJ process being a more traditionally adversarial one.⁸⁰

The current role of the ALJs and the hearings that they conduct are the subject of much discourse and critique (a familiar theme, by this point). Given the inquisitorial, rather than adversarial, nature of a hearing before an ALJ, it is often stated that the ALJs “wear three hats.”⁸¹ This is shorthand for the concept that an ALJ, in effect, represents the claimant by eliciting his testimony (hat number one); represents the SSA, also by eliciting the claimant’s testimony and applying the law (hat number two); and finally decides the case based on the evidence that she herself has elicited (hat number three).⁸² Without veering too far from the path of this note, there is certainly room to question the ability of any human to seamlessly transition between these conflicting roles. This is certainly a valid concern, but in its ideal form the three-hat system is intended to create a sort of balance, with the ALJ at the center weighing the case of the claimant against the rules of the SSA.⁸³ When a claimant has attorney representation, this “balance” is necessarily thrown off, and cannot be regained. If the ALJ does not realign his position, the claimant will be represented to a far greater degree than the SSA.⁸⁴ If the ALJ shifts his

⁷⁶ *Id.* at 763–67.

⁷⁷ *Id.* at 771.

⁷⁸ *Id.* at 781–82.

⁷⁹ *Id.* at 781.

⁸⁰ *Id.*

⁸¹ See Verkuil & Lubbers, *supra* note 11, at 781; Robert M. Viles, *The Social Security Administration Versus the Lawyers . . . and Poor People Too*, 40 MISS. L.J. 24, 59 (1968); Wolfe, *supra* note 11, at 548–49.

⁸² Viles, *supra* note 81, at 40–41.

⁸³ Wolfe, *supra* note 11, at 550.

⁸⁴ *Id.*

position in order to counterweigh the fact that the claimant is represented, balance is lost because the representative of the SSA is also the judge who ultimately makes the decision.⁸⁵ This issue is an ever-increasing problem for Social Security disability hearings, as more and more claimants are obtaining representation.⁸⁶ It makes the author uneasy to point to an increase in representation as a “problem,” and the fact that it has become so is another indicator that the underlying system contains some correctable errors.⁸⁷ One alternative method for resolving Social Security disability claims at the administrative level is outlined below.

2. A New Approach in the SSA with a Focus on the Hearing Stage

It is hard to discern a rational basis for having three levels of review at the administrative level, and it has already been noted that changes in disability determinations are rare at these stages.⁸⁸ Perhaps an elimination of the reconsideration and Appeals Council/Decisions Review Board stages, combined with a more thorough initial consideration and a modified ALJ hearing process would provide a greater level of efficiency to the process. It has been observed that the “vast majority of Social Security disability cases can be won, mostly at the initial determination stage.”⁸⁹ If that is so, and if modified determinations at the subsequent levels are rare, then such a large amount of reviews appears superfluous and wasteful. The initial determination stage should be viewed as a critical stage—much like the trial level in a more traditional civil or criminal case—and should be taken seriously by both the claimant and the SSA.⁹⁰ “Getting it right” at this initial stage would save resources, and would allow deserving claimants to receive their benefits promptly. Following this initial consideration, a claimant who is denied benefits may appeal this decision to an ALJ by requesting a hearing. It is at this stage that the author sees the greatest need for systemic change.

⁸⁵ *Id.*

⁸⁶ *Id.* at 554–55.

⁸⁷ See Chana Joffe-Walt, *Unfit for Work*, NPR PLANET WORK (2013), available at <http://apps.npr.org/unfit-for-work> (for a discussion on Social Security disability generally, and for the proposition that attorneys have steadily attempted to push more people onto the disability payroll, while the government has remained effectively unrepresented).

⁸⁸ See discussion *supra* Part III.B.1.

⁸⁹ Sanbar, *supra* note 23, at 91.

⁹⁰ See Rains, *supra* note 50, at 251.

If the ALJ hearing stage of Social Security disability claims were redesigned to involve an adversarial element, the three-hat dilemma would be eliminated, as would the problems that arise when a claimant has representation in a system that was designed with a lack of representation in mind.⁹¹ There are those who argue that transforming the adjudication of Social Security disability cases into an adversarial process would lead to unjust effects, as most of the claimants in these scenarios lack the financial capacity to hire counsel.⁹² However, the fact that a substantial percentage of the attorneys who work in this field operate on a contingency basis should serve to alleviate this particular concern, regardless of one's viewpoint toward contingency fees. Further, it is difficult to sustain an argument that a represented claimant in an adversarial setting is facing less potential for injustice than a claimant facing a judge who is also her inquisitor and her representative. Some have gone so far as to lambast the "general bias" exhibited by some ALJs, and while the author does not care to venture down that path, it certainly appears that the "three-hat" system lends itself more readily to bias than would an adversarial system.⁹³ In short, if both the SSA and the claimant were represented by counsel, and the ALJ could sit in a more traditional role of a neutral judge, then the ALJ would no longer be faced with the impossible role of serving three competing roles with pure equanimity. Further, both the claimant *and* the government would be able to advocate their case to the extent that they feel is appropriate. The decision reached by the ALJ would become the final decision of the Commissioner of Social Security. It is worth noting that most ALJs appear to be in favor of both claimant and government representation.⁹⁴

3. Post-Agency Appellate Opportunities

While it is tempting to say that the next level of recourse for a claimant denied at the ALJ hearing stage should be to seek review in the federal courts of appeal for issues of law only, the sheer volume of Social Security disability cases makes this option impracticable. Instead, the author throws his hat in with those who, with varying degrees of enthusiasm and varying models of implementation,

⁹¹ See discussion *supra* Part III.B.1.

⁹² Sheehy, *supra* note 16, at 135.

⁹³ See generally Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769 (2005).

⁹⁴ See Frank Bloch et al., *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications: A Report to the Social Security Advisory Board*, SOCIAL SECURITY ADVISORY 67 (May 2003), <http://ssab.gov/documents/bloch-lubbers-verkuil.pdf>.

argue that the creation of an Article I Social Security Court would add some stability and efficiency to the current system.⁹⁵ In the version proposed by this note, the Social Security Court would not be an extension of the SSA, but rather would be a stand-alone judicial entity (similar to the Tax Court), and would contain two tiers. The first tier would function essentially as an appellate court, wherein the judges undertake a review of the record of the ALJ hearing, and ensure that the law was properly applied and procedures properly followed. Every claimant who was denied benefits would have the right to an appeal at this level. The second tier of this Social Security Court would be the functional equivalent of the United States Supreme Court, but only for disability cases. This “supreme court” would maintain the option to grant or deny review, much like the current Appeals Council. The key difference is that, under this model, the record would be established to a more substantial degree than that currently reviewed by the Appeals Council or Disability Review Board, based on the adversarial nature of the ALJ hearing and the review of legal issues by the tier 1 court.

The final stage would be an opportunity to file an appeal of the Social Security Court’s decision with the federal courts of appeal for the circuit in which the claimant resides. Appellate review of Social Security cases by the circuit courts is superior to review by the district courts, because such an appellate role matches the intended purpose of the circuit courts.⁹⁶ This civil suit could be pursued in the event that the second tier of the Social Security denied review, or in the event that the second tier granted review, and then affirmed the decision that was unfavorable to the claimant. The circuit court would also contain the discretion to grant or deny the appeal, and their jurisdiction would only be in regards to legal issues. If a regulation was being challenged as unconstitutional, for example, that may be an issue for which the circuit court would grant an appeal. This Article III review should alleviate some of the concerns held by proponents of district court review.⁹⁷ While this proposed format still results in the potential for multiple reviews (initial consideration, ALJ hearing, Article I tier one, Article I tier two, federal courts of appeal, and then, theoretically, the United States Supreme Court), the more rigorous standards would result in substantially decreased dockets at each level following Article I tier one.

⁹⁵ Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 461 BYU L. REV. 512–37 (1990); Verkuil & Lubbers, *supra* note 11, at 778; FCSC REPORT, *supra* note 62, at 55.

⁹⁶ See discussion *supra* Part III.A.

⁹⁷ *Id.*

Some may question why the Social Security Court should be an Article I rather than an Article III court. In fact, there are those who argue that an Article III court is the more appropriate choice.⁹⁸ As mentioned previously, some feel that the presence of Article III judges in the process is critical to just decision making.⁹⁹ However, the recourse of appeal to the circuit courts allows the Article III judges to remain involved in the process, while avoiding the practical difficulties that emerge if the Social Security Court is to be an Article III court. For instance, Article III judges are appointed to life terms. While the determination of Social Security disability cases is a legal matter of the utmost importance, its limited scope may deter some candidates from accepting it as a lifetime career.¹⁰⁰ Under the Article I proposal, the judges could be appointed to a term of a number of years, making it more likely that competent legal minds would pursue that option. Having said that, the author does not find the distinction between an Article I and an Article III Social Security Court to be of critical importance; it is likely that either model would help to improve the administration of efficient justice in these cases.

4. Modifications for Attorneys

It has been posited that the single greatest factor in the increase of Social Security disability appeals is the increase in attorney representation throughout the process.¹⁰¹ As noted in the preceding sections, the author is of the opinion that the increased representation can certainly be a beneficial element to the process and to the individual claimants. However, the system needs to be modified to ensure that the attorneys working these cases are truly operating with the best interest of their clients in mind. In the current system, the longer a claim is delayed, the greater the potential payout is for an attorney based on the accumulation of back-due-benefits for the claimant.¹⁰² It is fundamentally incorrect that a system's design be such that the detriment of the claimant should be the boon of his counsel. In addition to this public policy concern, the current incentive for delay almost certainly results in actual delay, and therefore a contribution to the backlog. The resolution to this issue is unclear, but it appears self-evident to the author that any system that creates

⁹⁸ See, e.g., FREDERICK B. ARNER, A MODEL DISABILITY STRUCTURE FOR THE SOCIAL SECURITY ADMINISTRATION 110, 117 (1989), *quoted in* Verkuil & Lubbers, *supra* note 11, at 750 n.85.

⁹⁹ See discussion *supra* Part III.A.1.

¹⁰⁰ Verkuil & Lubbers, *supra* note 11, at 778.

¹⁰¹ Wolfe, *supra* note 11, at 545–46; see also Joffe-Walt, *supra* note 87.

¹⁰² See Wolfe, *supra* note 11, at 561–62; Verkuil & Lubbers, *supra* note 11, at 743.

incentive for poor representation practices and inefficient delays is worthy of reconsideration.¹⁰³

IV. CONCLUSION

Social Security disability is an entity that directly touches every American's life in one way or another. To those who fall under its protections, it may afford them their only source of income. To the rest, it represents at least a reduction in their paycheck, and perhaps an investment in their future or the future of someone they care for. Any government program that has such widespread effect is almost invariably going to contain substantial room for improvement; Social Security disability is no different.

It should be observed that the reform of Social Security disability is something that has been under consideration by government officials and scholars alike for many years. As discussed, a congressional committee was organized to analyze the federal court system in 1990, and the court's role in Social Security disability cases was evaluated.¹⁰⁴ In 2002, the Social Security Advisory Board commissioned a comprehensive report,¹⁰⁵ and the United States General Accounting Office also released a fairly detailed report of its findings in regards to Social Security disability.¹⁰⁶ Partially in response to these reports, the Social Security Administration initiated the Disability Service Improvement (DSI) process in 2006.¹⁰⁷ As previously mentioned, part of this process involves the introduction of the Decision Review Board in favor of the Appeals Council.¹⁰⁸ The Social Security Administration explained the impetus for this improvement process:

As the disability programs have grown in both size and complexity, we have been increasingly challenged to provide the high quality of service that disabled claimants and the public expect and deserve. Over the last four years we have

¹⁰³ *But cf.* Bloch et al., *supra* note 94, at 68 (opining that this incentive to delay was not a systemic problem). Still, the anecdotal evidence encountered by this author combined with the inherent potential for abuse leaves his concerns intact.

¹⁰⁴ FCSC REPORT, *supra* note 62.

¹⁰⁵ Bloch et al., *supra* note 94.

¹⁰⁶ GAO REPORT, *supra* note 14.

¹⁰⁷ Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 2006).

¹⁰⁸ *Id.*

undertaken a number of major initiatives designed to fundamentally improve the administration of these programs.¹⁰⁹

The author applauds the SSA for recognizing and attempting to tackle the problems that have grown all too apparent, and many of the initiatives taken by the DSI appear to be actual improvements. For example, a sort of “fast track” was put into place, wherein individuals who are “clearly disabled” may receive favorable decisions within twenty calendar days of the receipt of their claim.¹¹⁰ Additionally, absent exceptional circumstances, the record will be closed after the ALJ hearing.¹¹¹ This could remove some of the opportunity and thereby the temptation for an attorney to delay the process to his financial gain but to the detriment of his client. Also, while the removal of the Appeals Council seems to be a positive step, it is difficult to distinguish the major differences between the Appeals Council and the Decision Review Board, and further the Appeals Council is still prominently featured in the 2013 SSA Budget and appears to be going nowhere fast. Regardless, the stated goal of the Decision Review Board to “identify issues that may impede consistent adjudication at all levels of the process” is certainly a positive endeavor.¹¹²

While taking steps in the right direction is to be applauded, the work required for a proper reform of Social Security disability appears to be far from over.¹¹³ The disability trust fund is fast-depleting, so the resolution must come sooner rather than later.¹¹⁴ This note has shown the inefficiencies and resulting potentials for

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ It appears that Michael Astrue, former Commissioner of Social Security, would agree. In 2011, the SSA invested \$1.5 million in a stipend program for graduate students to attempt to improve the disability process. See Press Release, Social Sec. Admin., Social Security Expands Compassionate Allowances Conditions (Oct. 13, 2011), available at <http://www.socialsecurity.gov/pressoffice/pr/ss-expands-compassionate-allowances-alt.pdf>. Further, in the 2013 SSA Budget, the Commissioner included a “performance plan” that outlines all the ways in which the SSA wishes to improve, including reducing the waiting time for decisions and eliminating the backlog. See SSA BUDGET, *supra* note 7, at 203. Tellingly, however, Astrue recently voiced his opinion that “Washington . . . [has] really walked away from Social Security,” which paints a bleak picture for the future of the program. See Steven Ohlemacher, *Social Security Head: Program Fraying from Neglect*, ASSOCIATED PRESS (Feb. 14, 2013, 5:34 AM), <http://bigstory.ap.org/article/social-security-head-program-fraying-neglect>.

¹¹⁴ See TRUSTEES REPORT, *supra* note 5.

unfairness that exist within the current system of Social Security disability determination. With a restructuring of the determination approach at the SSA-level, the creation of an independent Social Security Court, and a shifting of the federal judiciary into a more suitable role, perhaps the gears of Social Security disability can be oiled to such a degree that claimants are properly cared for in a way more aligned with the ideals of efficient practice.