S. HRG. 98-674

SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

JANUARY 25, 1984

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WEDNESDAY, JANUARY 25, 1984

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:08 a.m., in room SD-215, Dirksen Senate Office Building, the Honorable Bob Dole (chairman) presiding.

[The press release announcing the hearing and the prepared statements of Senators Dole, Heinz, Durenberger, Grassley, Pryor, and a memo from the Department of Health and Human Services follow:]

[Press Release No. 83-204]

PRESS RELEASE

FOR IMMEDIATE RELEASE, DECEMBER 12, 1983

U.S. Senate, Committee on Finance, SD-219 Dirksen Senate Office Building

FINANCE COMMITTEE SETS HEARING ON SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

Senator Robert J. Dole (R., Kans.), Chairman of the Committee on Finance, today announced that the Committee will hold a hearing on Wednesday, January 25, 1984, on the social security disability insurance program and proposals to modify the eligibility review process.

The hearing will begin at 10:00 a.m. on January 25, 1984 in Room SD-215 of the Dirksen Senate Office Building.

In announcing the hearing, Senator Dole said, "The periodic eligibility reviews mandated by Congress in 1980 have generated real concern about the adequacy of the disability determination process. Different standards are being used by State agencies, which make the initial eligibility decisions, and administrative law judges, who are reviewing those decisions. As a result, large numbers of beneficiaries are being found ineligible for disability benefits only to have those benefits reinstated upon appeal."

Senator Dole noted that with some States implementing their own standards of disability while others are halting reviews altogether, "beneficiaries are no longer assured of equal treatment in the various States. Clearly, steps must be taken to ensure that the disability insurance program is administered in a nationally uniform manner. Only in this way can we ensure that the rights of the Nation's disabled are protected under the law."

Senator Dole stated that the Committee will receive testimony on the disability provisions of H.R. 4170, and S. 476, as well as other legislative or administrative steps which might be taken to improve the accuracy and quality of disability reviews. "The probable impact of program changes on the financing of disability insurance will also be addressed at the hearing," Senator Dole concluded, noting that "additional spending measures were not anticipated when the social security financing bill was enacted last spring."

OPENING STATEMENT OF SENATOR DOLE

I am pleased to welcome each of our witnesses to this morning's hearing on the Social Security Disability Insurance program and proposals to modify the eligibility review process. The committee will be particularly interested in receiving your views on the disability provisions in H.R. 4170, the bill approved by the House Ways and Means Committee, and on S. 476, which was introduced by Senators Levin and Cohen. Certainly, there is a great deal of concern about the way in which the Nation's largest public disability program is being administered. We hope to have a clearer view of how the situation can and should be remedied by the testimony we receive today.

LEGISLATIVE ACTIVITY IN 1982 AND 1983

The Committee on Finance last held public hearings on the disability insurance program in August 1982. At that time, a number of problems were highlighted. Among them were the heavy workload for states conducting the new eligibility reviews, mandated by the 1980 disability amendments, and the relative frequency with which administrative law judges were reversing the termination decisions made by the state agencies.

Emergency legislation was approved by the congress in December 1982. This legislation, P.L. 97-455, allowed the Secretary of Health and Human Services to slow the flow of cases sent to State agencies to take account of the backlog of cases and potential staffing difficulties. In addition, face-to-face evidentiary hearings were mandated at the reconsideration stage of appeal for terminated beneficiaries, effective January 1984. Under prior law, there was no requirement for face-to-face contact with a decisionmaker prior to a hearing with an administrative law judge. Finally, the legislation introduced payments pending appeal. For the first time, terminated beneficiaries were granted the option to elect continued payments pending their appeal to an administrative law judge.

Many difficult problems remained, however, to which there were no easy or obvious solutions. For example, how do we protect individuals on the rolls who are severely disabled and yet maintain the principle that people who can work must be removed from the rolls? This, after all, was the underlying premise of the provision in the 1980 amendments which mandates the 3-year review of continuing eligibility. What is the proper treatment of people first applying for benefits relative to those who have been on the rolls for many years? How can we ensure that this completely federal program is administered in a nationally uniform manner? Presently, some 15 States are not processing eligibility reviews and another 9 States are operating under court-ordered eligibility criteria. Allowance rates vary widely among the States. How can we ensure more accurate and uniform decisions between the levels of adjudication? How can we ensure thorough and careful development of medical and vocational cases?

The absence of quick or easy remedies has been clearly demonstrated on the House side as well. The Ways and Means Committee has twice drafted legislation for comprehensive disability reform, once in 1982 and again in 1983. The two bills were widely different in their approach. Neither bill has been considered by the full House.

Our efforts to develop comprehensive legislation in the Senate, which began in 1932, continued through the end of the session in 1983. Throughout October and November, in fact, I met frequently with concerned Members of the Senate, including Senators Cohen and Levin. In addition, I met with Secretary Heckler and acting Commissioner of Social Security, Martha McSteen, and my staff met intensively with the staff of 10 to 15 Members of the Senate, including several on this committee.

We made real progress. The difficulties and complexities were sizeable, however, and we were unable to develop a consensus bill with the support of the administration prior to adjourning. And on the House side, as I mentioned earlier, the House failed to take up the disability provisions in H.R. 4170, which were approved by the Ways and Means Committee on September 27.

I should point out that when it became clear in the final days of the session that formulating a comprehensive bill with bipartisan support would not be possible, I brought legislation to the floor that would have ensured that the provision allowing payments to continue through appeal would not expire on December 7. The amendment I offered would have extended this provision until June 7, 1984, giving Congress time to enact further legislation without penalizing those who would be terminated from the rolls during the winter months. The amendment would have also extended the vitally important section 1619, which allows severely impaired individuals to continue receiving supplemental security income and medicaid despite substantial gainful activity. This legislation was approved in the Senate by a vote of 80 to 0 on November 18, the House, however, failed to act on this legislation prior to adjourning. An extension of these provisions must be top priority.

ADMINISTRATION INITIATIVES

While there is no denying that there are serious problems in the disability determination and appeals process, I believe it is worth noting that many improvements have been made by the administration over the past 2 to 3 years. Through a series of administrative initiatives, positive steps have been taken in the area of both accuracy and fairness of decisions.

Among other important changes, face-to-face interviews have been introduced in district offices for individuals preparing to undergo eligibility reviews; all medical evidence available over a 12 month period must now be examined; more detailed explanations of decisions are required; a larger proportion of the beneficiary population has been classified as "permanently" impaired and thus exempted from the 3-year review requirement; and a temporary moratorium has been placed on the review of two-thirds of all mental impairment cases pending a revision of the criteria used for determining eligibility.

I commend the administration for introducing these measures and I urge the administration to step up its review of the workings of the disability program so as to make further adjustments where warranted.

THE CHALLENGE BEFORE US

We have a real challenge before us. Identifying the problems in the disability program is only part of the task. Finding solutions that compassionately and reasonably address those problems is the other, more difficult task. We must find remedies that do not revive the explosive growth that characterized the 1970s and thereby jeopardize the solvency of the disability program. I feel confident that we in Congress can meet the challenge.

I look forward to hearing the testimony this morning.

OPENING STATEMENT OF SENATOR JOHN HEINZ

I want to commend the Chairman of the Senate Finance Committee for scheduling this hearing on the crisis in the social security disability program. I am pleased to see that the distinguished Chairman of this Committee has assigned this tragic problem the priority it deserves.

I would like to bring to the Committee's attention a recent judicial decision that has direct significance for issues we are here to consider. Two weeks ago, U.S. District Judge Jack B. Weinstein ruled that the Social Security Administration has implemented a "fixed clandestine policy against those with mental illness," and ordered SSA to reinstate all mentally disabled New Yorkers terminated from the rolls in the past four years.

Judge Weinstein's finding reconfirms what I have argued all along—the mentally disabled have been singled out for unfair treatment by SSA, and the methods employed to determine their capacity to work are badly flawed. The unfortunate result of this policy is that tens of thousands of particularly defenseless people have been forced through a lengthy, anxiety-ridden review and appeals process, and all-too-many have been cruelly denied benefits.

The decision in New York stands as just the most recent of a long series of desperate state and judicial actions to protect the disabled from what has become a national tragedy—the continuing eligibility review process. Currently, more than half the states have either declared moratoria upon the reviews, are under court order to do so, or conduct reviews under standards that differ from those of SSA. Responsibility for the disability program does not lie with the states or the courts, however—it is a Federal problem that only Congress can resolve.

The social security disability program needs to be completely overhauled. We have a schizophrenic review process that takes away benefits with one hand and gives them back with another. We have a method of re-examining eligibility that does not yield fair or realistic results about an individual's capacity to actually work. We have purged the Federal rolls only to shift the expense of caring for the disabled to state and local welfare programs, emergency shelters, and state hospitals.

To comprehensively reform the disability program we have to accomplish three things. First, we have to institute a medical improvement standard to protect people who came on the rolls when different evaluational criteria were in place, and shift the burden of proof of continuing eligibility from the beneficiary to SSA. Second, we have to impose a temporary moratorium on all reviews of the mentally disabled, pending revision of the method through which their eligibility is determined. We also need to require that a qualified psychologist or psychiatrist perform the medical assessment of mentally impaired beneficiaries. Finally, we have to bind all levels of the disability decision-making process to one set of uniform standards, defined in regulations, and open for public inspection. Only these reforms will adequately reconstruct the disability program.

Mr. Chairman, we have witnessed the disastrous effects of the continuing disability investigations for three years. Sound legislation to end this carnage is available in both the Senate and the House. It is time for swift and decisive action.

OPENING STATEMENT BY SENATOR DAVE DURENBERGER

Mr. Chairman, I am pleased that our committee is addressing the important issue of disability reform, today. I was disappointed that Congress adjourned last session, before enacting comprehensive reform.

The continuing disability investigations, mandated by Congress in 1980, has become a major concern for 80,000 Minnesotans who are severely disabled. The importance of this issue is illustrated in a letter I received last week—I quote: "I am extremely dismayed and frustrated to know that our elected leadership has chosen to dally over these amendments for the past two years. In the meantime our most vulnerable citizens are again the victims. How much longer must they endure having their benefits denied or terminated."

These people have a right to be dismayed. Our past efforts have been dismal failures—Committee Print 98-93, indicates that 421,000 persons have been terminated by State agencies under the supervision of the Social Security Administration. Over half of those cases which have been appealed to an Administrative Law Judge have been reinstated. There has also been a steady drop in the number of allowances of individuals applying for social security benefits.

My first concern is correcting the real tragedy—the suffering that many beneficiaries and their families endure because of the loss of benefits. As a result of the review process we began in 1980, thousands of disabled individuals who should not have been terminated in the first place have been forced to live, for an average of 6 months, without necessary benefits—both the disability payments themselves and the often equally important medicare eligibility.

So serious is this problem that the States are starting to take the administration of the program into their own hands. Several States have imposed moratoriums on the continuing reviews, refusing to process the cases sent to them by the Social Security Administration. Other states have adopted their own standards to determine eligibility.

It is time to recognize that the 1980 continuing disability review process has been a dismal failure. While the original intent should remain unchanged, we must change the process by which we carry out this intent—we need comprehensive reform or our current process. In addition, as a cosponsor of S. 1737, I want to stress the need to retain sections 1619 (a) and (b) of the Social Security Act, which allows continuation of benefits of Medicaid without regard to earnings and enables persons with developmental disabilities to become productive workers and tax payers without losing much needed support.

We need to address these issues, and today is our opportunity to provide needed reform in order to ensure economic stability to the disabled of our nation.

OPENING STATEMENT OF SENATOR CHARLES GRASSLEY

Mr. Chairman, I would like to express my appreciation to the chairman in scheduling this hearing so shortly after the start of the second session of Congress. Congress was unable to reach agreement prior to its recess last year, and I feel these hearings are the appropriate place to begin consideration of the options available to us which would correct shortcomings in the disability insurance program.

This is my first opportunity to hear from the distinguished Acting Commissioner of Social Security, Mrs. McSteen, and I want to welcome her to this committee. I feel it is critical that before the Senate acts on social security disability legislation, we have the chance to hear what actions the Administration has taken and is proposing to take to provide for a fairer, more orderly DI review program.

All of us have heard from constituents on the problems and frustrations encountered with the on-going disability review program. While I firmly believe such a review process is necessary to prevent abuses in the DI program, we have a responsibility to guarantee the judicious implementation of the review program. It is up to this Congress to fashion a fair and workable continuing disability review program.

In 1980 we adopted disability insurance beneficiary review to address the justifiable concerns that many individuals were on the benefit rolls who should not be. There was considerable concern over the lack of oversight on who was receiving disability. Certainly the implementation and administration of the CDR program has left much to be desired. However, I do not believe we should let the pendulum of legislative activity swing too far back toward an abandonment of the CDI process. I remain convinced we can craft a bill which can maintain the integrity of the DI benefit program, while providing for the disabled of this Nation in a humane and dignified manner.

Last year I supported Senator Heinz in his efforts to secure adoption of a provision to modify the the CDR process as it related to mentally disabled beneficiaries. I have also supported legislation to continue to pay.

Benefits to individuals terminated from the disability rolls during their appeals process. Clearly, it is time to address the problems in a comprehensive fashion, and I want to commend my colleagues here today for their efforts in this important program.

I look forward to hearing the comments and concerns of the wide range of individuals and organizations who will testify today.

OPENING STATEMENT OF SENATOR DAVID PRYOR

Mr. Chairman, I have very mixed feelings about the scheduling of this hearing today. In one respect, I believe this could be the first step toward much-needed Finance Committee action on a comprehensive disability reform bill. On the other, it pains me to be reminded that another year has come and gone, and yet no substantive action has been taken to correct the abuses that have continued in the continuing disability investigations process for almost three years now. The opportunity to once again focus on the disability issue vividly reminds me of the fact that these ongoing administrative abuses translate into very unnecessary yet all the same very real pain and suffering for hundreds of thousands of individuals.

I hope that the Congress' inability to extend the temporary, stopgap benefit provisions which allowed for the receipt of benefits through the Administrative Law Judge level, and the subsequent moratoria imposed by the state and Federal governments, has sent the clear message to my colleagues that our Federal disability program is no longer in existence. I want to stress here that a mere extension of benefits will not solve the problems which we have, to date, allowed to get completely out of hand. I hope that Governor Clinton, my good friend from my own home state of Arkansas, will be able to tell us what problems will remain for the states should we fail to legislate changes affecting uniform standards, the evaluation of pain, multiple impairments, and in other areas.

It is my firm hope, Mr. Chairman, that your calling this hearing today represents a sincere effort on your part to determine what our next steps must be, and that we will move toward a speedy markup of comprehensive legislation.

I am a cosponsor of both S. 476 (which was introduced by Senators Cohen and Levin) and of the Senate version of the Pickle legislation, which was introduced by Senator Moynihan. I believe that both of these bills contain vital elements which would go a long way toward straightening out the problems within the disability program. I want to stress here that I have always strongly supported efforts which would eliminate the undeserving from the rolls of any government program, as, I am sure, have most of my colleagues. But the situation in the disability program has reached crisis proportions, and it is now time to act.

In addition, Mr. Chairman, when this committee addresses this legislation, I suggest we also look to the disability and supplemental security income rehabilitation services programs. Rehabilitation services restore disabled beneficiaries to productive employment with complete job skills, as opposed to tossing them off the rolls through an arbitrary and unfair review process. Restoration to employment and subsequent savings to the trust funds is a much more constructive approach for them, for us, and for society as a whole. The Pickle legislation contains amendments to strengthen the program (with a cost of less than $5 million) and I would like to see this Committee consider and support similar legislation.

As a final comment, I would like to express my deepest dissatisfaction with the cavalier manner in which this Administration has dealt with the whole issue of disability, and with its approach to the workings of the Social Security Administration in general. A full year ago John Svahn was nominated to be promoted from his job as Commissioner of Social Security to the post of HHS Undersecretary. I strongly opposed Mr. Svahn's nomination, chiefly because of the manner in which he oversaw carrying out of the continuing disability investigations. He was confirmed on March 8, 1983, and since that date the Senate has not yet received a nomination for the post of SSA Commissioner. I wrote the President last June urging that he send the Senate a nomination and I find it unbelievable that this Administration has not seen fit to nominate a Commissioner to take charge of an agency of such magnitude—one which at one time or another will touch the life of every single citizen of these United States.

I am anxious to hear today's testimony, and most hopeful that we will soon be working in markup sessions to develop comprehensive disability reform legislation.

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Refer to: SNS

Memorandum

Date: January 13, 1984

From: Eli N. Donkar
Supervisory Actuary

Subject: Estimated OASDI Short-Range Financial Effect of H.R. 4170, as Reported by the Committee on Ways and Means

To: Harry C. Ballantyne
Chief Actuary

The attached tables present the estimated effects on the OASI and DI Trust Funds of the various provisions comprising title IX of H.R. 4170. Title IX relates mainly to the DI program and is essentially identical to H.R. 3755 as reported by the Committee on Ways and Means on September 27, 1983. The attached estimates, therefore, are similar to those presented in a series of memoranda issued by the Office of the Actuary over the past several months, which dealt with the earlier bill. Since the last of these memoranda was issued (by Richard S. Foster on October 20, 1983), it has become desirable, for a variety of reasons, to update and revise the estimates. The attached tables include the effects of those changes. Table 1 contains the estimated additional OASDI benefit payments that would result from the provisions of title IX of H.R. 4170. Tables 2 and 3 summarize the bill's financial impact on the trust funds by means of various "fund ratios." As discussed below, the attached estimates assume enactment of the bill on April 1, 1984.

The new estimates reflect the effects of (1) recent actual economic and program experience, (2) an expanded interpretation of the applicability of section 901 of the bill, (3) a revised effective date for the implementation of the bill, and (4) revised methodology. These changes will be discussed in more detail in the following sections.

RECENT ACTUAL EXPERIENCE

The estimates appearing in our earlier memoranda were all based on the economic and program assumptions consistent with the alternative II-B projections of the 1983 Trustees Report, issued June 24, 1983. It is now apparent that in 1983 the economy performed better than had been anticipated. At the same time, however, net program financial experience in 1983 was somewhat worse than expected.

In order to take account of these changes, we recently issued revised estimates of the financial status of the OASI and DI Trust Funds under present law (see November 16, 1983 memorandum by Richard S. Foster).

Table 2.--Estimated assets of the OASI and DI Trust Funds at beginning of year, expressed as a percentage of expenditures during year, under present law and under H.R. 4170 as reported by the Committee on Ways and Means

	Calendar year						
	1983	1984	1985	1986	1987	1988	1989
<u>Disability Insurance Trust Fund</u>:							
Present law, as shown in the 1983 Trustees Report......................	19%	38%	32%	29%	28%	30%	38%
Present law, revised for recent economic and program experience (including effects of Administration DI initiatives) 1/..............	15	34	26	20	17	16	21
H.R. 4170, including ending of current State moratoria on CDR terminations and repayment of loans by OASI in 1989:							
-- With section 901 applied to new cases only........................	15	33	24	16	9	4	6
-- With section 901 applied to new cases and prior terminations.....	15	31	17	6	-2	-7	-7
H.R. 4170, including ending of current State moratoria on CDR terminations and repayment of loans by OASI in 1985:							
-- With section 901 applied to new cases only........................	15	33	24	39	31	25	24
-- With section 901 applied to new cases and prior terminations.....	15	31	17	30	20	13	11
<u>Old-Age and Survivors Insurance Trust Fund 2/</u>:							
Present law, as shown in the 1983 Trustees Report......................	15	20	20	22	23	23	28
Present law, revised for recent economic and program experience (including effects of Administration DI initiatives) 1/..............	14	19	20	23	25	26	33
Present law, revised for recent economic and program experience (including effects of Administration DI initiatives) 1/, but with repayment of DI loans in 1985 (instead of 1989)......................	14	19	20	20	23	24	31
<u>Old-Age and Survivors and Disability Insurance Trust Funds, combined</u>:							
Present law, as shown in the 1983 Trustees Report......................	15	22	21	23	23	24	29
Present law, revised for recent economic and program experience (including effects of Administration DI initiatives) 1/..............	14	21	21	23	24	25	32
H.R. 4170, including ending of current State moratoria on CDR terminations:							
-- With section 901 applied to new cases only........................	14	21	21	22	24	25	30
-- With section 901 applied to new cases and prior terminations.....	14	21	20	21	23	24	29

1/ See covering memorandum and November 16, 1983 memorandum by Richard S. Foster for details.
2/ Estimates are shown only for present law, since H.R. 4170 would have only a very minor effect on OASI benefits.

Notes: 1. Estimates shown above for the effects of H.R. 4170 are based on the 1983 Trustees Report alternative II-B assumptions as revised in November 1983.
2. Under these assumptions, the benefit increase "stabilizer" does <u>not</u> take effect during the projection period. See covering memorandum and table 3 for further discussion of this issue.

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Office of the Actuary
January 13, 1984

Table 1.--Estimated additional OASDI benefit payments under H.R. 4170 as reported by the Committee on Ways and Means

(In millions)

Section	Proposal (including bill report requirements)	Fiscal year 1984	1985	1986	1987	1988	Total, 1984-88
901	Medical improvement:						
	Applied to new cases 1/	$30	$380	$470	$500	$540	$1,920
	Applied to prior terminations 2/	440	790	260	210	180	1,880
	Subtotal	470	1,170	730	710	720	3,800
902	Study concerning evaluation of pain	--	--	--	--	--	--
903	Guidelines for disability determinations:						
	Multiple impairments	(3/)	(3/)	10	10	20	40
	Noncompetitive work	(3/)	(3/)	(3/)	(3/)	10	10
911	Moratorium and revised criteria for mental impairment cases	(4/)	(4/)	(4/)	(4/)	(4/)	(4/)
912	Face-to-face evidentiary hearing for CDR reviews	--	(3/)	10	20	30	60
913	Continuation of benefits through ALJ hearing	60	130	130	150	170	640
914	Qualifications of certain medical professionals	(3/)	(3/)	10	20	20	50
915	Regulatory standards for consultative exams	(3/)	(3/)	(3/)	(3/)	(3/)	(3/)
921	Uniform standards for disability determinations	(3/)	(3/)	(3/)	(3/)	(3/)	(3/)
922	Compliance with certain court orders	(5/)	(5/)	(5/)	(5/)	(5/)	(5/)
923	Revision to vocational rehabilitation reimbursement rules	(3/)	(3/)	(3/)	(3/)	(3/)	(3/)
924	Advisory Council and trial work	(3/)	(3/)	(3/)	(3/)	(3/)	(3/)
925	Staff attorneys	--	--	--	--	--	--
(6/)	Work evaluation in mental impairment cases	(3/)	(3/)	(3/)	(3/)	(3/)	(3/)
Total before ending current State moratoria on CDR terminations:							
	-- With section 901 applied to new cases only	70	470	580	650	730	2,500
	-- With section 901 applied to new cases and prior terminations 7/	840	1,280	840	860	910	4,730
Effect of ending current State moratoria on CDR terminations		-10	-80	(3/)	--	--	-90
Total after ending current State moratoria on CDR terminations:							
	-- With section 901 applied to new cases only	60	390	580	650	730	2,410
	-- With section 901 applied to new cases and prior terminations	830	1,200	840	860	910	4,640

1/ Includes effect of applying medical improvement standard to all cases that will be pending a final decision of the Secretary as of the assumed enactment date of April 1, 1984.

2/ Estimates assume that past CDR terminations would be reopened and evaluated under the new medical improvement standard and that reinstated beneficiaries would receive retroactive benefits from the month of termination. See covering memorandum for a discussion of this issue.

3/ Cost or savings less than $5 million.

4/ No cost is shown for this provision since existing Administration initiatives are expected to accomplish the same results under present law. The financial effects of the initiatives are described in a memorandum by Richard S. Foster dated August 1, 1983.

5/ This provision has the potential to affect benefit costs substantially, although such effects cannot be estimated since they would depend on unpredictable court cases and the subsequent actions of the court. As an example, if future court cases were to repeat past decisions concerning the evaluation of pain, additional benefits of over $1 billion could occur during 1984-88 as a result of this section.

6/ This item is contained in the committee report only, and is not associated with a particular section of the bill.

7/ Includes $360 million due to continuation of benefits during appeal for past CDR terminations which are reopened and evaluated under the new medical improvement standard but are not reinstated.

Notes:
1. Due to the uncertainty concerning the effects of many of these proposals, actual experience could vary substantially from these estimates.
2. Estimates shown for each section alone (1) are based on the assumption that current State-initiated moratoria on CDR terminations would gradually phase out over the next 2-3 years, and (2) exclude the effects of interaction with other proposals. Total costs for bill reflect such interactions.
3. Estimates are based on the 1983 Trustees Report alternative II-B assumptions as revised in November 1983.

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repayment of the OASI loan could delay or prevent the short-term deficiency problems for DI, but would have an offsetting, though relatively small, negative effect on the OASI financial position. The overall effect on OASDI is indicated in the third section of table 2 which shows "trust fund ratios" for the combined OASI and DI Trust Funds.

EFFECT OF H.R. 4170 ON OASDI "AUTOMATIC" TRIGGERS

The worsening of the financial status of OASDI under H.R. 4170 could have implications for certain "automatic" actions required under present law. These "automatic" actions include, for example, the repayment of interfund loans from the HI Trust Fund and the possible limitation of future benefit increases under the "stabilizer" provision of the Social Security Amendments of 1983. The triggering of these "automatic" actions depends on the financial status of OASDI as measured by certain "fund ratios" that are similar in concept (but not in detail) to the ratios shown in table 2. The various triggers and their operation under our revised present law estimates are discussed in detail in the November 16, 1983 memorandum cited above.

In table 3, attached, estimated trust fund ratios (under various applicable definitions) are shown based on present law and the law as modified by H.R. 4170. The results in that table, based on the updated alternative II-B assumptions, show that the bill would bring the 1984 "stabilizer" ratio even closer to the 15-percent trigger level. In addition, the lower "HI loan repayment" ratios would further delay the repayment by OASI of the HI interfund loan.

As we have described in other reports, it is not possible to state with certainty whether or not the benefit increase "stabilizer" provision would limit benefit increases in the near future under present law. On the basis of the specific assumptions underlying the attached estimates, the benefit increases would not be limited. However, it is clear that enactment of H.R. 4170 would increase the likelihood of such limitations.

With the exception of the revisions discussed above, the assumptions and limitations on these cost estimates are consistent with similar restrictions described in the October 20, 1983 memorandum mentioned earlier. In view of the various qualifications, the attached estimates should be regarded only as rough indications of the possible financial effects of H.R. 4170.

Eli N. Donkar
Eli N. Donkar

Attachments: 3

Such reopenings of prior terminations would result in significant additional program costs attributable to section 901 relative to our previous estimates, which assumed an essentially prospective application of that provision of the bill. However, we recognize that there is some uncertainty attached to the outcome of attempts to have section 901 applied retroactively. Therefore, we have shown separately, in table 1, the benefit cost associated with reopening all CDR cases since March 1981 involving terminations. The benefit cost of the total bill is presented both with and without this additional cost.

EFFECTIVE DATE

In all previous memoranda dealing with H.R. 3755, it was assumed that the bill would be enacted at the beginning of fiscal year 1984 (i.e., October 1, 1983). However, since Congress adjourned on November 18, 1983, without acting on H.R. 4170, and will not reconvene until late January, our earlier assumption is no longer appropriate. As mentioned earlier, for purposes of the attached estimates, we have assumed that the bill would be enacted on April 1, 1984. This assumption presents a small problem with respect to section 913. That section provides for continuation of benefit payments during appeal through the Administrative Law Judge level and is a continuation of a provision in present law that expired on December 6, 1983. For these estimates we have assumed that the bill, if enacted, would provide for a retroactive application of section 913 to all CDR terminations after December 6, 1983.

REVISED METHODOLOGY

The current estimates reflect several improvements that were not included in our previous estimates. First, we have implemented somewhat more refined techniques for estimating certain provisions of the bill. Second, we have improved our basis for estimating the interaction among the various sections of the bill, and between the bill as a whole and our present-law trust fund projections.

OVERALL IMPACT OF H.R. 4170

The net effect of the above items is to increase significantly the cost of the bill over prior estimates, particularly when the cost of the potential reopening of past terminations is considered. Table 2 indicates the impact of the two sets of cost estimates on the financial condition of the DI Trust Fund. As is often done, the financial condition is evaluated using the customary "trust fund ratio," i.e., total assets of the trust fund at the beginning of a year as a percentage of outgo during the year. DI assets, in this case, do not include the $5.1 billion owed to DI by OASI until that amount is assumed to be repaid.

The DI "trust fund ratios" under the program as modified by H.R. 4170 indicate that the DI Trust Fund would be unable to pay benefits on time beginning in about 1985 (under the retrospective version of section 901) in the absence of an early repayment of the OASI loan. (Under the prospective version of section 901, the DI financial difficulties would be deferred until 1987.) An early

In addition to reflecting current economic experience in those estimates, we took into account several specific actions that are expected to have an impact on future DI program experience. In particular, the new present law estimates include the effects of (1) a broader application of certain DI administrative initiatives originally announced by the Secretary on June 7, 1983, (2) current SSA procedures for implementing the pre-effectuation review of 65 percent of DI allowances, and (3) a temporary continuation of the recent State-initiated moratoria on the issuance of disability termination notices in continuing disability review (CDR) cases.

The financial effects of the first two items have been discussed in prior memoranda in this series (see August 1, 1983 memorandum by Richard S. Foster). The third item refers to the fact that certain States, representing roughly one-third of the current workload of CDR cases, have declared moratoria on the issuance of some or all disability termination notices. Our new present-law estimates incorporate the effect of currently existing State moratoria. We assume, however, that in the absence of specific legislative action, administrative action would be taken to require nationwide uniformity in the processing of CDR cases. Therefore, our present-law estimates assume that the current State moratoria would end over the next 2-3 years.

We believe that enactment of H.R. 4170, or similar disability legislation, would result in the lifting of the State moratoria. Thus, although the specific provisions of the bill would increase DI benefit costs, the enactment of H.R. 4170 would have an indirect effect that would tend to reduce such costs. We have reflected this probable indirect effect in the estimated total benefit cost of the bill, as shown in table 1. Estimates in table 1 for each provision of the bill, however, are shown relative to present law (including the gradual phase-out of the State moratoria). This convention has been followed so that individual provisions can still be evaluated on a stand-alone basis, if desired. We believe it is unlikely that the moratoria would be lifted in response to enactment of any single section of H.R. 4170 (with the possible exception of section 901).

RETROSPECTIVE APPLICATION OF SECTION 901

Section 928 of the bill states that these amendments "...shall apply with respect to cases involving disability determinations pending in the Department of Health and Human Services or in court on the date of enactment of the Act, or initiated on or after such date." This language could be read to include certain pending and anticipated class actions in which the courts could be asked to require the Secretary to apply a medical improvement standard retroactively. Court decisions coming from such suits could force the reopening of cases involving terminations under the CDR process, possibly as far back as March 1981.

We believe that a number of such court actions would occur and could require the reopening and reevaluation of a large number of cases under the new standards in section 901. Furthermore, full rights to appeal could be available in such reopened cases and reinstated beneficiaries could receive retroactive benefits from the month of termination.

Table 3.—Estimated OASDI "trust fund ratios" under present law and under H.R. 4170 as reported by the Committee on Ways and Means, calendar years 1983-89

	OASDI "contingency" reserve ratios 1/ under —			OASDI "stabilizer" ratios 2/ under —			OASDI "repayment" ratios 3/ under —		
		H.R. 4170 with section 901 applied to —			H.R. 4170 with section 901 applied to —			H.R. 4170 with section 901 applied to —	
Calendar year	Present law	new cases only	new cases and prior terminations	Present law	new cases only	new cases and prior terminations	Present law	new cases only	new cases and prior terminations
1983	14.9%	14.9%	14.9%	—	—	—	13.8%	13.8%	13.7%
1984	20.7	20.7	20.5	15.9%	15.7%	15.0%	13.7	13.6	12.9
1985	20.9	20.7	20.0	14.6	14.4	13.8	15.5	15.1	14.2
1986	22.7	22.3	21.3	16.9	16.5	15.5	17.0	16.6	15.7
1987	24.2	23.8	22.8	19.3	18.5	17.5	17.5	17.1	16.9
1988	25.1	24.7	24.4	22.4	21.3	20.1	23.9	22.4	21.1
1989	31.6	30.0	28.8	31.6	30.0	28.8	33.9	32.0	30.6

1/ Assets at beginning of year (<u>including</u> outstanding balance of any loans from HI and advance tax transfer for January) as a percent of outgo during year. This is the normal definition of trust fund ratio as used to evaluate the financial condition of a trust fund. See table 2, for example.

2/ For 1985 and later, equals assets at beginning of year (<u>excluding</u> outstanding balance of any loans from HI but <u>including</u> advance tax transfer for January) as a percent of outgo during year. For 1984, the asset figure used is as of the end of 1984. If this ratio for any year falls below 15 percent (20 percent after 1988), the automatic benefit increase effective for December of that year is based on the lower of the annual wage index increase or third quarter CPI increase.

3/ Assets at beginning of year (<u>including</u> outstanding balance of any loans from HI but <u>excluding</u> advance tax transfer for January) as a percentage of outgo during year. Assets in excess of 15 percent of outgo must be used to repay any outstanding HI loans.

Notes: 1. The above estimates are based on the 1983 Trustees Report alternative II-B assumptions as revised in November 1983.
2. For more details on trust fund ratio definitions, refer to sections 112, 141, and 142 of Public Law 98-21.

Social Security Administration
Office of the Actuary
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BACKGROUND ON SOCIAL SECURITY DISABILITY INSURANCE

Basic Program Facts

The social security disability insurance (DI) program pays monthly cash benefits to 3.9 million beneficiaries; 2.6 million of these are disabled workers; the remainder are spouses and children. The DI program is financed entirely with Federal revenues (a portion of the social security payroll tax--0.5% out of the 7% employee tax) and all eligibility criteria are established by Federal law. The program is administered on behalf of the Federal Government by State agencies which are fully reimbursed for any expenses incurred.

DI outlays in 1983: $18 billion

average payment for disabled-worker family: $841/month

Eligibility

Under the law, disability is defined as the inability to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment expected to result in death or last at least 12 months. Generally, the worker must be unable to do any kind of work which exists in the national economy, taking into account age, education and work experience.

To be eligible for DI benefits, a worker must have credit for having worked in covered employment for a certain period of time. Generally, this is satisfied if the individual has: (1) credit for working at least one calendar quarter for each year after 1950, or if later, after the year in which he or she reaches 21, and prior to the onset of disability; and (2) 20 quarters of coverage in the immediately preceding 40 quarters. (There are exceptions for younger workers and the blind.) Currently, about 99 million people are insured in the event of disability.

Over 1 million applications for disability benefits are received each year by social security district offices, and in about 32% of these cases, benefits are granted. The leading causes of disability among new awards involve the circulatory (28%) and muskuloskeletal (17%) systems. The average age of disabled-worker beneficiaries is 53 years.

1980 Disability Amendments

A number of changes to the DI program were made by the Social Security Disability Amendments of 1980 (P.L. 96-265), enacted

June 9, 1980. The provisions were directed toward: (1) limiting benefits so that they would not exceed the worker's predisability earnings; (2) increasing the incentives for disabled workers to return to work; and (3) improving the administration of the program to insure that benefits go only to those who are eligible.

The legislation was prompted, in part, by concern over the great expansion of the program during the 1970's. Between 1970-1980, expenditures on the DI program rose from $3.3 billion to $15.9 billion. The number of disabled-worker beneficiaries nearly doubled between 1970-1978--from 1.5 million to 2.9 million. The number of new benefit awards to workers and their dependents peaked at 1.26 million in 1975. (Awards have since decreased--there were 641,000 in 1982.)

Among other important changes designed to improve administration, this legislation required the Secretary of Health and Human Services to review the continuing eligibility of disabled workers at least once every 3 years (except where the disability is considered permanent, in which case review may be less frequent).

CDI Activity

Between March 1981 and October 1983, approximately 1.047 million eligibility reviews were conducted by State agencies. Some 458,000 individuals were found ineligible for benefits, amounting to an initial termination rate of about 44%. This rate has subsequently fallen to 41% (as of FY 83). In about 17% of the cases for which a reconsideration of the initial decision is requested, the termination decision is reversed. Among those who request an appeal before an administrative law judge, the termination decision is reversed and benefits are reinstated in about 61% of the cases.

Termination rates vary widely among States and jurisdictions. In FY 83, for example, benefits were terminated in 18% of cases reviewed in South Dakota and 67% of cases reviewed in Puerto Rico.

Due to a number of recent court actions and actions taken by States, on their own initiative, the CDI review process is not being administered in a nationally uniform manner. Some 15 States are not presently processing eligibility reviews, and another 9 States are processing reviews under court ordered eligibility criteria.

Issues of Concern

Key issues raised by the eligibility review process include the following:

- The uniformity in decisionmaking and the basic standard of disability from one stage of adjudication to the next;
- the uniformity of decisionmaking from State to State, and from jurisdiction to jurisdiction, and the viability of the Federal-State arrangement for administration;
- the appropriateness of current law and practice whereby benefits may be terminated whether or not the agency is able to show that the disabling condition has improved, but nevertheless finds the individual ineligible for disability benefits on the basis of ability to work;
- the proper treatment of individuals first applying for benefits relative to those undergoing review;
- the proper treatment of beneficiaries already on the rolls prior to enactment of the 1980 amendments relative to those now coming onto the rolls;
- the adequacy of evidence development procedures;
- the heavy backlog of cases before administrative law judges (228 cases per ALJ) and the length of time prior to appeal (6 months on average); and
- the impact on the solvency of the DI program of legislative changes when coupled with an underlying increase in allowance rates and ongoing administrative changes, and possible impact on the triggering of a reduction in the January 1985 or January 1986 COLA for all social security recipients.

The CHAIRMAN. We are here this morning to have a long awaited hearing on social security disability insurance legislation. Before we hear from the witnesses—and we are very pleased to have three of our colleagues here this morning—I would like to call upon members of the committee for very brief remarks.

Senator Heinz.

Senator HEINZ. Mr. Chairman, first I'd ask unanimous consent that the full text of my remarks be put in the record.

I just want to thank you, Mr. Chairman, for holding these hearings. These are not the first held by the Finance Committee. I hope, however, it will be unnecessary to hold any further hearings because we will be able to report and enact legislation.

We have a critical situation where literally hundreds of thousands of people are being cut off the rolls unfairly on a program that they have contributed to. This is an insurance program. It is one of the three social security programs, and the one that operates in the black year in and year out. Indeed, if it hadn't been for the disability insurance program, we wouldn't have been able to bail out the old age and survivors' program to a position of solvency. So this program is something people have paid for and people should not be unfairly treated.

As a measure of that unfairness—with apologies to my good friend, Pat Moynihan, who has also read this opinion, I will use his States judge, U.S. District Judge Jack B. Weinstein, as a way of reiterating my concern that the mentally ill have been hurt most by the continuing reviews. Judge Weinstein ruled that the Social Security Administration, and I quote, "implemented a fixed clandestine policy against those with mental illness" and ordered SSA to reinstate all mentally disabled New Yorkers terminated from the rolls in each and every one of the past 4 years.

It's very unusual for a Federal judge to interpret the behavior of a Federal agency by means of motivation. But I must say, Mr. Chairman, that I'm afraid—it's my experience—that Judge Weinstein is correct. The Social Security Administration's policy has worked unfairly against the mentally ill, and many other groups as well, and that policy must be changed.

We have a lot of witnesses here who are going to speak to the specifics of that need, and those specifics are well known to the members of the committee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Heinz.

Senator Moynihan.

Senator MOYNIHAN. Mr. Chairman, I would just extend colleague's remarks on the decision by Judge Weinstein who is the chief judge of the Federal District Court in the Eastern District of New York. This was a case brought by the Corporation Council of the city of New York alleging deliberate wrongdoing on the part of the Social Security Administration. Courts are usually reluctant to assert with such vigor that an administrative agency has been deliberately disregarding its own regulations and the interests of its clients. However, in this case Judge Weinstein, a respected and restrained man, said that indeed there was a fixed clandestine policy on the part of the Social Security Administration against those with mental illness. He said of the Secretary of the Department, and I quote: "the Secretary's practices have violated the requirements of her own regulations."

We are not just here to ask whether new laws ought to be adopted, but whether existing laws are being violated. Mr. Chairman, I want to thank you for taking this up. But there has not in my long experience in these matters ever been a case where a Federal judge ordered every person taken off the rolls by the Health and Human Services Agency, the Administration's people to be put back on the rolls. That's how vigorous this finding was.

Senator HEINZ. Would the Senator yield? He didn't order all people be put back on the rolls. It was the mentally ill.

Senator MOYNIHAN. The mentally ill.

Senator HEINZ. Although a small number of the total population—about 10 percent of those who receive disability—is about 30 to 40 percent of all those who have been terminated because they can't defend themselves. That is what is so unfair and cruel.

This Senate with the support of virtually everybody on this committee, including, I think, Senator Dole—I can't speak for everybody on the committee—supported an amendment, which I offered, to place a moratorium on any further determinations regarding the mentally disabled. Although that was dropped in conference because Jake Pickle wanted to handle it as a whole, the Senate is overwhelmingly on record affirming, even before he made the order, that Judge Weinstein is correct.

Senator MOYNIHAN. We will stop there because other colleagues want to speak.

We have a court order stating that the Health and Human Services Department is in violation of its own regulations.

The CHAIRMAN. Senator Long.

Senator LONG. No statement at this time.

The CHAIRMAN. Thank you.

I would ask that my statement be made a part of the record. And what I have tried to do in the statement is to recite what has happened in the course of the past couple of years, the changes that have been made, the very intensive negotiations that occurred all last year—I think with some 15 Senators, including the 3 that are going to testify in just a moment here.

We do have some difficult programs. How do we protect the individuals on the rolls who are severely disabled, and yet maintain the principle of people who can work must be removed from the rolls? And I think some of these questions—and this was after all the underlying reason for the change in 1980 by the Congress. And I would hope that we can solve this problem very quickly.

I think the fact that we are scheduling this hearing in the very first week we are here, I hope, keeps our commitment to the witnesses here this morning, and the members of the committee, and also on the House side, that we are going to move on this as quickly as we can. We have tried to develop comprehensive legislation. I think we are very close to reaching an agreement. And I would hope that the record that we make today will be a final record. We hope to have a very intensive, exhaustive, complete hearing to make the record, and then take action. And if we can all work together, it would seem to me that we can do that very quickly.

So having said that, I will put this excellent statement in the record.

Senator MOYNIHAN. Mr. Chairman, could I put portions of Judge Weinstein's statement in the record?

The CHAIRMAN. Sure.

[The prepared statement of Senator Moynihan follows:]

STATEMENT OF SENATOR MOYNIHAN FOR SUBMISSION TO THE FINANCE COMMITTEE'S HEARING RECORD ON SOCIAL SECURITY DISABILITY INSURANCE

I share the deep concern of many of my colleagues on this Committee and in the Senate, about the injustices in the current Social Security Disability Insurance Program.

Since March of 1981, the Social Security Administration has reviewed the eligibility of more then one million recipients of disability benefits; nearly half of these beneficiaries, more than 445,500 disabled recipients, were terminated at the initial stage of the review process. Mentally ill beneficiaries of Social Security Disability, comprising nearly 25 percent of all those reviewed and the group least able to cope with the comlex review process, were hardest hit. The experiences of the mentally disabled were well documented by Peter J. McGough, associate director of the General Accounting Office, in hearings before the Senate Select Committee on Aging on April 7, 1983. Mr. McGough reported that in a recent study of mentally disabled beneficiaries, the GAO found that:

> Man individuals had their benefits terminated despite having severe impairments, and in our opinion, having little or nor capability to function in a competitive work environment.

I should like to direct the Committee's attention to a series of events in my own State of New York which offer compelling evidence of the inequities in the current Disability redetermination process. These events underscore the need for prompt Congressional action to rectify this situation, and to restore the credibility and integrity of the Social Security disability program.

Since the inception of the comprehensive review of current disability cases in 1981, more than 25,000 persons have been removed from the disability rolls in New York. Ten thousand of these individuals were mentally ill. On appeal, 85 percent of the mentally ill have won a reinstatement of their benefits.

Last July, Cesar A. Perales, Commissioner of the New York State Department of Social Services and the official responsible for administering the disability program, halted the further termination of disability benefits in New York until the U.S. Department of Health and Human Services develops reasonable standards for review. To date, no new standards have been published. In the months following Commissioner Perales' directive, eleven other states have followed New York's lead. Fifteen more states are operating under court-order or other medical improvement standards.

Commissioner Perales is a man who takes no pleasure in overuling a department of the United States Government. I can assure you that he would not take such action without the most compelling evidence that it was warranted. In discharging his responsibilities -- as chief administrator of the State agency serving the needs of the most poor and vulnerable citizens of New York, and as the agent of the Federal Government for the disability program -- Commissioner Perales found himself in a conflict. The New York State Department of Social Services estimates that as many as 50 percent of all disability recipients terminated from the rolls will have to depend on State and local public assistance programs. The growing evidence that the harsh mental illness standards used by the Social Security Administration were unworkable, inequitable, and clearly counterproductive, led this fine public servant to impose a moratorium on further terminations.

On February 8, 1983, New York State and New York City filed a lawsuit in the U.S. District Court for the Eastern District of New York, in Brooklyn. In this suit , *City of New York v. Heckler*, the City and State charged the Social Services Administration with violating the Social Security Act, by imposing unlawfully restrictive eligibility standards.

On January 11, 1984, Judge Jack B. Weinstein ruled that the Social Security Administration had implemented a "fixed clandestine policy against those with mental illness." Judge Weinstein wrote,

> Courts assume that professionals such as doctors, lawyers and managers responsible for important government institutions will enforce the law with scrupulous impartiality and concern for the rights of their clients - - here those claiming disability. That presumption of legality has been rebutted by evidence of denial of the rights of disabled persons acquiesced in by the professionals charged with assisting them. The result was particularly tragic in the instant case because of its devastating effect on thousands of mentally ill persons whose very disability prevented them from effectively confronting the system.

Judge Weinstein has an outstanding record as a fair and thoughtful jurist. His opinion in this case is no exception. I quote from his opinion once again, and at some length:

> The federal government provides disabled persons benefits through the Social Security Disability Insurance Program (SSD) and the Supplemental Security Income Program (SSI). Under both statutes, "disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." An individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."
>
> By regulation the Secretary has adopted a five-step "sequential evaluation" process to determine whether individuals -- both applicants and recipients -- are eligible

for benefits. The process is essentially the same for both SSD and SSI claimants.

At the first step, if the person is presently engaged in substantial gainful activity, he or she is disqualified from receiving benefits.

At the second step, the Secretary must determine whether the claimant's condition is severe. If not, benefits are denied.

If the impairment is severe, the Secretary as a third step determines whether or not the applicant meets or equals the listings of impairments set forth in the Social Security regulations. The listings contain *per se* disabling impairments. If a person meets or equals the listings, he or she is entitled to benefits.

If the claimant does not meet or equal the listings, the fourth step requires an assessment of the individual's residual functional capacity (RFC) and a determination of whether that capacity enables the individual to meet the demands of the work he or she performed in the past. If it does, the individual will not be entitled to benefits.

Even if the claimant cannot perform his or her past work, the fifth step calls for a determination of whether he or she can perform work available through jobs in significant numbers in the national economy. This assessment is made in light of the claimant's residual functional capacity, age, education and work experience. A determination of entitlement to benefits at this point is known as a "medical-vocational allowance."

All initial disability decisions are made by the New York State Office of Disability Determinations (State ODD) pursuant to a contract between the State and the Social Security Administration (SSA). The case record on any claim or review is compiled by a lay disability analyst who gathers information from the claimant and his or her treating physicians, social workers, and family members. Where such information is insufficient, the disability analyst is responsible for procuring one or more consultative examinations from a contracting psychiatrist or psychologist. The consulting doctor prepares a report of mental status following State ODD's instructions.

The actual psychiatric assessment of a claimant is then made on the basis of a review of the file by a staff physician employed by State ODD. The review physician is directed to use SSA's Psychiatric Review Form (or "QED" form, as it is often referred to within SSA and its agencies) to record his or her findings on a numerical basis. In theory, that form is designed to record the results of analysis of various psychiatric examinations. Space is provided for assignment of a numerical rating to each of 17 component items in three major areas in order to formulate a total "Psychiatric Impairment Rating" on a five point scale, "one" being normal and "five" a condition which compels a finding that the Listings are met.

Ratings of three and four are specifically defined to indicate severe mental illness which nevertheless does not meet or equal the listings of impairments.

Where the ratings on the QED form are three or four, regulations require that the review physician also assess the individual claimant's residual functional capacity. Before late 1982, SSA had no formal requirements or forms by which to make this measurement. To date no instructions have been promulgated indicating how this assessment is to be made. A form was provided by SSA in late 1982, however, on which the physician is directed to indicate whether the claimant has "limited" or "unlimited" abilities to sustain seven separate mental activities such as "understand . . . job instructions," "interact with supervisors and co-workers," and "maintain concentration and attention." Where the evidence from the mental status examination and other data are inconclusive, instructions from the SSA Central Office have recognized that a full-scale "workshop evaluation" of the claimant's actual work abilities in a simulated work or work-like setting may prove helpful.

The physician's RFC assessment is then referred back to a disability analyst or specialist, a State ODD employee. After considering the claimant's RFC, age, experience, and education, this person decides whether the claimant can return to his former work or engage in any substantial gainful activity.

All decisions by the State ODD are subject to a "Quality Assurance Review" by the Regional and Central Offices of SSA. At the Regional level (Tier II), reviews are conducted by the region's analysts and physicians who have power to reverse any State ODD determination. In order to conduct the quality assurance assessment, SSA officials have conducted sample reviews of State ODD determinations on a sufficient basis to ensure, with what they contend is 95% accuracy, that the uniform policies of the Social Security Administration are being followed by the states.

The same oversight function is performed on a higher level by the Central Office of SSA in Baltimore, Maryland to

> III reviews from Baltimore are both analyzed and followed in order to avoid the issuance of bureaucratic "demerits" within the system.
>
> Dr. Geller testified that the standards reflected in these reviews constitute the best sources of guidance for the determination of future disability claims. A large number of returns from a higher level causes the region and state administrations to pressure the review physicians to conform to the line from Baltimore.

Judge Weinstein's opinion goes on to describe how the practices and procedures of the Social Security Administration, regarding the review of the mentally impaired, have deviated from established statutes and regulations:

> Contrary to legal requirements, the Social Security Administration has consistently followed a policy which presumes that mentally disabled claimants who do not meet or equal the listings necessarily retain sufficient residual functional capacity to do at least "unskilled work." Sequential evaluation ends without assessing residual functional capacity or ability to engage in work. For younger individuals (those under 50 years of age), the presumption of ability to work is effectively conclusive. For older individuals (those over 50 years of age), the presumption applies with equal force and will also result in a denial of benefits unless the claimant not only has a severely impaired RFC, but also has extreme deficiencies

in the other "vocational factors" of education and work experience. The means of enforcement of the policy, through internal memoranda, returns, and reviews, has meant that the affected SSD or SSI applicant as well as counsel, social workers and advisors for a long time were unaware of its existence.

Evidence at trial revealed that this covert policy was followed consistently from 1978 until at least the early months of 1983. In 1983 the Social Security Administration yielded to pressure to allow medical vocational allowances for those with mental disabilities. The change was precipitated only after the filing of this lawsuit and after a preliminary injunction was issued on December 22, 1982, in the case of *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd.*, ___ F.2d ___ (8th Cir. 1983). The Minnesota Court declared the policy challenged in the instant case to be illegal within the Chicago Region of SSA.

Evidence of the fixed clandestine policy against those with mental illness is overwhelming. In 1978, the New York Office of Disability Determinations noted that virtually all of the mental disability cases in which it had allowed benefits upon medical vocational grounds had been reversed by the Central Office of SSA upon Tier III review. When the New York Regional SSA officials failed to follow suit in Tier II reviews, the State sought clarification of the policy to avoid being caught between conflicting levels of review. The response from Baltimore was a very clear pronouncement that allowances in cases of mental disability should not be granted unless the listings of impairments were met.

The effects of the clarification of policy were described at length by Dr. Anne Geller. Commenting in particular on a group of severely ill individuals who in her opinion clearly could not work, she testified that her findings in favor of granting disability benefits were flatly overruled. She further testified she understood from Tier Three reviews that "in younger workers medical vocational allowances are not considered when the impairment is psychiatric."

Marvin Lachman similary testified that only older workers were able to get medical vocational allowances for mental disorders. He estimated that the effect of SSA's policy was to cut the number of disability allowances in psychiatric cases in half

Dr. Maurice Osinoff -- a consulting psychiatrist with the State Office of Disability Determinations who was calle as a witness for the defense -- confirmed that prior to 198 he had <u>never</u> seen an allowance of benefits for a mentally ill younger worker who did not meet the listings; this was despite the fact that he saw "many" cases where he and his colleagues did not themselves believe that the claimant could work. This result made him "uncomfortable" since it did not square with what he knew as a doctor.

Dr. Theodore Cohen, a supervising consulting psychiatrist for the State ODD, similarly affirmed his understanding of SSA policy that a medical vocational allowance for a younger worker should generally never occur.

The distainful professional attitude towards the assumption of Baltimore that these claimants could really work is summarized by the following quotations from the record. Dr. Anne Geller testified that Baltimore was telling her:

> Somewhat like Candide in the best possible world these people can find employment and sustain, employment, basically they do have the capacity in some fantasyland of getting and maintaining employment.

Dr. Arthur Meyerson testified in regard to SSA's Psychiatric Review Form, that:

> [T]here is no way you can take the complex of human behaviors recorded in the psychiatric history, or even a summary of a single hospitalizations and narrow it down to 17 numbers That is absolutely ludricrous. And if you're trying to do it for determination of one's capacity to work, I don't know if it becomes more or less ludricrous; but its a silly notion.

The confidential policy was reiterated in a series of unpublished internal memoranda which were circulated within SSA from 1979 through 1982. The most incriminating was issued by Dr. Jose' Puig, then SSA's Acting Chief Consultant in psychiatry. He wrote:

> In the Mental Disorders, at least, a Total Psychiatric Impairment rating of less than "5" signifies the ability to engage in SGA [substantial gainful activity] at the level of unskilled work or higher. Where it does not mean that, the PRF [psychiatric review form] is being improperly used. Thus, where the PRF is properly employed, a separate RFC rating would be redundant and tantamount to giving double weight to the same case aspects.

This document was issued despite the sequential evaluation regulations which require a *separate assessment* of RFC and ability to engage in substantial gainful activity when a claimant has a severe impairment (3 or 4 on the 5 point scale) but does not meet the listings.

Although there is evidence that the *sub rosa* policy is no longer in effect, the effects on those terminated remain. In addition, New York City and State suffered difficult demands on their social service agencies, hospitals and shelters as a result of SSA's surreptitious undermining of the law.

This practice of secret memoranda, subjective standards of evaluation, and illegal policy directives has seriously undermined the basic integrity of SSA.

Judge Weinstein notes the particularly severe impact of these clandestine policies, on the lives of thousnads of mentally ill beneficiaries:

> Despite the fact that many suffering from mental illness are well educated and may even have been employed in the past, deteriorating mental illness increasingly impairs ability to work. Prognosis is poor. Ultimately work becomes impossible. This may be true despite the absence of active delusions. Medication may control delusions and bizarre behavior, but at the same time promote symptoms which make a patient unable to work.
>
> One witness described this as "[t]he inability to perform behavior as opposed to performing bizarre behavior."
>
> Others testified to the lack of correlation between an ability of a mentally ill person to perform daily activities such as household chores and the ability to cope in a work environment.

Those suffering from schizophrenia have a particularly difficult time coping with a work situation:

> The basic underlying symptomology of the disease is a disorder affecting ability of any kind of an emotional response to people, disorder of attention, disorder of energy and inability to get motivated to get started . . . .
> And you're left with this residual person. This person. . . is really unable to sustain a kind of activity for any period of time.

The mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA.

Others are afraid of the system. Even with help from social workers, many do not appeal denials or terminations.

An erroneous termination or denial of benefits to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback. Dr. Beatrice Braun testified that one of her patients who had not been hospitalized for fifteen years was hospitalized as a result of the trauma of having benefits cut off. This is not a unique case.

Judge Weinstein's finding, that of illegal acts by the Social Security Administration has acted illegally, offers the most persuasive evidence of the urgent need to reform the current disability determination process.

The Social Security Act and its regulations require the Secretary to make a realistic, individual assessment of each claimant's ability to engage in substantial gainful activity.

The class plaintiffs did not receive that assessment. On the contrary, SSA relied on bureaucratic instructions rather than individual assessments and overruled the medical opinions of its own consulting physicians that many of those whose claims they were instructed to deny could not, in fact, work. Physicians were pressured to reach "conclusions" contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment. The resulting supremacy of bureaucracy over professional medical judgments and the flaunting of published, objective standards is contrary to the spirit and letter of the Social Security Act.

The Secretary's practices have violated the requirements of her own regulations. Defendants have ignored the five step sequential evaluation process by presuming that the failure to meet listings at step three or four of the process automatically translates into a residual functional capacity to do unskilled work at steps four and five. The bureaucratic assessment of residual functional capacity if it was done at all was reduced to a paper charade where the SSA physician completed a cursory report or checked off a form knowing the conclusion had to be that the claimant had the capacity for unskilled work. Medical experts demonstrated to the court that the symptoms and restrictions of the listings of impairments do not measure an individual's capacity for work or his or her ability to withstand the stress of even the least demanding work. A denial of benefits on the basis utilized by the Secretary is arbitrary and contrary to the statute and regulations. Although the Secretary may rely on rulemaking to resolve classes of issues, the rules as applied may not conflict with the statute.

Because the Secretary no longer is following the illegal policy in adjudicating cases, there is no need to reach plaintiff's contention that the illegal rule violated the Administrative Procedure Act and that the Secretary should be required to begin notice and comment procedures to implement a regulation covering the determination of residual functional capacity for mentally disabled individuals.

Plaintiffs also allege that the Secretary's policy violates plaintiff class members' due process rights. The finding that the policy is contrary to the social security statute, obviates the need to reach the constitutional issue

The Secretary's illegal policy has affected all class members who have been denied, or terminated from, benefits. As was conceded by defendants' own witness, administrative law judges routinely give great weight to the finding on residual functional capacity which is entered in the record by the state agency's internal review physician. Testimony of Irwin Friedenberg, T. of 1983 at 876. Had the administrative law judges known that the assessment of residual functional capacity was not based on the doctor's professional opinion, the results in many cases might well have been different.

The decisions denying benefits or terminating benefits must be reopened and determined by the Secretary using proper standards. The usual administrative appeal rights will follow. In the interim the Secretary will, from the date of this order, reinstate benefits of all class members until the claimant's eligibility is properly determined by the Secretary. No retroactive benefits will be awarded until the Secretary determines whether or not the initial denial was correct.

This relief is within this court's remedial powers under the Social Security Act. Class relief is available in actions brought under section 205(g) of the Act.

Injunctive relief is also available.

Interim payments are an appropriate form of relief for a procedural violation of the social security statute.

(the Social Security Act does not "exclude the possibility of interim payments ordered by a court exercising its remedial power")

(sovereign immunity does not bar award of retroactive benefits; Social Security Act operates as a waiver of sovereign immunity). Mandamus jurisdiction also supports an allowance of interim benefits.

This memorandum and order constitutes a final judgment. Rule 58, Federal Rules of Civil Procedure. It embodies findings of fact and law. Rule 52, Federal Rules of Civil Procedure.

The judgment is stayed for ten days to permit application for a stay to the Court of Appeals.

Judge Weinstein ordered concrete relief: "the decisions denying benefits or terminating benefits must be reopened and determined by the Secretary using proper standards."

This is relief in full accordance with the court's remedial powers under the Social Security Act and, I might add, with the entire American legal tradition. I would argue, however, that only the Congress can ensure that this despicable situation never happens again.

What happend in my State of New York is by no means anomolous. Governors and courts throughout the country have assumed the role of protecting the rights of the disabled. It is not time for Congress to reassume its responsibility. We ought not abdicate our responsibility and authority in this area.

The **CHAIRMAN**. And we are very pleased to have three of our colleagues—Senator Cohen, Senator Levin, Senator Sasser—who have been sort of the leading edge in efforts to make responsible changes in the law. And I'm not certain just who is going to be first. Senator Cohen?

Senator **COHEN**. I thought I might open, Mr. Chairman, and then yield to Senator Levin to touch upon some of the specifics of our bill.

The **CHAIRMAN**. Fine.

STATEMENT OF THE HONORABLE WILLIAM S. COHEN, U.S. SENATOR FROM THE STATE OF MAINE

Senator **COHEN**. Thank you very much, Mr. Chairman. I might follow on your remarks last evening by saying "Good evening."

The **CHAIRMAN**. Right. We only kept you 15 minutes.

Senator **COHEN**. We do appreciate having the opportunity to testify before the Finance Committee. By now, I think, the statistics are familiar to all of us. Since March 1981, when these disability reviews began, more than 470,000 beneficiaries have been disqualified by the State agencies which have been applying the Social Security Administration guidelines. Of these 470,000, more than 160,000 individuals have been reinstated after appealing those termination decisions to administrative law judges.

I think we have waited too long to remedy a clearly inhumane, inefficient and inflexible system for deciding who is going to continue to receive disability payments. Now it has been said by some opponents of our legislation that many of those receiving disability payments are alcoholics, malingers, or both. And the facts, I think, are just to the contrary. Senator Levin and I have had disabled individuals found by our subcommittee, such as a man who had a shattered spine in a full body cast, being denied benefits. A woman involuntarily committed to a mental institution was also terminated from the program as were individuals with advanced multiple sclerosis and a man in an iron lung. They are among those who have had their disability terminated, receiving notices from the Social Security Administration that they are well enough to return to work.

I was going to comment on the court case that has been mentioned by Senators Moynihan and Heinz, but there is another case, *Lopez* v. *Schweicker,* which contains quite a list of those apparently unjustly terminated. I will submit the list for the record.

Let me just touch upon a few. James Board, a 48-year-old resident of California who suffers from diabetes mellitus, kidney failure, residuals of spinal meningitis, bone deterioration, blood clots and fistulas, had his benefits terminated.

Wallace Dorsey, a 58-year-old resident of California who suffers from severe brain damage due to ongoing strokes with blindness, uncontrolled high blood pressure, and inability to remain awake for sustained periods of time due to damage to brain cells, had his benefits terminated.

Trinidad Lopez is a 43-year-old resident of California who suffers from residuals of a brain tumor, residuals from brain surgery, residuals from spinal meningitis, and now has renewed leakage from his brain stem, which requires further surgery, yet his benefits were denied.

Ronald Minton, a 38-year-old resident of California who is currently a patient in a State hospital in Nebraska, suffers from paranoid schizophrenia and epilepsy, but his benefits were terminated.

And the list goes on. I won't take any more time to go through these, but will simply submit them for the record to give you examples of the types of cases in which benefits have been terminated because of what I, Senator Levin, Senator Heinz, Senator Moynihan, and others believe has been a faulty review process.

What we have is a situation where we are striving for efficiency at the expense of equity. In case after case we found that disabled people have lost their benefits due to a paper oriented review process, characterized by misinformation, incomplete medical examinations, inadequately documented files, conflicting standards, and erroneous decisions. I think what we have done is we have resorted to the computer, and we scan those computers; we've rounded up the disabled workers in this country; we've pushed the discharge button; and we have let them go into a free fall, into economic chaos, which has resulted in some of them committing suicide, others attempting to commit suicide, some of them dying from the very conditions that the Social Security Administration said were no longer disabling.

In a moment, I will yield to Senator Levin to go through the specifics of this comprehensive approach that we have been discussing with the chairman for a number of months now. At times I believe we have been very close to reaching an agreement upon the reforms.

I would just like to make the point that initially we were told that there was a 20-percent problem; that about 20 percent of the people who are receiving social security disability benefits didn't deserve them. All of us believe that we have to have periodic reviews to make sure that those people who are on disability who aren't entitled to it are removed. But what we have come up with is a 40-percent solution to a 20-percent problem. Forty percent of those reviewed have been terminated. And then we force these individuals to go through a lengthy review process, which can last as long as 12 to 18 months. Individuals who appeal were forced, prior to temporary legislation which you helped to secure, Mr. Chairman, to bear the expense of going through that whole review process without benefits only to be reinstated 18 months later. That is a fundamentally unfair system.

Senator Levin and I have initiated legislation to try and bring some sense of compassion to the problem, dealing with the reality that we have to review these cases, but should do so in a humane and truly fair fashion.

I'm hoping, Mr. Chairman, that you will move quickly on this bill. I think we all believe that the Government has a duty to be just as well as efficient. But right now the disability review process is neither.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator Cohen.

[The prepared statement of Senator Cohen and information on the *Lopez* v. *Schweicker* case follow:]

STATEMENT OF WILLIAM S. COHEN

Mr. Chairman, I appreciate the opportunity to testify on urgently needed legislation, introduced by Senator Levin and myself, which would reform the Social Security disability program.

By now, the statistics are familiar to all of us: since March 1981, when the disability reviews began, more than 470,000 beneficiaries have been disqualified by the state agencies which apply Social Security Administration guidelines. Yet, more than 160,000 of these individuals have been reinstated after appealing to administrative law judges.

We have waited far too long to remedy a clearly inhumane, inefficient, and inflexible system for deciding who should continue to receive disability payments. Perhaps we are numbed by the statistics and have forgotten the injustice inflicted on thousands of disabled people. As a result of a flawed review process, severe hardships have been imposed on the disabled. A man with a shattered spine in a full body cast, a woman involuntarily committed to a mental institution, individuals with advanced multiple sclerosis, and a man in an iron lung are among individuals who have received notices from our government informing them that they are well enough to return to work.

In desperation, people have committed suicide after losing their benefits, and men and women have died of the ailments that the Social Security Administration had decided were no longer disabling. Even severely disabled individuals whose medical conditions had actually deteriorated since they were awarded benefits decades ago have been dropped from the program.

The problem is a review process that strives for efficiency at the expense of equity. Witnesses at hearings held by the Oversight of Government Management Subcommittee recounted case after case in which a truly disabled person lost benefits due to a paper-oriented review process characterized by misinformation, incomplete medical examinations, inadequately documented files, conflicting standards, and erroneous decisions. The General Accounting Office has testified that the message perceived by the state agencies, swamped with cases, is to "deny, deny, deny," and, I might add, to process cases faster and faster and faster. In the name of efficiency, we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free-fall toward economic chaos.

The need for fundamental change in the disability reviews has been evident for some time. Our failure to remedy this problem has fostered contempt for the rule of the law and has permitted injustice to flourish unchallenged.

In response to congressional inaction, the states have taken matters into their own hands. Half of the states no longer follow the flawed procedures and criteria mandated by the Social Security Administration. In a dozen states, including Maine, the Governors have imposed moratoriums on further disability reviews, while other states have devised their own standards for determining eligibility or are following court decisions that require medical improvement in a beneficiary's condition before benefits can be curtailed.

Legislation such as S. 476 is required to end this chaos and to ensure an equitable review process. Senator Levin and I have indicated previously our willingness to modify several provisions of our bill in order to reduce its cost. Indeed, the amendment which we offered on the Senate floor last November represented such an effort. Today, however, I would like to comment on S. 476, as introduced, because I believe all of its provisions deserve the Committee's serious consideration.

First—and fundamental to a fair system—S. 476 would require that the claimant be given a clear and complete notice of what the review process entails. Although the SSA has taken steps to improve its notices, this basic safeguard should be incorporated into the disability statute. Considerable confusion in the disability process resulted from the agency's early notices, which simply told the beneficiary: "Your case is due for review" to see if you "continue to meet all requirements." This notice was misleading because it did not inform disability recipients that they would have to prove all over again with new medical evidence that they qualified for benefits.

Second, our legislation would require that the standards for determining disability be issued as regulations subject to public notice and comment. This provision would accomplish three essential objectives: It would promote uniformity in decision-making by requiring all adjudicators to use the same criteria; it would improve the quality and consistency of the standards by involving the public, including the medical profession, in their development; and it would ensure that everyone involved has ready access to the standards. An attorney in Maine who represents the disabled recently described the current criteria as "secret" because the internal agency guidelines used by state claims examiners are not available for public scrutiny and are so difficult for her to obtain.

Third, S. 476 would institute a face-to-face meeting between the claimant and the state adjudicator to humanize the process and to permit a more complete understanding of the individual's capabilities.

Fourth, the cornerstone of our bill is the section which would establish clear criteria for terminating benefits. The specific criteria in S. 476 would clear the confusion that shrouds the current review process and, for the first time, would provide beneficiaries, attorneys, state claims examiners, and administrative law judges with a clear understanding of the grounds for terminating benefits. The bill would establish a general rule requiring the Social Security Administration show medical improvement in the claimant's condition before benefits can be ended.

There are, however, specific exceptions to the medical improvement standard included in our proposal. These exceptions would allow benefits to be terminated if:

(1) The individual has benefited from advances in medical or vocational technology or therapy which allow him or her to perform substantial gainful activity;

(2) Substantial evidence demonstrates that the individual's impairment is not as disabling as it was considered to be when benefits were first granted;

(3) the initial decision was clearly erroneous or the result of fraud; or

(4) the individual has demonstrated an ability to perform substantial gainful activity.

Although I do not oppose the inclusion of a "prior work" exception to the medical improvement standard, provided that it is carefully structured, I share the judgment of the House Ways and Means Committee that anyone capable of performing his or her prior work could be terminated under one of the exceptions already included in S. 476 or the companion House bill.

Another provision of our bill would make permanent the continuation of benefits pending appeal to an administrative law judge. I recognize that this is a costly provision, and Senator Levin and I have indicated our willingness to sunset this provision after a reasonable length of time.

To streamline the appeals process S. 476 proposes that the reconsideration step be eliminated so that claimants could appeal directly to an administrative law judge.

I am aware that the Administration, in response to legislation passed in 1982, is moving ahead with plans to implement an evidentiary hearing at the reconsideration stage of the appeals process. While I agree that a claimant should be seen by a state examiner, I believe that an interview at the initial stage is the best way to achieve this goal. In my judgment, a reconsideration hearing is duplicative of the hearing conducted by administrative law judges, and I am concerned that claimants might be discouraged from appealing further to an ALJ. Also, whether they are federal or state employees, the hearing officers who will conduct these reconsideration hearings apparently would not be covered by the Administrative Procedure Act, which provides legal protections for administrative law judges to help ensure impartial decisions. For these reasons, elimination of reconsideration altogether seems to me to be a better approach.

S. 476 also would include language on pain in the statute. The Social Security Administration's regulations require consideration of a claimant's pain in reaching a disability determination. However, for a time, the agency eliminated the evaluation of pain section from the POMS, the internal guidelines which set forth the standards for disability decisions, saying there had been an "improper emphasis" on the role of pain. I would point out that Federal courts have recognized the importance of pain in disability determinations for more than 20 years. Although new guidance on pain has been reinserted into the POMS, our bill would provide statutory guidance on evaluating a claimant's pain to prevent future confusion or arbitrary deletions by the agency.

Finally, I urge the Committee to carefully examine the provisions of the bill affecting the SSA's policy of issuing rulings on nonacquiescence when it disagrees with a federal court decision but chooses not to appeal it. The implications of the agency's current approach are troubling. When the SSA issues a ruling of nonacquiescence, it, in effect, forces an identically situated claimant to go to court in order to obtain relief. This renders the administrative proceedings pointless as the disabled individual knows he will have to file a district court action if the administrative law judge follows the agency's policy and ignores the court ruling. Moreover, the circuit court opinions in which the SSA has a nonacquiesced have involved major issues, such as medical improvement, which would have significantly altered disability determinations had they been followed.

Mr. Chairman, I want to emphasize that I support periodic reviews of individuals receiving disability. Since a worker does not have to be permanently disabled in order to receive benefits, it makes sense to recheck beneficiaries from time to time to ensure that only those who remain disabled continue to collect disability checks. Workers who have recovered should go back to work. Period reviews also provide a useful check against the fraud that plagues virtually every Federal program.

But what we have now is a 40 percent solution to a 20 percent problem. The percentage of ineligibles was estimated to be about 20 percent when Congress passed the 1980 amendments, but benefits are being terminated for twice that number. Based on the administrative law judges' reversals of state termination decisions, more than 160,000 mistakes have already been made, and that doesn't include those severely disabled people who didn't pursue an appeal because they lacked the resources, willpower, or understanding.

Government has a duty to be just as well as efficient, and right now, the disability review process is neither. We should remember that the individuals receiving Title II benefits have paid for this protection against disabling illness. This is not a welfare program; it's an insurance program.

The legislation that Senator Levin and I have proposed would reform the disability system to allow the SSA to eliminate from the program those who are no longer disabled, while protecting the benefits of the truly disabled. While Secretary Heckler deserves praise for the administrative reforms she has implemented, it is clear that legislation is still needed to rectify the fundamental flaws in the disability program. I hope that the Committee will promptly and favorably report S. 476 or comparable legislation.

From Plaintiffs' Declaration in Support of Motions for Class Certification and Preliminary Injunctive Relief.

Lopez v. Schweiker

CAPSULE DESCRIPTION OF DISABLED INDIVIDUALS

1. RICHARD ALTON is a 36-year-old resident of Oregon who suffers from permanent brain damage. His SSI benefits have been terminated.................................. 26
2. JAMES BOARD is a 48 year-old-resident of California who suffers from diabetes mellitus, kidney failure, residuals of spinal meningitis, bone deterioration, blood clots and fistulas. His SSDI benefits were terminated... 32
3. GEORGE BRIMIDGE is a 54-year-old resident of California who suffers from disc disease and mental impairment. His SSDI benefits have been terminated.... 38
4. ROBERT E. BROCK is a 50-year-old resident of Arizona who suffers from cerebral palsy. His SSDI benefits have been terminated.................................. 45
5. OUIDA BROWN is a 59-year-old resident of California who suffers from crippling arthritis. Her SSDI and SSI benefits are being terminated...................... 53
6. MICHAEL CARDENAS is a resident of California who suffers from congenital retardation, sensorineural hearing loss, allergy and asthma. His SSDI and SSI benefits have been terminated......................... 66
7. WALLI CARLSON is a 41-year-old resident of California who suffers from a psychiatric condition and chronic

alcoholism with accompanying physical residuals. Her SSI benefits are being terminated........................ 83

8. JOSEPHINE CHAVERIN is a 62-year-old resident of California who suffers from severe mental illness, rheumatoid arthritis and various physical residuals. Her SSDI benefits have been terminated................. 91

9. PEYTON J. CLARK is a 49-year-old resident of California who suffers from hypertension, cardiovascular disease and a nervous disorder. His SSDI and SSI benefits have been terminated..................102

10. KATHERINE COLEMAN is a 48-year-old resident of California who suffers from hypertension, diabetes mellitus, arthritis, bladder incontinence and a nervous disorder. Her SSDI and SSI benefits are being terminated..108

11. CAMELIA COUSINS is a 29-year-old resident of California who is mentally disabled. Her SSDI and SSI benefits have been terminated.....................114

12. MARILYN CROPPER is a 56-year-old resident of California who suffers from hypertension, angina pectoris, disc deterioration, ulcers and diabetes mellitus with damage to her eyes. Her SSDI benefits have been terminated..........................122

13. MARY R. DIAZ is a 61-year-old resident of Arizona who suffers from diabetes and arthritis. Her SSI benefits have been terminated..........................130

14. WALLACE DORSEY is a 58-year-old resident of California who suffers from severe brain damage due

to ongoing strokes with blindness, uncontrolled high blood pressure and inability to remain awake for sustained periods of time due to damage to brain cells. His SSDI benefits have been terminated.........135

15. BERTHA EDWARDS is a 46-year-old resident of California who suffers from severe nerve damage from a work injury, high blood pressure, limitation of motion and emotional overlay with a history of suicide attempts. Her SSDI and SSI benefits have been terminated. Her last forced hospitalization for a suicide attempt was January 1983..140

16. IRVIN EVANS is a 50-year-old resident of California who suffers from diabetes mellitus with severe nerve damage in both arms, disc disease and blindness in the left eye. His SSDI and SSI benefits were terminated...149

17. ROBERT FEULNER is a 52-year-old resident of Arizona who suffers from a back injury, diabetes, high blood pressure, chest pains and depression. His SSDI benefits were terminated.................................155

18. CLARENCE FIELDS is a 39-year-old resident of California who suffers from hypertension, arthritis, asthma and mental illness. His SSI benefits are being terminated.......................................160

19. CELIA FOOTE is a 36-year-old resident of California who is mentally retarded and who suffers from

hypoglycemia, arthritis and schizophrenia. Her SSI and SSDI benefits have been terminated................165

20. JOSEPH G. FULLER is a 44-year-old resident of Arizona who suffers from asthma and emphysema. His SSDI benefits were terminated...........................171

21. ROY E. GETSCHEL is a resident of Montana who suffers from alcoholism, seizures, ruptured vertebrae, thrombosis and arthritis. His SSDI and SSI benefits have been terminated....................................175

22. MARCELLA GIRARD is a 48-year-old resident of California who suffers from thrombophlebitis, degenerative disc disease, bronchitis, tumors and nervousness. Her SSDI benefits are being terminated...177

23. RONALD GRAY is a 47-year-old resident of California who suffers from mental illness, cirrhosis of the liver, high blood pressure, residuals of bone injuries, poor vision and a connective tissue disorder. His SSI benefits are being terminated.......182

24. HENRIETTA HAYNES is a 43-year-old resident of California who suffers from recurrent anal stenosis, recurrent bowel obstruction, resulting abscesses and fistulas and bowel incontinence in spite of repeated surgeries. Her SSDI and SSI benefits have been terminated...187

25. JAMES HERRON is a 42-year-old resident of California who suffers from hydradenitis suppurative with extensive painful lesions and draining abscesses. His SSDI benefits have been terminated.................198

33. MARGARET MARTINEZ is a 60-year-old resident of California who suffers from cancer of the stomach and intestines and who undergoes chemotherapy treatments which cause severe residuals. Her SSDI benefits have been terminated..........................259

34. SHERILYN MEACHAM is a 30-year-old resident of California who is mentally retarded and who suffers from epilepsy and mental illness. Her SSI benefits are being terminated.................................265

35. RONALD MINTON is 38-year-old resident of California who currently is a patient in a state hospital in Nebraska. He suffers from paranoid schizophrenia and epilepsy. His SSDI benefits have been terminated..273

36. ENDRE NEMETH is a 51-year-old resident of California who suffers from liver disease, heart disease, residuals of heart attacks, kidney disorder, asthma, arthritis and hypertension. His SSDI benefits have been terminated......................................286

37. ZOLA ORR ia a 39-year-old resident of California who suffers from residuals of cancer, recurrent pelvic inflammatory disease, osteoarthritis and lymph-edema. Her SSDI benefits have been terminated.................292

38. LOUIS ORTIZ is a 59-year-old resident of California who suffers from diabetes mellitus with nerve damage and crippling rheumatoid arthritis. His SSDI benefits have been terminated....................298

39. SAMUEL J. PARRISH is a 56-year-old resident of California who suffers from arthritis and hypertension. His SSDI benefits have been terminated.......304

40. JOHN J. PRESTON is a 57-year-old resident of California who suffers from hypertension, angina, 3 vessel heart disease, peptic ulcer and arthritis. His SSDI benefits have been terminated.................309

41. ANITA PROBERT, a resident of California, committed suicide on February 10, 1983, at the age of 49 years. She suffered from psychotic depressive reaction, hypertension, pancreatitis, severe electrolye and vegetative disturbances, gastric ulcers, ankle edema, tardive dyskinesia and heart disease. Her SSDI and SSI benefits were being terminated............316

42. LEON RAMEY is a 55-year-old resident of California who suffers from severe back injuries. His SSDI benefits have been terminated...........................339

43. MARY RAPSON is a 38-year-old resident of Arizona who suffers from hormonal dysfunction and chronic manic-depressive illness. Her SSDI benefits were terminated..344

44. SAMUEL RUVALCABA is a 45-year-old resident of California who suffers from a severe spinal injury, bulging anulus fibrosis. His SSDI benefits have been terminated.....................................350

45. WILLIE SHAW is a 43-year-old resident of California who suffers from chronic schizophrenia. His SSDI and SSI benefits are being terminated.................358

STATEMENT OF HON. CARL LEVIN, U.S. SENATOR FROM THE STATE OF MICHIGAN

The CHAIRMAN. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

I have somewhat mixed feelings in appearing before you today. I must say that while I am delighted that the committee is holding hearings, and I commend the Chair and other members of the committee for doing so, I can't forget that it's over a year, almost a year and a half now, that we first started appearing before this committee on this issue. There have been many negotiations during this year and a half, but the injustice continues. Hundreds of thousands of Americans have had their disability benefits, which they deserve, terminated. Administrative law judges and courts a year or 2 years after these people have been kicked off the disability rolls have come along and said those folks were unjustly removed.

I'd like to point our finger just at the SSA or the OMB—and much of the problem does lie there—but I must say that Congress has to bear its share of the responsibility as well, because Congress has not acted to correct what is obviously an injustice, an outrageous and clear injustice to hundreds of thousands of American citizens who we know are being erroneously removed from the social security disability rolls.

Senator LEVIN. The motives of Congress were good. We wanted to remove people from the rolls who don't belong there. That is a legitimate goal. We do not want people on the rolls who shouldn't be there. But, my God, with equal passion, we should want people on the rolls who do belong there.

And just over this year and a half alone, we have witnessed again tens of thousands of people being denied a benefit that they paid for. This is not a welfare program. It is not a charity program. It is not a gift. It is something that they earned and contributed to. It is a trust fund to which they contributed.

This Government—and I'm not pointing my finger at any particular part of it—but this Government has violated that trust as we have stood and borne witness to these injustices. And it is time, Mr. Chairman, to correct these injustices.

What we have now is chaos. Twenty-six States have told the Federal Government they are ignoring our laws. That the injustices are so bad that now over half of our States have said they will not abide by the social security regulations any longer. That is unprecedented. It may be unprecedented since the Civil War that so many States have told the Federal Government that they will not comply with Federal regulations.

The National Governors Association has written the Members of the Senate in support of my and Senator Cohen's bill. We now have over 30 cosponsors of our amendment and our bill. The National Governors Association is on record as saying the following in support of our bill: "The manner in which the 1980 disability redetermination amendments have been implemented has resulted in large numbers of erroneously terminated benefits causing severe financial and emotional hardship of eligible individuals."

And, Mr. Chairman, I would like to ask the Chair at this point to include in the record that letter from the National Governors Association as well as letters from Governors of a number of States, including the State of Kansas. Governor Carlin has written one of the most eloquent letters that we have received, pointing out just why it is that Kansas is not going to abide by unjust rules that have been perpetrated by the Social Security Administration upon these reviews.

Our bill, S. 476, contains a number of provisions. No. 1 it would require the Social Security Administration to show medical improvement when they want to remove somebody from the disability rolls unless they can show fraud or error in the previous allowance decision or they can show that the person has benefited from a new medical device or technique, or that the person based on new diagnostic techniques is less disabled than previously thought. That is a reasonable approach to this problem. We should not be removing people from the rolls because they have a new person working in the office who has made a new determination, or they found a new judge who has reached a different conclusion with no new evidence.

Mr. Chairman, we provide that the Social Security Administration keep folks on the roll where there are medical findings of pain, even though you can't show it on an X-ray. If there are medical findings of the presence of pain, that should be adequate to keep people on the rolls who were put there to begin with.

We allow the Social Security Administration in this bill to consider multiple impairments. Right now the Social Security Administration does not consider the cumulative effect of impairments. They will not consider more than one at a time. What we say is that you can look at all and add them together. The whole is not greater than the sum of the parts, but for heaven's sake, it ought to be at least equal to the sum of the parts.

And, Mr. Chairman, we continue the payment of benefits through the administrative law judge. This has been a lifesaver for some. But it has run out because of the action of one Member of the House, which stopped us from continuing the payment of these benefits to the administrative law judges.

The CHAIRMAN. I think they can still bring that up though.

Senator LEVIN. That is correct. Through a technicality, the Social Security Administration has continued it for a few months. But is going to run out unless we act..

But we are no longer able to simply say let's just adopt some interim solution; let's just continue these benefits for another 6 months while we look at it. We have been saying this for a year and a half. I must commend the Chair. I think the Chair has worked beautifully with us and with members of this committee to try to reach a conclusion which is just to the people of this country. But we must end the moral and the administrative chaos which is out there. And our bill will end that chaos in a reasonable way. And I'm glad the committee this morning is taking up our bill. And I thank you for it.

[The prepared statement of Senator Levin follows:]

STATEMENT OF SENATOR CARL LEVIN

Mr. Chairman, I have mixed feelings as I testify before this committee today. While I am, of course, pleased that the committee is taking up S. 476 for consideration, I can only recall that it was in August, 1982—almost a year and a half ago—that Senator Cohen and I appeared before this committee on the same subject. In that period of time, tens of thousands of severely disabled persons have suffered through the anxiety inherent in the disability appeals process—where they have been terminated by the state disability services only to be reinstated by an administrative law judge or a federal district court.

The comments of one person who experienced this process are rather telling and sound more like the words of a prisoner of war than of a disabled American worker:

I pray that no one has to experience the grief, pain, and humiliation I've felt.

Mr. Chairman, S. 476, which I introduced along with Senator Cohen now has a total of 35 cosponsors representing a broad spectrum of support. Those cosponsors are, in addition to myself and Senator Cohen, Senators Boren, Specter, Dixon, Kennedy, Heinz, Matsunaga, Pryor, Glenn, Nunn, Kasten, Moynihan, Cochran, DeConcini, Lautenberg, Andrews, Boschwitz, Riegle, Huddleston, Hawkins, D'Amato, Pell, Sasser, Durenberger, Quayle, Tsongas, Bumpers, Stafford, Cranston, Byrd, Metzenbaum, Chafee, Bingaman, and Sarbanes.

S. 476 is an effort to bring equity and order to the Social Security disability program.

As my colleagues well know—from the reports they have been receiving through their caseworkers back home—something is seriously wrong with the administration of the Social Security disability program. Severely disabled persons who should be protected by the benefits of this program have been terminated in unexpected numbers. The horror stories have proven to be not isolated examples but to reflect the experience of tens of thousands of disabled people. And let me emphasize here a fact that became obscured in the debate last session. The Social Security disability program is an insurance program for our nation's workers. It is *not* a welfare program. Each employee contributes a part of his earnings to the Disability Insurance trust fund. (This is matched by a tax paid by the employer.) The workers of this country count on this program as protection—insurance—against the unexpected event of a catastrophic illness or accident. Eligible beneficiaries have earned their right to this benefit. That fact makes it all the more important that in the administration of this program we take care not to deny benefits to any eligible, severely disabled applicant.

Let me briefly explain how we got into the shameful situation we are in today with this program.

In 1980, Congress enacted into law an amendment to the Social Security Act which required the SSA to review every three years the eligibility of persons receiving Social Security disability benefits. This was based on a growing concern that large numbers of persons were receiving benefits who were really ineligible to do so. This was a reasonable management initiative and one I endorse. It is the implementation of that provision that has created the chaos and hardship we have been hearing so much about.

To begin with, the reviews themselves were begun prematurely—before adequate planning, training, and hiring of staff. Persons who had never been reviewed before were not given adequate notice about what was expected of them and the type of evidence they were required to produce to retain their eligibility. But most important, a signal was being sent from the national Social Security office that the people being reviewed were to be held to very strict standards, and that any error should favor the SSA as opposed to the disabled worker. More weight was given to a one-time exam by a SSA paid consultative physician than the beneficiary's long-term treating physician. The combination of these factors led to the unanticipated termination of 45–47 percent of the persons who were being reviewed—this was over double the number of terminations the SSA itself estimated would occur at the time the 1980 amendment was considered and passed.

In 1982, support for the reviews began to erode as there were increasingly dramatic press accounts of the effects these reviewed were having on severely disabled persons. Numerous congressional committees in early 1982 began oversight hearings on the disability review process. House Aging held a hearing in May of 1982. The Subcommittee on Oversight of Government Management, which Senator Cohen chairs and on which I serve as ranking minority member, convened a hearing on May 25, 1982, and heard testimony that should have embarrassed us all as public officials. We heard the moving account of Mrs. Richard Kage, who described how the disability review process forced her severely disabled husband to try to go back to work, intensified the degree of his disability and finally was a causal factor in his untimely death at the age of 49. We had documentation from Mr. Kage's doctor that it was his medical opinion that the emotional anxiety surrounding the review process contributed to Mr. Kage's death. That is a stunning accusation. And it is not the only such accusation that has been made about this process.

There were also hearings by the Social Security Subcommittee of the House Ways and Means Committee, the Senate Aging Committee, and, of course, the hearing in August of 1982 by this committee. Throughout all these hearings the testimony has been the same. Something has to be done to improve the way in which these reviews are being conducted to restore order and fairness to the disability program.

The congressional concern was complimented by a growing number of cases in the federal courts. Numerous lawsuits have been filed challenging the standards used by Social Security for terminating someone from the program and to date some half dozen federal courts have held that Social Security should have to prove that the person's condition has changed or medically improved before the person can be terminated. But the Social Security Administration has a policy of nonacquiescence which means it picks and chooses those Circuit Court decisions with which it will agree and refuses to follow those court decisions with which it disagrees. This means that although litigants were winning in the courts on the question of showing medical improvements before termination, these court decisions were not being applied to other disability beneficiaries.

Two major class action cases have forced Social Security to change its procedures. In the Ninth Circuit, in a case entitled *Lopez* v. *Schweicker,* the federal district judge ordered Social Security to follow prior decisions by the Circuit Court and require a showing of medical improvement prior to termination. The judge has ordered the SSA not only to apply such a standard prospectively, but also to review those persons who have been terminated over the past two years and apply the standard retroactively. The SSA is complying with that court order, but it is also on appeal to the Ninth Circuit. That medical improvement standard, however, is being applied by the SSA only to persons within the six states covered by the Ninth Circuit.

In the Eighth Circuit, a federal district court ruled that the SSA had used an erroneous process in reviewing the eligibility of persons with mental impairments and has ordered the SSA to review all persons with mental impairments within the jurisdiction of the Chicago regional office who have been terminated without completing the full sequential evaluation process. That involves some 32,000 persons in my state of Michigan alone.

In an effort to protect their own constituents, and to abide by the authority of the federal courts, many states have taken action on their own to address the problems in the disability program. At my last count, 17 states have imposed moratoriums on the reviews of disability beneficiaries until Congress passes a reform bill or the SSA straightens the system out administratively or they have imposed their own standard for terminations, which include a showing of medical improvement or change in the beneficiary's condition. Nine other states are under court order to follow a medical improvement standard.

On June 8, 1983, Secretary Heckler attempted to bring some administrative reforms to the disability program. She instituted, among other actions, a partial moratorium on reviews of those with mental impairments and initiated a study of the disability program. While her efforts were in the right direction, they were far from solving the real problems which only comprehensive reform legislation can do.

When these reviews started in March of 1981, there was no statutory protection for the payment of benefits for these individuals while they were appealing their termination decisions. This was particularly troubling in light of the fact that over two-thirds of the persons who appealed their benefit terminations to administrative law judges were being reinstated. The latest SSA statistics show that since March of 1981, of some 470,000 persons who have been terminated initially, 160,000 have been reinstated on appeal and 120,000 appeals are pending. Seeing the human tragedy that was resulting from this process—persons were losing their homes, their ability to purchase basic necessities, and even their will to live while the appeals process dragged on—Congress passed last year an emergency provision which continues the payment of benefits through appeal to an administrative law judge. That provision expired on October 1, 1983, and we extended it to December 7, 1983, but unexpectedly failed to renew the extension before the close of the last session. The assumption has always been that that provision was merely a stopgap measure until Congress could pass comprehensive reform legislation. Now we don't even have that. But, because the SSA pays benefits for two months beyond the month of termination, and because the SSA has imposed its own nationwide temporary moratorium on terminations, no one has been affected by our failure to renew the aid-paid-pending provision. However, soon it will be a different story once terminations are again processed by the SSA. That is the deadline we now face on this legislation.

We introduced S. 476 on February 15, 1983. We offered an amendment to S. 476 on June 29. Let me briefly describe, now, just what provisions are contained in this bill and why.

(1) The bill requires that before a person receiving disability benefits can be terminated, the SSA must be able to show medical improvement unless one of the following factors is present:

(A) There was error or fraud in the previous allowance decision;

(B) The person has benefited from an advance in medical or vocational technology;

(C) New or improved tests or diagnostic techniques demonstrate that the person is less disabled than previously thought.

The weight of court opinion supports—on the basis of procedural fairness—the concept of medical improvement. Some courts have ruled that the burden in termination cases shifts from the beneficiary to the SSA to show a change in the person's condition or a reason why the person is no longer found to be eligible; others simply state that the SSA should show medical improvement. The SSA has refused to follow these decisions.

Applying a standard of medical improvement as that contained in S. 476 is only reasonable and fair. When a disability beneficiary was initially allowed benefits, Social Security was concluding, by its own standards and tests, that that person was so severely disabled as to not be able to do any job in the national economy. Now Social Security has "tightened" the administration of the program and may judge that same person, who has not experienced any change or improvement in his or her condition, as no longer being eligible. Basically, the SSA is saying it changed its mind; no other reason is necessary. I think that's wrong and terribly unfair. Now if the SSA can prove that the person was fraudulent in his initial application, or the SSA committed an error in processing that initial claim, then the SSA should be able to terminate that person even though the person's condition has not changed. Likewise, the SSA should be able to take advantage of recent developments in the medical field. Thus, if there is a new device that can better assess the extent of disability or that can lessen the effects of the disability, then the SSA should be able to require its use and take advantage of the changes, regardless of whether or not the beneficiary's condition has in fact improved. An example of this might be the advent of the stress test, which can now determine cardiac capability to a far greater degree than the standard electrocardiogram. S. 476 allows for these exceptions. But where these factors are not present and where the individual's condition has not changed, then the SSA should be required to stand by its previous judgment of eligibility. Frankly, I cannot see how a person can legitimately be terminated unless one of these exceptions applies.

(2) The bill requires the SSA to consider multiple impairments in determining whether or not a disability is severe or meets or equals the listings. This has been a particularly difficult problem in the operation of the program. In order to standardize the judgements made on these disability cases, the SSA has restricted its interpretation of severity and has precluded consideration of multiple impairments. If one of the several impairments an individual may have does not alone, meet the standards for disability set out by the SSA, then the person is denied benefits regardless of whether or not the cumulative effect of all the impairments may, in fact, exceed the severity of any single eligible impairment. That is simply unfair and unjustifiably restrictive.

(3) The bill requires certain improvements in the administration of the reviews—better, more complete notice to the individual, the opportunity for a personal appearance with the state disability examiners before actual termination, and a thorough documentation of the beneficiary's preceding twelve-month medical history with foremost reliance on the comments of the treatment physician as opposed to the SSA ordered and bought consultative examiners.

(4) The bill establishes by statute a standard for consideration of pain. Earlier hearings brought to light gross inconsistencies in the treatment of pain between the state disability examiners and the administrative law judges—largely a result of the SSA's use of internal guidelines (the POMs) which were different from the regulations. The standard contained in S. 476 would allow for pain to be considered disabling without proof of a medical cause (as the SSA now requires) if there are medical findings of the presence of the pain. Numerous court cases have similarly held, and I will gladly provide the Committee with those cases if requested.

(5) The bill would make the payment of benefits through the administrative law judge stage permanent law. Since these benefits are frequently the only object that stands between subsistence and poverty for many of these beneficiaries, they should only be terminated when the administrative appeals process has been completed and the decision of the SSA is final. Not only does a beneficiary lose his or her benefits, he or she also loses the important Medicare coverage which helps the beneficiary obtain needed medical treatment. The termination of benefits is, therefore, a very serious consequence and should only be done when the SSA prevails at the ALJ level.

(6) The bill requires the Secretary to either appeal or acquiesce in decisions of federal circuit courts. This is a very difficult issue. Absent a direct court order involving an entire class of people, the SSA feels free to ignore as to subsequent beneficiaries' decisions of federal district and circuit courts interpreting substantive law except as they apply in the specific case being decided. Some believe that is violative of the fundamental principle of the separation of powers as interpreted by the Supreme Court in *Marbury* v. *Madison*. The SSA replies that it has the responsibility to administer a national program and can't respond to decisions with which it disagrees in less than a national way. Were it to follow a Circuit Court decision on a national basis, it would be thereby elevating the Circuit Court of Appeals to the level of the Supreme Court. Because of the SSA's arguments and would be comfortable with some modification of this provision in the bill. The change I would propose would be to require the Secretary of HHS to report all acquiescence and nonacquiescence decisions and the reasoning for those decisions to Congress. This is a very important policy question—the extent to which a federal agency can ignore federal district and circuit court interpretations of law—and one that has implications governmentwide. I can understand if this Committee does not feel it can fully respond to the problem in just the SSA context.

(7) The bill requires that any standard for determining disability to be followed or used by the SSA be made subject to public notice and comment and applied at all levels of the administrative process, from the state disability examiners to the Appeals Council. I was shocked to discover that many of the most important determinative standards and factors used by state disability examiners at the insistence of the SSA are not published as regulations. One such example was an internal guideline or POM which listed 20 impairments as being ipso facto nonsevere, meaning if

the person has one of these impairments, the person is deemed automatically not eligible. Now I take issue with that standard substantively, but equally important, I take issue with the process that allows such a standard to be used without public knowledge. There really is no acceptable justification for allowing standards of disability which so clearly affect the final outcome of the eligibility decision to be promulgated and made effective without public notice and comment.

Mr. Chairman, at last count 41,000 of the 44,000 lawsuits pending against HHS involved disability claimants. In Detroit the figures are equally staggering and the percentages are growing. According to figures compiled by the Detroit News.

In the year ending June 1982, some 987 Social Security cases were on the docket [in U.S. District Court for Detroit]—just under 16 percent of the total civil filings. By June 1983, that number had almost doubled to 1,709 and represented one out of four of the new cases coming into the court. In the first four months since June, Social Security disability appeals accounted for 35.5 percent of new cases at the federal courthouse in Detroit.

By failing to enact comprehensive reform legislation to clean up this chaotic system, Congress is unnecessarily burdening our already overburdened federal courts.

The actions by the states, the enormous growth in federal district court disability cases, the tens of thousands of persons who are terminated only to be reinstated on appeal—these are facts which compel your Committee's action on this legislation. Congress must bring order to this administrative chaos, and for the welfare of those workers who have invested in and placed their trust in this program to ensure them against the financial loss of unexpected disability, Congress must act immediately.

Thank you for the opportunity to testify.

STATEMENT OF HON. JAMES SASSER, U.S. SENATOR FROM THE STATE OF TENNESSEE

The CHAIRMAN. Since you are here to discuss the same general issues, perhaps we can hear from Senator Sasser. Then we can have questions.

Senator SASSER. Well, thank you, Mr. Chairman. Let me express my appreciation to the chairman and to the ranking member, and to the committee for allowing us to appear here this morning and express our views on the social security disability system reform.

I'm grateful, Mr. Chairman, for the efforts that you and this committee are making in trying to resolve a matter which has plagued literally thousands, tens of thousands, of disabled Americans in every State in the Union over the past several years. And I'm optimistic today that an effective, fair, and permanent solution to the problem will be implemented in an expeditious fashion.

Now I think the timing of these hearings only serve to underscore the importance of expediency. Senators Cohen and Levin have been diligent in pursuing their reform efforts over the past 2 years. And, of course, Senator Moynihan and Senator Pryor and Senator Heinz, members of this committee, must be applauded for their efforts, stalwart efforts I might add, in this regard.

Now Federal disability benefits are an integral and essential part of the much discussed safety net. The distinguished ranking member of this committee, Senator Long, over 25 years ago—that's a quarter of a century ago—led in the fight for these benefits. And the intent of the major legislative proposals introduced since 1982 in the disability area have been to abide by the spirit of the disability concept as it has been developed over the years.

We all know what the problem is. These proposals were made necessary in large part due to the hasty acceleration of periodic reviews by the Administration begun in March 1981. Begun, I might say, 9 months before the States were prepared or had been alerted that they would be in a position to be called upon to make these reviews.

Now I don't think any of us quarrel with the intent of the 1980 amendments mandating periodic reviews. If individuals are not disabled or if they have recovered from their temporary disability, then certainly they ought not to be receiving disability payments. And I supported that legislation.

But we have worked, I think, a great injustice and a great inequity, and a most cruel inequity, on many deserving disabled Americans in this country. And I suspect that there is not a Senator sitting before this committee or on this committee this morning that has not heard their constituents in their State in which the cruelties and injustices have been outlined in great detail

In closing, Mr. Chairman, I would like to encourage this committee to take a look at the reforms contained in S. 2002, which was offered by Senator Moynihan, Senator Pryor and myself in October of last year. Now this is essentially the Pickle bill, H.R. 3755, which has already been examined, and already been passed out of the House Ways and Means Committee, and the Social Security Subcommittee.

Let me end by saying, Mr. Chairman, something that we all know here today. That we need effective reform and effective reform now. And I'm greatly encouraged by the action that you, Mr. Chairman, and your committee are taking today.

Thank you.

[The prepared statement of Senator Sasser follows:]

TESTIMONY OF SENATOR JIM SASSER

The primary focus of these hearings is to deal with an issue which is of vital concern to more than four million disabled beneficiaries throughout the country, namely reform of the Social Security Disability Insurance program.

The problems which have arisen in the federal disability program over/the past several years have given rise to deep concerns on the part of many of those in Congress with respect to the adequacy and fairness of the process itself. This has prompted numerous legislative proposals and approaches for modifying the existing administrative system. Among the remedies which have been offered is H.R. 3755 by Congressman Pickle, which is a comprehensive measure designed to reform the review and appeal process. This legislation has been subsequently introduced in the Senate as S. 2002 by Senators Moynihan, Pryor, and me. It is in support of this measure that I appear before this committee today.

In short, it is my belief that a quick and effective resolution to the administrative problems encountered in the current process is imperative. Indeed, the timing of these hearings serves only to underscore the importance of remedial action on the part of Congress. The magnitude of the hardships imposed by the current system on deserving disability beneficiaries over the past three years has been well documented and needs no further elaboration here. The process currently in place must be reformed in a way that eliminates what has effectively become a purge of the disability rolls. It is to this end that the committee must devote its energies in the near term.

To a great extent, the problems which have plagued the disability system over the past three years are directly attributable to the decision to accelerate the implementation of periodic reviews in March 1981. The 1980 Disability Amendments mandated review of the disability rolls once every three years, beginning in January 1982. I supported this effort and have no quarrel with the intention of the legislation. The implementation of the provision, however, has worked to pervert the original intention. Such perversion has been precipitated and exacerbated by the Reagan Administration's decision to speed up the review process some nine months ahead of schedule. This in effect caught the State disability determination units off-guard and ill-prepared to handle the enormous increase in caseloads. The purge had begun.

The federal disability program is an essential and integral part of the government's safety net to protect those persons who can no longer support themselves or their families. The government's commitment to this ideal has been strengthened over the past quarter century. The distinguished ranking member of this committee played a large role in securing the disability program and I admire his participation in this regard. However, the time for comprehensive reform is now. We cannot sit idly by and watch as thousands of deserving beneficiaries are systematically removed from the disability rolls.

In December 1982, Congress passed H.R. 7093 which was a temporary approach to the procedural problems in the administrative system. This was the result of months and months of negotiation and bargaining on the part of many Members, including myself, to realize reform of a system which was erroneously terminating beneficiaries at a rate of more than fifty percent. Upon passage of this legislation, it was clearly acknowledged that the measure was temporary in nature and that effective comprehensive reform was needed.

One of the biggest disappointments of the first session of the Ninety-eighth Congress was failure to enact comprehensive reform. Despite substantial pressure for reform, the only action taken by Congress was a sixty-seven day extension of disability payments through the appeals process. Such action only prolongs the inevitable: a return to the disastrous policies and processes in effect prior to the passage of H.R. 7093.

The bill offered by Senators Moynihan, Pryor and myself contains important legislative remedies to many of the most serious deficiencies in the current system. Among the provisions contained in our bill are the following: a detailed medical improvement standard of review for terminations of disability benefits; the requirement of the Secretary of Health and Human Services in conjunction with the National Academy of Sciences to conduct a study concerning the subjective evidence of pain in determining disability; a provision on consideration of multiple impairments; a moratorium on mental impairment reviews; permanent continuation of benefits through the appeals process; regulatory standards for consultative examinations; and a requirement that the Secretary comply with the decisions of the circuit courts of appeal.

This legislation represents a comprehensive approach to a complex problem, a problem, made more complex by the costs not only in dollars but in human suffering. It is my sincere hope that this committee will give the concerns addressed in our bill through consideration and will act to alleviate the current administrative deficiencies in a comprehensive manner.

ELIMINATE THE 5-MONTH WAITING PERIOD FOR TERMINALLY ILL

While immediate attention must be given to comprehensive reform of the disability review and appeal process, another issue to which I would like to direct the Committee's attention is the five-month waiting period for payment of benefits to those diagnosed as terminally ill.

In August of last year, I introduced, along with Senator Durenberger, a bill which would eliminate the five-month waiting period for the terminally ill. This is a matter which has been acted upon by the Senate before and deserves attention. During deliberations on the 1980 Disability Amendments, the Senate adopted, by a vote of 70-23, an amendment similar to the legislation I have offered (S. 1785). Unfortunately, the amendment was dropped in conference with the House.

S. 1785 currently has thirty consponsors, The cosponsors cross both political and ideological bounds. The bill stipulates that terminal illness be defined as a "medically determinable physical imparement which is expected to result in the death of such individual within the next 12 months and which has been confirmed by two physicians in accordance with regulations of the Secretary." By requiring that two physicians confirm the extent of the illness, the definition is necessarily restrictive in its application.

As it currently stands, disabled individuals must undergo a 5-month waiting period before the receipt of their disability benefits. In actuality, however, the beneficiary does not receive his or her first check until the seventh month, since benefits are paid for only the first full month after the waiting period. The waiting period concept was ostensibly designed to reduce the costs of the system. Now cost-saving measures, particularly in these times of exploding Federal budget deficits are certainly laudable, but there must be a line drawn between the benefits or reducing expenses and the costs in terms of human compassion and basic equity.

While no amount of money can ever replace the pain of a terminal illness or the fears of imminent death, the ability to collect righfully owned compensation by virtue of a lifetime of contribution to the social security system can certainly work to ease the financial hardships and burdens facing those in the last months of their lives.

For those citizens who have paid into the social security system all of their working lives, who have contributed to our Nation through their labor and who expected to collect retirement benefits, it comes as a rude shock at the most trying time to discover that their Government has found a way to save money by withholding benefits for the first 5 months.

Sadder yet are statistics compiled by the Social Security Administration which show that over the past 3 years, the average person who is terminal and disabled will live for only 2½ months after that diagnosis.

For terminal patients with little means, the loss of income caused by the disabling condition coupled with escalating medical expenses can be particularly onerous. It is little comfort to know that the American Cancer Society estimates that 30 percent of us will have cancer—855,000 last year alone. Two out of every three American families will have cancer afflict one of their family members.

For families with little savings in this country, the financial hardships caused by this disease and others can be absolutely devastating. On average, it costs $20,000 to die of cancer in this country.

When viewed in strictly monetary terms, the costs of our bill is large. The Congressional Budget Office unofficially estimates that the bill could cost from $200 million to $300 million per year. When viewed in terms of fairness and equity, however, the costs pale in comparison to the benefits gained.

A CASE FOR FEDERALIZATION

Another issue which deserves further committee consideration is that of federalization of the disability system. This is not a new issue and is one which I have been looking at for some time now.

One of the most unique aspects of the federal disability program, from an organizational perspective at least, is its administrative structure. Although it is a Federal insurance program, the initial determination of eligibility and administration of benefits rests with individual State Disability Determination Units.

The Federal-State administrative structure received critical attention as early as 1959. In that year, the House Ways and Means Subcommittee on the Administration of the Social Security Laws held hearings on this very subject. The following year the Subcommittee released a report which raised substantial questions about the Federal-State structure. The report went on to note that the disability program was "the most difficult social insurance program, from an administrative standpoint, on the statute books" at that time.

In 1974, the House Ways and Means Committee issued a report which roundly criticized the Federal-State structure on the grounds that it was largely responsible for the wide interstate variations in the disability determinations that were occurring in the country at the time.

In 1978, the General Accounting Office released a study entitled A Plan For Improving the Disability Determination Process By Bringing It Under Complete Federal Management Should Be Developed which seriously questioned the efficiency and effectiveness of the Disability Determination System under the existing Federal-State arrangement. The report continued that the Federal-State relationship was an "impediment to improving the administration of the programs because of (1) unanswered questions about the effectiveness and efficiency in the Federal-State relationship that has existed almost twenty years; (2) questionable need for the process to be closely aligned with the State vocational rehabilitation activities; (3) inability of the principals to remedy contractual defects, such as clearly defining their responsibilities; and (4) need for Social Security to have more effective management and control over the disability programs."

It seems to me that with the uncertainty surrounding the organizational effectiveness of the current system, now may be the time to examine ways in which the system can be streamlined and organized to spend the taxpayers money more efficiently. While federalizing the disability program may be costly in the short-run, it very well may prove to be cost-effective in the long run. Such alternatives should be looked at.

I have instructed the General Accounting Office to conduct an exhaustive study of this issue and I anticipate their report within the next six months. At such time, pending the conclusions of the GAO report, I will consider offering comprehensive legislation reorganizing the disability program.

I believe that this approach is particularly timely given the current revolt on the part of many States with respect to disability determinations. In October of last year I submitted into the Congressional Record a list, compiled by the House Aging Committee, of States' actions up until that date. Since that time, other states have taken unilateral action defying the Social Security Administration regulations relating to disability determinations.

I am under the impression that Chairman Roybal will be presenting a detailed up-to-date list during these hearings and I applaud him for his efforts in this regard.

In summary, let me reiterate my concern for the need for comprehensive disability reform now. In the coming months, I will be paying close attention to the disability problem and will be prepared to introduce legislation in the areas I have discussed here. In the meantime, I sincerely hope that this committee will undertake the necessary action to alleviate the hardships and trauma confronting many thousands of eligible disabled beneficiaries under the current system.

The CHAIRMAN. Senator Long, did you have a question?

Senator LONG. Let me just say, Mr. Chairman, to the witnesses and to all here that the Senator from Louisiana was one of the original sponsors of the amendment to create this program. It passed by a single vote when the Senate passed it, so you might say that if this Senator hadn't voted for it, it wouldn't have become law. I've always been proud to support a proposal to care for those who are disabled.

We had testimony at the time we originally enacted this program, to the effect that you are going to have a great number of cases where the tests of disability are subjective. For example, even doctors can't really tell whether a person is in pain, or to what degree he is in pain. It was contended that this program was going to be one where we could not control its cost.

Senator Heinz has correctly stated that as of this moment, the program is operating within the estimated costs, or at least within the tax that pays for it. But let's analyze that for a moment. On a comparable basis, this program was estimated to cost 0.33 percent of payroll at the time we first enacted it, and that is what it would be costing now based on our estimates at that time. That was based on how many disabled people we estimated that we had before we were paying people to be disabled under the program.

This year, our taxes for the disability program are 0.5 percent on employers, matched by 0.5 on employees, which is 1 percent of wages in total. That's three times the original estimated cost. I asked the staff to look up these figures, and it is my understanding that at one point the long-range cost of this program was estimated to cost eight times the original estimate.

I have all the sympathy in the world with people who are totally disabled and who properly belong on the rolls. But I'm concerned about those who don't. I visited a friend some time back who I wanted to help me do a little domestic chore—something he has always been able to do. I asked him to come help me and he said, I'm afraid I can't help you; I'm disabled. I couldn't see any difference in his situation, but he had had an accident with a chain saw. I said, well, look, if you will bring the kit along, you show me what to do, I can repair this thing myself if you will just show me how to do it.

When he got there on the scene he said, well, hand me that, and he went ahead and fixed it. He was able to do it all the time. He was pretending to be disabled, I guess because since the Government put him on the rolls, he felt he had to continue that image.

It turns out the way it happened was that this fellow had gone down to the Social Security Administration and apparently they didn't have all his records. As a result, he was not going to be entitled to anything like the social security payment he thought he had earned.

Apparently someone at the social security office said, well, maybe we can declare you to be disabled. It wasn't his idea that he was disabled—it was their idea that he was disabled. They proceeded to put him on the rolls as disabled, and he is now drawing disability benefits. But that man was not disabled according to what we had in mind when we passed that program.

In my own hometown, I've had communications from housewives, young women who have to hire someone to look after their children while they are out either working or going to college. In Baton Rouge, their experience has been that if you want to try to hire somebody for this kind of work, the odds are that many of those who apply for the job will say that they are available to do the work provided that they are paid in cash with no records kept. In many cases there are people who are on those disability rolls.

When we first passed this program we had testimony about how hard it would be to deal with allegations of pain. Doctors were telling us that doctors can't tell you for sure what degree of pain a person has. You can see certain things on that X-ray, but all you can tell is that he might be in pain where he can't work and he might not. Now, it is one thing for one person to have the pain that you can't prove or disprove. And it's another thing for his life long buddy to acquire the same pain at about the same time, and for those two retire, you might say, at an early age on this disability roll. The same symptoms, the same disability, almost as though it were contagious, when you wouldn't think that kind of disability is contagious.

Now as far as the Senator from Louisiana is concerned, I really think that we ought to have a program to encourage and coerce employers, if necessary, to hire handicapped people because a lot of people on our rolls are severely handicapped but not totally disabled. And we ought to try to encourage business, with tax advantages or whatever—I would like to vote for it—to provide employment opportunities to people who can't otherwise get employment.

In times of high unemployment these disability applications go way up. Why is that? People can't get a job and they have, therefore, concluded that they are disabled and ought to apply for disability benefits and seek to convince others that they are disabled. It's far better to have those people doing what they can do, and set aside jobs for them that they are capable of doing rather than making them try to prove that they can't do anything.

Now let me say that as far as anyone who is truly and totally disabled, I am sympathetic for them. I would like to provide for them. I have voted for it. I would like to continue to vote for it. But I do think we have a responsibility to the taxpayers who are paying for all this. To make sure that is who we put on the rolls.

When the social security program was passed, Congress had a doubt about the constitutionality of a Government insurance program. So what did it do? It voted to levy a tax. We levy a tax on all citizens in certain situations. Having voted the tax, we then say now we will pay you this benefit if you qualify for that benefit. In that sense it is an insurance program. But we had doubts, and still do, that we have the right for the Government to have an insurance program. And, therefore, we operate it as a program where we tax the public and then we provide certain benefits.

Now we are certainly providing a great deal more in benefits than we had in mind when we levied the tax. The last time this Senator ran for office, I had to lead the charge to raise this social security tax to pay for the fact that that program, including the disability program, appeared to be going broke.

It's no fun to ask the public to pay additional taxes for these benefits. I recall when I ran for office last time that it was described as the largest tax increase in history. As chairman of this committee, it was said that I had persuaded the Congress to pass the largest tax increase in history for social security.

Senator SASSER. I might add ~~to~~ the Senator from Louisiana that I ran for office last year. And that was raised against me. And I remember the Senator from Louisiana persuading me to vote for it. [Laughter.]

Senator LONG. I regret to say that we lost some good troops, Senator, who followed their conscience on that issue. And I helped to persuade them to do that. I feel sorry for them, but I thought it was in the national interest that we do it. Insofar as we provide what is necessary for people, I'm happy about it.

But I do think we owe a responsibility to taxpayers to see that what we are paying for is something that is essential, something that is necessary, something that must be paid for, and that we not pay for the kind of cases I'm reporting here of people who were never intended to be on these rolls. They were perhaps handicapped, but not totally and permanently disabled. To hold a tight rein on this program is difficult. It's no fun. Senator Dole told about the gold coffin they were presenting him.

The CHAIRMAN. Somebody gave me a golden coffin yesterday. They have just walked out of the hearing in protest, about 50 of them, when you started talking.

Senator LONG. Well, Senator, were you around here the time we first took up the family assistance plan? I recall at that time we had the welfare rights crowd running up and down that corridor outside this hall shouting "Fifty five hundred dollars or fight." So if you can be intimidated by a gold coffin, I guess you don't belong on this committee.

I think we have to see that this program is one that the taxpayers can subscribe to, one that they feel that they are being treated fairly with. But I would say that this requires that we do look after the needs of those handicapped people who are unable to find work. And I think that we ought to have something we don't have here right now. It costs money, I suppose, but we ought to do it. We ought to have a program to subsidize handicapped people, and to put the pressure on employers to hire them. Some businesses, may I say, are doing a fine job already when someone is handicapped. They try to find a job that person can do and put that person in that job.

We should not make this disability program a program for handicapped people if those people are capable of useful employment. Instead, we ought to do more to provide employment opportunities for handicapped people.

The CHAIRMAN. Thank you very much. There may be questions of the panel. I would hope they would be brief because we have about 25 other witnesses.

Senator Cohen, do you have another comment?

Senator COHEN. I would like permission to put my full statement in the record, Mr. Chairman.

The CHAIRMAN. Oh, sure.

Senator COHEN. Also, if I could just respond to a couple of points that were made. No. 1, under this program, you don't have to be permanently disabled in order to qualify for benefits. That's the reason why we have the need for periodic review. If you are temporarily disabled, you can still qualify as long as you are unable to engage in gainful employment and meet other requirements. You don't have to be permanently disabled.

Second, it has been suggested that the program has doubled or nearly quadrupled since it first began, and that somehow this is due to an increase in either unemployment or malingers or people who are simply trying to rip off the taxpayers. In fact, what you have had are some fundamental changes since this program was originally conceived. Back in 1956, only disabled workers aged 50 and over were eligible. Well, since 1960, workers of any age are eligible. So there's a major difference right there.

In 1956, no dependents were paid any benefits. Since 1958, benefits are now paid to dependents of disabled people. In 1972, the SSI program that was created. In 1972, the OASDI benefits were increased by 20 percent. In 1956, when the program was first adopted, you had 61.5 million people who were insured. You now have 100 million people covered. So there are legitimate reasons as to why the program costs have gone up.

There are people who have taken advantage of this system—and we are trying to find a way to get at those people who are abusing the system—but in the process of trying to get those people who are malingers or who are abusing the system, we should not terminate benefits for those people that I have listed in just a brief catalog of cases who are severely disabled, not simply handicapped in one fashion or another, but severely disabled to the point they cannot engage in gainful employment. We ought not to be throwing them off the rolls the way we have been.

Senator LEVIN. Mr. Chairman, could my statement be made part of the record?

The CHAIRMAN. Sure.

Senator LEVIN. I would also like to comment on Senator Long's point. There were more people perhaps on the rolls for a number of reasons, including the ones that Senator Cohen just listed, by the way. We want people off who don't belong there, Senator. And I think we do with the same strength that you do.

But once you concede that if there are people being removed from the rolls who do belong there, that that's an injustice that we should correct. And all I can say in that regard is that two-thirds of the people who appeal those removals are being restored a year later, after they are thrown on welfare. And in some instances, commit suicide.

And two-thirds of the people appealing are being restored. It's gotten to the point now where in my home district—this is so bad in my district now that about a third of all of the new filings in Federal court—35 percent, are social security disability appeals. Twenty-six States, twenty-six States, have told the Federal Government they will not obey Federal regulations. That's the amount of the injustice. So I have to share with you you—and you are a dear friend of mine—your feeling that we want to save money by removing people who don't belong there. The taxpayers have a right to that. They have a right to our protecting this trust fund. Get people off who don't belong there. But when you have the degree of injustice that we have in this system—it's been going on now for 2 years. And let me repeat that one statistic and I am going to close. The Social Security Administration estimated that these reviews would result in 20 percent of the people being removed. And you talk about a predicted number of people being on the rolls, and that's fair. Twenty percent were predicted for removal as a result of these reviews. Over twice that number have been removed.

You talk about excess of predictability. Now something is wrong. Everybody in the States knows it. It's time that we in Washington understand it, and act to correct it without in any way diminishing what you are saying. That we don't want folks on there who don't belong. But again with equal passion, we should want people on there who do belong.

Senator LONG. Let me just make this point clear. Of course, I agree with a great deal of what you said, Senator. I also differ with some of what you said. Now just to illustrate my point. My father was one of those lawyers in Louisiana who persuaded the Supreme Court that under our workers' compensation law a person was totally and permanently disabled if he had lost a hand if he was a carpenter, or a person who had been working, let's say, out on the yard as a railroad man. This was based on the theory that even though the statutes specifically had a schedule for less than total disability for the loss of a hand, the person had been disabled from doing that particular job which he had done at an earlier period.

We didn't have that kind of thing in mind when we passed this program. For example, I knew a man who worked in the railroad. He lost his hand. He couldn't work on the railroad anymore, but that didn't mean he was unable to do any work. He went into business for himself, and he wound up being one of the most successful men in the community.

It's a tough job for somebody to tell people "no" in this area. I can understand that. I can understand how a judge or an examiner, when someone comes and appears before him and that person looks pretty pitiful, is inclined to say: "Well, gee, I feel sorry for that fellow" and to put him on the rolls.

The burden is on us, when we set up a program, to try to find some way to see that it does not become an open-ended spending program—putting all kinds of people on those rolls that we did not intend to be on there.

For example, I don't think any Senator here would approve of the situation we have throughout the whole country where you've got people applying for work and saying, "I am willing to work provided that I am paid in cash and no records are kept."

Nor do I think any Senator would want to pass a program which pays benefits to a person who could find employment and is capable of doing a job, but they decline to make themselves available for that employment because the benefits are available to them. No one wants people who don't belong on the rolls to be on there.

But it's the marginal cases we have got to deal with. I know Senator Cohen and others referred to situations where it is clear they are totally disabled, such as cases of people in wheelchairs, and paraplegics. Now that's not the kind of case I'm thinking about. That's not the case that gives me cause for a concern. The case that gives me cause for concern is these people that I can't see anything the matter with.

Senator COHEN. Those people have been terminated. Those people in body casts, iron lungs, have been terminated under this review process. That's what we are dealing with.

Senator LONG. Now I'm not here to quarrel with you about that, Senator.

Senator COHEN. Well, that's why we are here.

Senator LEVIN. Can we list you as a cosponsor?

Senator LONG. I want to provide for the people who are, in fact, totally and permanently disabled. What I'm concerned about is that we owe the taxpayers a better run for their money than to have these rolls loaded down with people who are working full time.

Senator LEVIN. We all agree with that. Everybody agrees with that.

Senator LONG. Or people who could be working full time.

Senator LEVIN. We agree with that.

Senator LONG. Or should be working full time.

Senator LEVIN. And we all agree with that. The question is how to prevent people from being removed from these rolls who can't work, who are so severely impaired that they can't do any job in the national economy. That's what the test is. Not permanently and totally disabled. So severely impaired that they can't do any job in the national economy. I will make it part of the record how many feet and how many hands have to be lost in order to qualify for that particular designation rather than reading them to you here because I know the chairman wants to move on.

[The information from Senator Levin follows:]

National Governors' Association

James R. Thompson
Governor of Illinois
Chairman

Raymond C. Scheppach
Executive Director

November 17, 1983

TO: All Members of the United States Senate

We are writing to urge your support of floor amendments to be offered by Senator William S. Cohen and Senator Carl Levin that would revise certain Social Security Disability Insurance (SSDI) provisions. While this reform package would not accomplish all of the changes we believe are needed, it is critical that Congress take immediate action to modify current policies.

The SSDI provisions of the Social Security Act provide that the states administer the eligibility determination process under federal rules and regulations. We share your goal of assuring that only those eligible for assistance receive SSDI. Apparently, however, the manner in which the 1980 disability redetermination amendments have been implemented has resulted in large numbers of erroneously terminated benefits causing severe financial and emotional hardship to eligible individuals.

The Governors and their state agencies often are being held responsible for these federal policies and procedures. As a result of such concerns, in August the Governors unanimously approved a policy statement calling for six major reforms in the disability process:

1. Make permanent the temporary policy that continues Social Security Disability benefits through the Administrative Law Judge level in all Continuing Disability Investigation cases.
2. Adhere to a medical improvement standard before terminating benefits once eligibility is initially established.
3. Publicly promulgate policies and regulations affecting the determination of disability.
4. Require SSA to apply decisions of the Circuit Courts Appeal or appeal those decisions with which it disagrees.
5. Provide for face-to-face evidentiary interviews at the initial decision level.
6. Provide for a temporary moratorium on mental impairment reviews until such time as the listings for mental impairment have been revised.

Each of these provisions is included in some form in the disability package awaiting House action. We urge the Senate to adopt the Cohen-Levin Amendment as soon as possible.

To avoid yet another stop-gap measure, some action must be taken before the temporary measure that continues benefits pending appeal expires on December 7th. To be fair to the disabled citizens in this country and to the states which administer SSDI eligibility determinations, a reform package should be passed by that date.

Sincerely,

Richard D Lamm

Governor Richard D. Lamm
Chairman
Committee on Human Resources

Governor Thomas H. Kean
Vice Chairman
Committee on Human Resources

HARRY HUGHES
GOVERNOR

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
ANNAPOLIS, MARYLAND 21404

January 13, 1984

The Honorable Carl Levin
Ranking Minority Member
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Levin:

Thank you for your letter of December 5, 1983 which was signed also by the Honorable William S. Cohen, Chairman of the Subcommittee on Oversight of Government Management, regarding Maryland's decision to discontinue the termination of benefits to persons currently under the Title II Social Security Disability Program.

A moratorium was imposed in Maryland because current federal policy is not clear and consistent with regard to continuing benefit eligibility. Enclosed is a copy of the statement released by Mr. David W. Hornbeck, State Superintendent of Schools, on October 4, 1983 in which he discusses the reasons for this action.

As you are aware, on December 13, 1983, the United States District Court for Maryland issued a decision requiring the Social Security Administration to employ a medical improvement criterion when making Title II continuing disability review medical (CDR) and medical-vocational determinations for residents of Maryland. This injunction has resulted in the SSA's implementing a moratorium on the issuance of Title II medical or medical-vocational CDR determinations and decisions.

Maryland's decision to discontinue the termination of benefits has resulted in our holding in abeyance 594 claims. The number of suspended claims would be significantly higher had the SSA not suppressed the release of additional periodic review claims to the Maryland State Department of Education.

GENERAL INFORMATION (301) 269-3431-TTY FOR DEAF BALTO. AREA 269-2609/D. C. METRO 565-0450

During Fiscal Year 1983, the State Department of Education received 4,912 Title II periodic review claims. On initial review, 1,369 of these claims were found to be ineligible for continued benefits. The Department believes that many of the 1,369 persons whose benefits were terminated under current SSA policies were truly disabled and unable to sustain gainful employment.

Maryland encourages legislation to clarify the law and establish a nationwide medical improvement standard for benefit eligibility. The legislation should allow truly disabled persons to remain on the disability rolls while providing for the removal of persons who have medically improved and can maintain gainful employment. Additionally, the legislation should make it possible to remove persons who were placed on the disability rolls incorrectly.

Thank you for your interest in this matter. Please contact me if additional information is needed.

Sincerely,

Harry Hughes

Governor

1983 DEC 27 AM 10: 28

COMMONWEALTH of VIRGINIA

Charles S. Robb
Governor

Office of the Governor
Richmond 23219

December 15, 1983

The Honorable Carl Levin
The Honorable William S. Cohen
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight
of Government Management
Washington, D. C. 20510

DEC 28 1983

Dear Senators Levin and Cohen:

On September 28, 1983, I ordered the Virginia Department of Rehabilitative Services, Disability Determination Services, to place a moratorium on terminations resulting from periodic reviews of those persons receiving Social Security disability benefits. I ordered this moratorium because of my grave concerns over the continuing impact of these reviews on the disabled people of this Commonwealth. Under the moratorium in this Commonwealth, the Disability Determination Services develops the Continuing Disability Review cases as usual. If the decision is to continue benefits, the decision is then effectuated. If the decision is to cease benefits, the decision is not effectuated and the case is being held in our Disability Determination Services offices. It is interesting to note that the Social Security Administration has now instructed all Disability Determination Services to hold cessations until further notice. This is essentially what this Commonwealth has been doing under its moratorium.

As I have repeatedly stated, the legislative reforms found in what was HR 3755, now incorporated in Title IX of HR 4170, would go far to instill fairness into a system which is lacking at this time. I would urge quick action on the part of the Congress during its next session on the above mentioned reforms legislation.

Sincerely,

Charles S. Robb

STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka 66612

John Carlin Governor

December 23, 1983

Honorable William Cohen
Honorable Carl Levin
Subcommitte on Oversight of Government Management
Committee on Governmental Affairs
S.D. - 326
Washington, D.C. 20510

Dear Senators Cohen and Levin:

I support your call for legislative reform in the Social Security Disability Program and welcome the opportunity to provide input from the perspective of a very concerned and committed State. We were previously contacted by Representative Edward Roybal, Chairman of the House Select Committee on Aging, who requested similar information on the specific initiatives we have taken in the administration of the Disability Program. Included with this letter is a package of material we sent to Representative Roybal in June, 1983, which has been updated with more recent information. This package outlines specific initiatives which we have taken as well as the adjudicative philosophy under which we operate.

You state that you have contacted us because we are one of 16 States to either suspend Continuing Disability Reviews or use standards for the reviews which are different than those imposed by the Social Security Administration. In Kansas, we have continued to process review cases; but we have developed and implemented our own decisionmaking guides, which we consider to serve as more accurate measures of disability.

Our decision not to suspend the processing of these cases was a deliberate choice. On the whole, we agree with the intent of the review process, which is to remove non-disabled beneficiaries from the disability rolls. Admittedly, there are some problems with the review process as it now stands; but we do not consider it productive to suspend the entire review because of isolated problems. Suspension of the review would simply delay the inevitable and would create a case management problem in the future when the backlog of cases would have to be processed.

Our difference with SSA is over the definition of who are truly disabled and deserving of benefits. Our approach is less rigid than SSA's and gives more weight to the human element than to rules and regulations. It is this basic difference in approach that underlies the actions we have taken.

We operate under the philosophy that we have a public trust to assure that all Kansas citizens who satisfy the intent of the law receive, or continue to receive, disability benefits. In those instances where we differ in our interpretation of legislative intent, it is our practice to exercise maximum discretion to the benefit of our citizens. When SSA adopted a rigid policy approach to the administration of the Disability program, we were confronted with the very basic decision of maintaining a people oriented program or adopting a more impersonal policy oriented program. We chose to put people ahead of policy.

We consider the action we have taken to be significant for two reasons. First, fewer individuals have had their benefits terminated than might otherwise have been the case. One of our first initiatives was to recall prior benefit terminations involving persons with either cardiovascular or mental impairments for a post-determination review. As a result of this review, 11% of the cardiovascular cessations were reversed to continuances and 22% of the psychiatric cessations were reversed to continuances. In addition, our overall cessation rate decreased by 38% from February, 1983, to October, 1983. For those individuals whose benefits would otherwise have been terminated, our actions have had a profound effect on their lives.

Second, the action of States such as ours has had significance in modifying the position of the Social Security Administration with respect to key disability program provisions. Recently the individual States were given the option of holding face-to-face hearings for beneficiaries who request reconsideration of the determination that they are no longer disabled. This was originally to have been a Federal function; but after a groundswell of concern and protest from the States, Secretary Margaret Heckler decided to at least offer administration of the function to the States, if they desired. Her action indicates that the Administration can be responsive to the needs and requests of the States. Unfortunately, it is a major effort to effect any changes in the disability program this way, oftentimes necessitating a concerted effort by the individual States, which may include court action or executive order.

Historically, there has not been an effective and meaningful dialogue between the Federal and State governments, particularly in the area of disability policy. The first action we would like to see Congress take is to establish a mechanism to allow State input into the formation of Social Security disability policy and administrative changes. The goals and objectives of the State and Federal governments should be the same, and by working together, rather than against one another, we should be able to develop a system that not only functions more harmoniously, but one which is more responsive to the needs of our citizens, as well.

As for specific changes in the disability program, we are in general agreement with the contents of House Bill 3755, entitled Standards of Disability. The provisions we endorse in particular include: Section 101, which provides standards for the termination of entitlement to benefits based on medical improvement; Section 103, which requires that consideration be given to the combined effects of all impairments regardless of their individual severity; Section 201, which imposes a moratorium on the review of beneficiaries with mental impairments until the criteria have been revised; Section 202, which extends the face-to-face hearing before a State Agency decisionmaker to the initial benefit terminations; and Section 301, which would require uniform standards for determining disability at all levels of adjudication. Section 304 calls for the creation of a temporary ten-member advisory council to consider the medical aspects of disability. We believe that this council should be established on a permanent basis and that its membership should include appropriate State personnel, as well as independent medical and vocational experts and Social Security Administration staff. The effective use of such a council in developing disability policy which is realistic and acceptable could help avert crises such as SSA is now experiencing in the Disability Program.

Changes not in House Bill 3755 which we advocate include a general provision that more discretion be allowed at the State level in making disability determinations; and that unless specifically proscribed by statute, rule, or regulation, the judgement of the State in individual cases, if reasonable and defensible, should have precedence. We realize that SSA's need for decision conformity and uniformity is valid, but we do not think that permitting more judgement at the State level will significantly affect uniformity. Cases in which a difference in judgement is critical to the decision make up a small percentage of an overall caseload. However, it is those very cases to which more weight should be given to the human element than is now allowed when using a strict interpretation of SSA rules.

We urge that consideration be given to expanding the list of impairments excluded from review to include beneficiaries of advanced age who have been receiving benefits for extended periods of time. Currently, their are a significant number of cases in which older beneficiaries who have been on the rolls for from 10 to 30 years are having their benefits ceased. We contend that as a result of having been declared disabled by the Federal Government at some point in time, these individuals began to consider themselves disabled. After years on the disability rolls these individuals adopt the lifestyle of a disabled person. In their own minds, there is no question that they are unable to work; and in reality they truly are disabled. It is unconscionable to terminate the benefits of a 55 year old person who has not worked for 20 years and expect that person to be able to make the major readjustment needed in his or her life to re-enter the work force. A possible guide for evaluating such claims would be that if the beneficiarys' age and years on disability added up to 65 (the usual retirement age), then benefits would be continued unless there was strong affirmative evidence to the contrary.

You state in your request to us that you want to share this letter with your colleagues to show the dilemma State office holders are facing in the absence of legislated reform of the Disability Program by Congress. The sharing of this letter may prove useful, because as Representative Roybal has said, these periodic reviews truly are a Federally-created State problem. However, as I reported to Representative Roybal's Committee, to think that we are going to solve the problem simply by substituting or adding more rules and regulations is to misperceive both the problems and the solutions. The rules and regulations that are now in place are basically adequate for purposes of the Program. As written, they allow for flexibility and discretion at the State level. It is in the application of these rules and regulations that problems arise. SSA has tried to interpret the rules and regulations in a very rigid and inflexible manner, which is contrary to their intent. A review and understanding of the rules shows that they are to be applied as guides. They stress the concept of adjudicating each case on its own merits, rather than using an average-person approach. The complexity of the Disability Program dictates that we must operate on the assumption that there is no policy which can cover every case and every issue, and that such absolute policy should neither be expected or sought. It is this very basic perception of the SSA rules which is the point of discord between the States and SSA.

The healthiest changes Congress can make in the Social Security Disability Program, and those which will best serve the long-range interests of your constituents, are: (1) to establish a mechanism for State input into the formation of program policies and procedures; and (2) to return to the State Agencies those discretionary powers in judging disability that have been steadily usurped over the years.

Our goals are the same. The success of our common mission is absolutely essential if we are to restore faith and equity to the disability process. Again, I thank you for this opportunity to share our thoughts with you at this critical time, and to convey our willingness to work with you in any meaningful capacity to bring about the resolution of this most distressing and disturbing problem.

Sincerely,

John Carlin
Governor

JC:tdj

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27611

JAMES B. HUNT, JR.
GOVERNOR

JAN 30 1984

January 26, 1984

Dear Senator Cohen and Senator Levin:

This is in response to your letter of December 5, 1983, regarding state actions and the need for reforms in the Social Security Disability Program. On September 7, 1983, I declared a moratorium on terminating continuing disability benefits where no improvement in the recipient's medical condition had been demonstrated (Executive Order attached). The reason for the moratorium was my observation that people's Social Security Disability benefits were being terminated even though they were unable to work and their conditions were unimproved. Furthermore, I was convinced that the Social Security Administration (SSA) was illegally terminating people because elegibility was being determined by standards set forth in manuals and regulations, in complete disregard of federal courts of appeals decisions interpreting these regulations and manuals.

Therefore, having determined that first, people who were disabled in fact were being terminated, and second, the terminations were the result of the application of illegal standards, I directed a moratorium on cessation of benefits. The moratorium will remain in effect until Congress passes appropriate medical improvement standards, or until superceded by another Executive Order.

Meanwhile, a class action lawsuit has been brought in the Fourth Circuit to litigate the issue of SSA's nonacquiescence in three particular Fourth Circuit decisions. The State has intervened on behalf of the plaintiffs in this class action and consequently is now a plaintiff-intervenor against the defendant SSA. The case went to trial in federal district court on January 18, 1984, and we are awaiting Judge McMillan's decision.

At the time of the moratorium, I was most optimistic that H.R. 3755, the Pickle Bill would be ratified. I still vigorously support that bill as well as your original counterpart bill in the Senate. If we do not get reform legislation for this program, we must continue to litigate Social Security Disability issues Circuit by Circuit. I am not being melodramatic or overstating my case when I say that the resulting patchwork of Social Security Disability decisions nationwide will be disastrous for the disabled citizens of this country. Litigation, while it is not the answer, is the only way we currently have of protecting our disabled. We must have fair and competent legislation to insure that this much needed program is efficiently and uniformly administered.

I offer my unequivocal support for your efforts on behalf of disabled citizens. Please call on me or any of my staff if we can help in any way.

Sincerely,

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
State Capitol
Little Rock 72201

Bill Clinton
Governor

January 24, 1984

The Honorable Carl Levin
459 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Levin:

Thank you so much for your letter of December 5, 1983, inviting the states to comment on pending legislation on the Social Security Disability Program.

Arkansas is one of the many states which was forced to act to protect the interests of a large and growing disabled population. On December 5, 1983, I imposed a moratorium on all cessations of benefits. No Arkansas resident who is presently receiving benefits will be cut off benefits due to a continuing disability review, until Congress enacts and implements remedial legislation insuring that the Social Security Administration is required to abide by appropriate statutes and federal court decisions.

We strongly believe there must be a national standard, set in law, and that SSA must not be free to pick and choose which laws to enforce or whether it cares to enforce any law. At present, the Disability Program is controlled by a combination of statutes, regulations, official instructions, directives and internal policy statements, all having the force of law so far as SSA and State Disability Programs are concerned. Unfortunately, some of the regulations, instructions, directives and policy statements violate the letter of intent of relevant federal statutes. Further, SSA has refused to honor relevant federal District and Circuit Court decisions which interpret and seek to enforce the statutes. Because SSA may change its interpretations at will, without public comment or regard to the law or the courts, Arkansas' disability adjudicators are kept in a state of flux.

Although the statutory definition of disability has not changed in 15 years, there has been a tremendous shift in the "adjudicative climate". In 1976, more than 40% of new applicants were approved without need for appeal. In 1981, the initial allowance rate was 22%. A large share of the dwindling allowance is due directly to administrative changes:

- SSA issued new instructions which now list as "slight" impairments which previously were listed as "severe". One listing means "disabled", the other does not.

- Previously the state Disability agencies had discretion to show that certain impairments not included in the "Listings" were equal in their disabling effect to other impairments specifically listed in the regulations. In 1975, more than 44% of all allowances were such "equals" cases; in 1982, fewer than 9% of all allowances were "equals".

- Written directives and policy statements strongly hinted that more claims should be denied and that allowances should be more clearly rationalized and documented than denials.

The adjudicatory quagmire is quite obvious, and its root is a lack of proper rules and fixed standards. In Arkansas, after the extent of the problem became obvious in late 1982, I began a push to ensure that the proper rules were enforced. In December 1982, we were allowing 22% of all initial claims. In November 1983, we were allowing over 31% of all initial claims. Our Continuing Disability Review cessation rate (those who were receiving benefits and were then cut off as being no longer disabled) was about 65% in November 1982. That rate had dropped to approximately 25% in November 1983. The most shocking observation, however, is that SSA called Arkansas' results ("accuracy rate") one of the best in the nation both when we were denying almost everyone, and since we've grown more concerned with following the law. The problem is larger. In Arkansas, as of September 1983, 61.2% of all claimants who appealed their cases to an Administrative Law Judge won. In 1982, the Eighth Circuit also ruled for claimants more than 60% of the time; that does not take into consideration the number of claimants who won at the federal district court level. Thus, within SSA, we see different standards between the Law Judges and the State Agencies. And between SSA and the courts the gulf is even wider. Clearly, no rule of law is being strictly and consistently applied.

Together, these and many similar problems with the Disability Program engender unnecessary anxiety in individuals and cause unjustifiable problems for the states. But the states are not acting precipitously. We recognize the need for calm, we welcome the concern over costs and program integrity. Indeed, it is Arkansas' position that a strict initial standard for disability, together with some form of continuing review process are absolutely necessary to public acceptance of the program.

We are, however, concerned that major reform must be implemented, without delay, at least in the following areas:

Medical Improvement

We propose a standard on medical improvement in which a disability beneficiary could not be terminated unless SSA showed that the medical condition which led to the initial finding of disability had improved and the beneficiary exhibited the present capacity to return to the work force. In determining the present capacity to return to the work force, the following factors should be considered:

(a) Comparison of present and prior estimates of residual functional capacity;

(b) Medical advances discovered or made available since the initial determination of disability;

(c) Work place/access advances making it possible for more handicapped persons to enter or remain in the work force;

(d) The amount of unproductive time spent out of the work force subsequent to the initial disability determination; and

(e) Claimant's age, education and work history.

Beneficiaries aged 50 years or older, who have been receiving disability benefits for ten years or more, and who have not demonstrated a capacity to return to their most recent past employment, should be exempted from review.

Face-to-Face Interviews

The administration should be required to implement face-to-face interviews prior to a decision on all initial and continuing disability claims. There are several configuration options for implementing this program. The simplest and least costly would be retraining of Social Security District Office Claims Representatives (CR) who handle these cases at the outset. The CR could be required to elicit additional information and to make more detailed notes on a claimant's appearance, movement, complaints, and visible handicaps. SSA's own experiments show the effectiveness of some variation of the face-to-face interview in improving decisional quality. Combining the Disability Hearing Unit, presently in place at the Reconsideration level with the initial level interview should cover most major objections. Alternatively, the full evidentiary hearing, with related procedural rights, could be moved up to the initial level, and the Reconsideration level could be abolished.

Benefits Continuation

New legislation should make permanent the present administrative policy continuing disability benefits through the Administrative Law Judge level in all continuing disability review cases. Congress previously recognized the need for such legislation, but failed to take action in 1983.

Employment of Rules Rather Than Internal Policy Statements

SSA should be required to implement regulations affecting disability determinations pursuant to the Administrative Procedure Act. The regulations should be applicable to all levels of SSA adjudication and be based on statute and applicable court decisions. In this regard, SSA should be required to acquiesce in, or appeal, circuit court decisions modifying or abrogating its rules or regulations. Where two or more decisions conflict, SSA should be required to seek appellate clarification.

Consultative Examinations

Legislation should require that the States provide the claimant's treating physicians with copies of consultative examinations reports where there is a conflict of medical opinion on the issue of disability.

Combination of Impairments/Pain

There is also a serious problem regarding determination of disability where claimants complain of multiple impairments, or where there is credible testimony regarding subjective complaints (i.e. pain) but no objective medical findings. SSA should be required to consider the combined impact of multiple impairments in disability determinations. Where the combined impact of two or more non-severe impairments is disabling, a claimant should be entitled to benefits. Likewise, SSA should be required to consider all relevant factors, including work history, medical treatment history, alleged onset circumstances, and claimant's credibility in determining whether a subjective disability claim is valid. There should be no legal requirements that objective medical findings support every claim.

Rehabilitation Emphasis Project

SSA should set up pilots to study the effectiveness of concerted vocational rehabilitation efforts on younger workers. The programs would take into consideration the individual worker's education, training and skills, prior work record and present residual functional capacity, together with present job opportunities and targeted industry outlooks. The programs would guarantee continued benefits and medical assistance on at least a reduced basis for up to three years after the end of the normal trial work period. Pilots would be in both industrial and rural states and in states with both "large" and "small" disabled populations. Financial incentives would be offered to state rehabilitation programs for effective models.

Finally, the Social Security Disability Program is a national program. There are, however, both state and federal features. ~~Our~~ mutual concerns require our combined efforts. It is my sincere desire that the Congress and the Administration will, in the future, continue to work with the States in threshing out the difficult problems.

I appreciate this opportunity to share our concerns with you.

Sincerely,

Bill Clinton

Bill Clinton

BC:cr:ew

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS
GOVERNOR

January 9, 1984 [illegible] 1984

The Honorable William S. Cohen, Chairman
The Honorable Carl Levin, Ranking Minority Member
Subcommittee on Oversight of Government Management
Washington, D.C. 20510

Dear Senators Cohen and Levin:

Thank you for your leadership on the issue of needed reforms in the Social Security Disability Insurance (SSDI) system. As you well know, implementation of the continuing disability reviews (CDRs) mandated by the 1980 amendments to the Social Security Act has caused unnecessary harm to thousands of disabled people across the nation and has severely strained the Federal-State partnership in the administration of SSDI benefits.

Many disabled beneficiaries terminated by the CDR process turned to the courts to seek equitable treatment. However, the Social Security Administration's policy of non-acquiescence with Federal Court decisions has placed disabled people in a difficult position. The policy of non-acquiescence forces disabled people to pursue their claims to the Appeals Court to obtain legal rights which the administrative process should provide on its own.

The Commonwealth found itself in an untenable situation because of the conflict between SSA rules and Federal Circuit law. The First Circuit Court of Appeals in Miranda v. HEW, 514 F.2d. 996 (1975), and in other cases has mandated the use of certain standards in terminating disability benefits. SSA, however, has consistently failed to follow the Miranda standards. As Governor of the Commonwealth, I have a responsibility to our disabled citizens to see that they are treated lawfully.

Last March, I directed the Massachusetts Rehabilitation Commission to comply with the First Federal Circuit Court's Miranda decision and other applicable decisions of the First Circuit, an action necessary to fulfill my obligation to protect the welfare of the citizens in the Commonwealth. As of that date, continuing disability claims are processed under these standards, outlined in greater detail in my March directive, which is enclosed.

In addition, the Commonwealth is currently following SSA's instruction that the Disability Determination Services (DDS) not send out Title II termination notices after December 7, 1983 due to the expiration of the "benefits pending appeal" provision. In fact, I had directed the DDS to be prepared to suspend these terminations had Secretary Heckler not chosen to afford continued protection to disabled beneficiaries while Congress is in recess. I applaud SSA's action in providing these protections and hope they remain in effect until Congress has the opportunity to act on a continuation of this provision.

The significance of complying with Miranda is that Massachusetts CDR cessation rate has dropped from the 30-45% level of the past to a level closer to approximately 13%. The action Massachusetts has taken to intervene in a pending lawsuit challenging SSA standards was prompted by the need to achieve a final decision for those adjudicated under our Miranda standards.

The actions taken by other states to comply with local court mandates and to fulfill their responsibilities to disabled citizens highlight the need for federal remedial legislation. On that count, I thank you again for your continued efforts to secure reform on the SSDI program. Legislation which includes, at a minimum, a medical improvement standard; continuation of benefits through the ALJ level; public promulgation of policies and regulations; compliance with unappealed Circuit Court decisions; face-to-face interviews before termination of benefits; and a temporary moratorium on review of the mentally impaired until the Listings are revised would restore national uniformity and fairness to this vital program.

Sincerely,

Michael S. Dukakis
Governor

MSD/pt
Attachment

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS
GOVERNOR

March 8, 1983

Elmer C. Bartels, Commissioner
Massachusetts Rehabilitation Commission
20 Providence Street
Boston, MA 02116

Dear Commissioner Bartels:

The Commonwealth of Massachusetts has a proud history of protecting the rights of disabled people and developing programs and policies that are responsive to their needs. My administration values that tradition. Many of the problems we encounter with this program currently exist in every other state. This letter expresses my concerns and directs certain initiatives for the Disability Determination Services program.

Some of my concerns and those of Secretary Carballo have recently been addressed by the Massachusetts Special Commission on Social Security Disability, and by the Commissioner's Task Force on Social Security Disability, a group of disability advocates whom you convened last Fall to help identify problems and develop solutions to resolve them. Other issues are currently receiving Congressional attention, as new national Social Security Disability policies are forged.

I am aware of the complexities of the issues involved, the varying interpretations of federal and state laws, policies and directives, and the differing viewpoints and interests that affect the Disability Determination program. Nevertheless, I am committed to providing every disabled person in the Commonwealth full consideration for all the services to which he or she may be entitled.

Therefore, I hereby direct you to undertake and initiate the following actions:

1. Issue by March 31, 1983 written State policies and procedures to ensure that Massachusetts Rehabilitation Commission's standards for determining continuing eligibility for Social Security benefits are consistent with the First Circuit Court of Appeals standards set forth in Miranda v. Secretary of H.E.W. 154 f.2d 966 (1975) and any other applicable decisions of the First Circuit.

2. Request authorization from the Social Security Administration that Massachusetts be designated as a demonstration site for a pilot program of face-to-face interviews with claimants before recommending any cessation of their benefits.

3. Submit to the Secretary of the Executive Office of Human Services by March 18, 1983 a Corrective Action Plan with concrete implementation measures, to improve the quality and accuracy of determinations on continuing disability investigations (CDI) cases.

4. Report weekly to the Secretary of the Executive Office of Human Services on the progress and status of the implementation of the recommendations of the Commissioner's Task Force on Social Security Disability.

5. Establish procedures for referral of denied recipients to vocational rehabilitation services; provision of information and referral to legal assistance as funded by the Supreme Judicial Court; and informing recipients who are denied benefits of their appeal rights and required procedures.

6. Request authorization from the Social Security Administration for a demonstration program which would create a state-operated claimant assistance program. This program would provide active individual assistance to denied recipients on an individual case basis for the purpose of assuring that these persons have every opportunity for employment and necessary supportive services.

We must continue to improve access to governmental services for disabled people to the end that they may live and participate on a full and independent basis in the communities of the Commonwealth.

Very truly yours,

Michael S. Dukakis
Governor

MSD:mdm

cc: Manuel Carballo, Secretary
EOHS

STATE OF COLORADO

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203
Phone (303) 866-2471

Richard D. Lamm
Governor

January 11, 1984

The Honorable William S. Cohen
Chairman
Committee on Governmental Affairs
Subcommittee on Oversight of
Government Management
United States Senate
Washington, DC 20510

Dear Senator Cohen:

Thank you for your letter of December 5, 1983. Colorado is one of the 16 states which has suspended continuing disability reviews under the Social Security Act. Please be assured that this is not a situation of our choosing.

The Colorado Disability Determination Services had been enjoined by the United States District Court from processing disability cessations, and, pursuant to the Court's final orders, was directed to apply a standard of adjudication requiring a showing of medical improvement for benefit cessation. As you are aware, this requirement is in conflict with Social Security Administration directives published in the Federal Register. The effect of the freeze on case processing has been to backlog more than 700 claims, which is the equivalent of three and one-half work years. The agency also has been placed in the position of adjudicating claims by local rule rather than those promulgated by the Social Security Administration.

I urge that the Congress act promptly to address the issue of required medical improvement, so that Social Security disability decisions can be completd on a more uniform and equitable basis.

If I can provide additional information, please do not hesitate to contact me again.

Sincerely,

Richard D. Lamm
Governor

The CHAIRMAN. I am fine, but there are other witnesses.

Senator LEVIN. Thank you.

The CHAIRMAN. Let me just say that it is our hope, as we have indicated for some time, that we would have a full, complete, exhaustive hearing. We hope that the hearing will continue throughout the day. If there are others who would like to submit testimony for the record, they may. And I would hope that in the next couple of weeks, and beginning today, we will start negotiations from where we left off when Congress recessed.

Senator COHEN. I believe the law providing for the continuation of those payments through the administrative law judge stage expired on December 7.

The CHAIRMAN. We are waiting for the House to act on the temporary extension of payments pending appeal, and send it back to us.

Senator MOYNIHAN. Mr. Chairman, just a brief question, and it has to do with taxpayers. In New York it has been our experience that 40 percent of the persons removed from the disability rolls by social security action then had to turn to public assistance to maintain themselves. They were, in fact, unable to support themselves and public assistance then supported them—a taxpayer program as against a social insurance program.

I wonder if you have some comparable reports from your own States or your own studies.

Senator LEVIN. Our staff is scrambling.

Senator COHEN. I'm told that in my hometown of Bangor, Maine, perhaps 25 percent of those terminated are now turning to welfare assistance.

Senator MOYNIHAN. In Bangor, Maine, 25 percent of those who have been terminated have to go onto public assistance that the taxpayers of Bangor pay for as against a social insurance program which has been in place for a very long time.

Senator COHEN. Right.

The CHAIRMAN. That does not necessarily indicate they were disabled. It may indicate they don't want to work.

Senator MOYNIHAN. Well, I think people in Bangor, Maine, like to work.

The CHAIRMAN. I'm not talking about Bangor. [Laughter.]

Senator MOYNIHAN. I think you know your people well enough to know whether they ought to be working. Don't you think, Senator Cohen?

Senator COHEN. I would say that the people of Maine have a reputation for being independent and work-oriented. They have a great reputation for their work product.

Senator LONG. May I just summarize?

The CHAIRMAN. Sure.

Senator LONG. Let me just summarize what I think are the taxpayers concerns. And keep in mind now that when I ran for office last time, I was on the receiving end of this thing about voting for the biggest tax increase in history.

Senator COHEN. Senator Dole is following in your footsteps because he is trying to urge us to vote for big taxes this year, too.

The CHAIRMAN. No, no. You have been reading the wrong material. [Laughter.]

Senator LONG. Let me just give you three items here which indicate my concern. When we put this program into effect, the original cost estimates—those made when the law was passed in 1956—projected a 0.42 percent of taxable payroll long-range cost for disability insurance. Now in 1977—that's about the time when we voted this tax increase—the 1977 report of the Social Security trustees projected a 3.68 percent long range cost or more than eight times—mind you, that's almost 4 percent of payroll—more than eight times the original estimate. The 1983 trustees' report, this year, projected a 1.38 percent long range cost, about four times the original cost estimate, on a comparable basis after adjusting for the changes in covered payroll since 1956.

We have to decide how costly a program we are asking the taxpayers to pay for. We can either put a great number of people on the rolls or we can limit it. In either case, we ought to be willing to spell out what we want. And when we do so, we ought to insist that whoever is administering this program abide by the law. And if we give the Secretary the power to carry out the law by regulation, we ought to insist that those regulations of the Secretary be complied with.

Now some of you mentioned those States that indicated that they would not comply. Frankly, I must say that in my judgment that is poor administration. If I had been Secretary—and I don't want to be Secretary, God forbid—but if I had had that job and some Governor had told me that he wasn't going to comply with my regulations, I would have notified him immediately that just the moment the law permits the Department to do so, we would begin hiring our own people to administer our program.

Senator LEVIN. Would you impeach all the district court judges who are throwing out the SSA decisions then too? I mean sooner or later you have got to face up to the injustice. It's either going to happen inside the Social Security Administration or it's going to happen in the Federal courts. The Federal courts are so disgusted with what is going on that they are correcting the injustices. Now how do you get rid of all the Federal court judges?

Senator LONG. Well, Senator, one way or the other I wouldn't let them charge the taxpayers any 8 times, 10 times or 50 times what the program was intended to cost.

Senator LEVIN. I agree with that.

Senator LONG. I wouldn't let them load those rolls down so that everytime you look around half the people you are seeing on the street are on disability rolls. I'm not saying half are that way. I wouldn't let it get that way.

Senator LEVIN. Senator Cohen has indicated we've over the years added categories of people who are eligible. You can't say that eight times as many people are there that belong there. It's eight times as many people are there than we originally predicted when the system started, but we've added new categories of people who are eligible so they do belong there according to the Congress. Now maybe we went too far. But I happen to agree with what you just said. If there are people on the rolls who don't belong there, let's get them off.

But, again, I think you would agree with us—and that's the thrust of this bill—that if there are people who do belong there, we want them there. We don't want folks who belong on those rolls, who contributed to the system, who have relied upon this system as an insurance program, as a trust fund, being told after they've been on it properly, without any face to face interview by the government, based on a paper review that suddenly you are off, you are in the street, you are on welfare. We don't want that. I don't think you want that. And I know you don't want that because you are a decent human being. I don't believe you want that.

Senator LONG. Senator, let's just understand this. I was all for this program at a time when it took my vote to pass it. And I was proud to support it. Now after we had that program for some years, the Secretary of HEW, Mr. Califano, told me and told others that it had gotten totally out of control; it's totally out of hand. At that point, I recommended to the committee and the committee voted a law to tighten up on the program. And, frankly, the intent of Congress was clear to say that you have got too many people on those rolls who were not qualified to be on there.

Now I'm not here to defend the kind of administration, one, that put a great number of people on there who didn't belong on there, and, two, just took them off without face to face interviews and all the rest. I'm not here to defend that type of administration.

But I am here to defend the taxpayer and say he shouldn't have to be burdened with paying for benefits which are going to people who are able to work and who ought to be working.

Thank you.

The CHAIRMAN. Thank you very much. I agree with Senator Long that if we work out some compromise, we are going to try to tighten up the Federal control over State administration. I'm not impressed with the National Governors Association—on every issue that comes before this committee they want more money. And I just read a big glowing op ed piece in the Washington Post Sunday signed by four Governors telling us we have got to do something about Federal deficits. Two Republicans and two Democratic Governors spanking the Congress for spending money. They were here yesterday asking for more money for child support enforcement. They are here today saying we have got to spend more money in this program. They will be here tomorrow for revenue sharing. They will be here the next day for something else. And they are all putting out these big releases back in their States blaming the Federal Government for spending. And some States have surpluses. Delaware is cutting taxes. And we are sending them revenue sharing money. So I don't shed any crocodile tears for the Governors. I have great respect for them and wish them well. [Laughter.]

The CHAIRMAN. Thank you very much.

Senator SASSER. Mr. Chairman, could I ask unanimous consent that my statement, written statement, be included in the record?

The CHAIRMAN. Be happy to do that. And we will be working with you in the future.

Senator SASSER. Thank you.

The CHAIRMAN. We now have a panel consisting of Mrs. Martha A. McSteen, Acting Commissioner of the Social Security Administration; and Ms. Carolyn Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice.

I read two names, and I see we have five witnesses. Please identify your associates.

Mrs. McSTEEN. Yes. I have with me Donald A. Gonya, Assistant General Counsel, social security division; Louis D. Enoff who is the Acting Deputy Commissioner for Programs and Policy; and Patricia M. Owens who is Acting Associate Commissioner for Disability.

The CHAIRMAN. And, Carolyn, you are alone?

Ms. KUHL. Yes, Mr. Chairman, I am alone.

The CHAIRMAN. All right.

We are very pleased to have you this morning. We would be pleased to have your testimony now. You can proceed in any way you wish. If you can summarize your statement, the entire statement will be made a part of the record. I know there will be questions from members of the committee.

Mrs. McSteen, do you want to begin?

Mrs. McSTEEN. Yes.

STATEMENT OF MRS. MARTHA A. McSTEEN, ACTING COMMISSIONER OF SOCIAL SECURITY, SOCIAL SECURITY ADMINISTRATION, WASHINGTON, D.C.

Mrs. McSTEEN. Mr. Chairman, and members of the committee, I am pleased to be with you today to discuss the progress we have made in improving the disability program. I would like to make it clear from the outset, however, that the administration opposes enactment of disability legislation.

As I will discuss, we believe that the administrative and legislative reforms already accomplished make further reforms unnecessary. Therefore, the very high cost of the disability provisions of H.R. 4170, about $6 billion in the first 5 years, are unacceptable, especially at the present time when the safety margins of the OASDI trust funds are relatively small.

With your permission, I am submitting a full detailed statement for the record.

[The prepared statement of Mrs. McSteen follows:]

STATEMENT FOR THE RECORD

OF

MARTHA A. MCSTEEN

ACTING COMMISSIONER

OF SOCIAL SECURITY

HEARING ON SOCIAL SECURITY

DISABILITY INSURANCE PROGRAM

COMMITTEE ON FINANCE

UNITED STATES SENATE

WEDNESDAY, JANUARY 25, 1984

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I AM PLEASED TO BE HERE TODAY TO DISCUSS WITH YOU THE PROGRESS WE HAVE MADE IN IMPROVING THE SOCIAL SECURITY DISABILITY DECISIONMAKING PROCESS. I WOULD LIKE TO MAKE CLEAR AT THE OUTSET THAT THE ADMINISTRATION OPPOSES ENACTMENT OF DISABILITY LEGISLATION. AS I WILL DISCUSS IN MY STATEMENT, WE BELIEVE THAT THE ADMINISTRATIVE AND LEGISLATIVE REFORMS ALREADY ACCOMPLISHED MAKE FURTHER REFORMS UNNECESSARY. THEREFORE, THE VERY HIGH COSTS OF THE DISABILITY PROVISIONS IN H.R. 4170--ABOUT $6 BILLION IN THE FIRST 5 YEARS--ARE UNACCEPTABLE, ESPECIALLY AT THE PRESENT TIME WHEN THE SAFETY MARGINS OF THE OASDI TRUST FUNDS ARE RELATIVELY SMALL.

IMPROVING THE DISABILITY PROCESS

AS YOU ARE WELL AWARE, THE IMPLEMENTATION OF PERIODIC REVIEW OF DISABILITY BENEFICIARIES MANDATED BY THE CONGRESS IN 1980 BROUGHT TO LIGHT THE NEED FOR A NUMBER OF FUNDAMENTAL CHANGES IN THE DISABILITY DECISIONMAKING PROCESS. IT BECAME CLEAR THAT THE REVIEW PROCESS WAS CREATING HARDSHIPS FOR SOME BENEFICIARIES AND THAT THESE HARDSHIPS HAD TO BE ALLEVIATED--EITHER ADMINISTRATIVELY OR LEGISLATIVELY. BEGINNING EARLY IN 1982, WE BEGAN IMPLEMENTING A SERIES OF ADMINISTRATIVE REFORMS TO MAKE THE DISABILITY DECISIONMAKING PROCESS MORE RESPONSIVE TO THE NEEDS AND CONCERNS OF THE DISABLED. IN ADDITION, THE CONGRESS ENACTED SOME IMPORTANT

REFORMS IN THE DISABILITY PROCESS. WHILE THE EARLY REFORMS WENT FAR TOWARD MAKING THE CDR PROCESS MORE FAIR, HUMANE AND EFFECTIVE, ADDITIONAL EXPERIENCE, ALONG WITH CONSULTATION WITH THOSE CONCERNED WITH THE DISABILITY PROGRAM, POINTED THE WAY TO THE FURTHER MAJOR REFORMS THAT SECRETARY HECKLER ANNOUNCED ON JUNE 7, 1983.

I WANT TO MENTION THAT A NUMBER OF THESE REFORMS IMPROVED THE INITIAL DISABILITY DECISIONMAKING PROCESS AS WELL. BECAUSE OF THE PUBLIC ATTENTION GIVEN TO THE CONTINUING DISABILITY REVIEWS (CDR) OVER THE LAST FEW YEARS, THE PROGRESS WE HAVE MADE WITH THE INITIAL DISABILITY CLAIMS PROCESS HAS PERHAPS BEEN OVERSHADOWED.

TWO OF THE KEY LEGISLATED REFORMS (INCLUDED IN P.L. 97-455) WERE THE CONTINUED PAYMENT OF BENEFITS DURING APPEAL (EXTENDED BY P.L. 98-118) AND A FACE-TO-FACE EVIDENTIARY HEARING AT THE RECONSIDERATION LEVEL. THE PROVISION TO CONTINUE PAYMENT OF BENEFITS DURING APPEAL TO AN ALJ HEARING RELIEVED THE ANXIETIES AND FINANCIAL HARDSHIPS OF MANY WHOSE DISABILITY BENEFITS HAVE BEEN TERMINATED. ABOUT 93 PERCENT OF THOSE WHO APPEAL THE DECISION TO TERMINATE BENEFITS HAVE ELECTED CONTINUATION OF BENEFITS.

A BASIC ISSUE TO BE RESOLVED IS WHETHER TO EXTEND OR MODIFY THE CONTINUED PAYMENT PROVISION BECAUSE IT HAS EXPIRED. UNDER P.L. 97-455 AS EXTENDED, CONTINUED PAYMENTS CAN BE OFFERED ONLY TO

BENEFICIARIES WHO WERE DETERMINED NO LONGER DISABLED BEFORE DECEMBER 7, 1983.

AS WE HAVE IN THE PAST, WE STILL SUPPORT CONTINUED PAYMENT OF BENEFITS BUT ONLY THROUGH THE FIRST EVIDENTIARY HEARING IN THE APPEALS PROCESS. WE THINK PAYMENT THROUGH THE ALJ LEVEL IS UNNECESSARY BECAUSE THE BENEFICIARY CAN PRESENT HIS CASE DIRECTLY TO THE DECISIONMAKER AT THE RECONSIDERATION LEVEL. AS A RESULT, WE BELIEVE THAT ERRONEOUS DECISIONS WILL BE LARGELY CORRECTED EARLIER IN THE APPEALS PROCESS. ALSO, WE ARE CONCERNED THAT PAYING THROUGH THE ALJ LEVEL MAY BE AN INCENTIVE FOR SOME PEOPLE TO APPEAL TO THE ALJ LEVEL ONLY FOR THE PURPOSE OF POSTPONING BENEFIT TERMINATION.

INCIDENTALLY, BASED ON THE RESULTS OF OUR PILOT PROJECT ON PROVIDING AN EVIDENTIARY HEARING AT RECONSIDERATION, WE BELIEVE THIS PROGRAM WILL IMPROVE BENEFICIARY SATISFACTION WITH THE DISABILITY PROCESS. SINCE STATES EXPRESSED AN INTEREST IN CONDUCTING THE RECONSIDERATION HEARINGS, WE HAVE GIVEN THEM THE OPPORTUNITY TO DO SO. WE BELIEVE THAT GIVING THE STATES THE OPTION TO PARTICIPATE WILL STRENGTHEN THE POSITIVE RELATIONSHIP BETWEEN THE STATES AND THE FEDERAL GOVERNMENT IN THE ADMINISTRATION OF THE PROGRAM. PRELIMINARY RESPONSES FROM THE STATES INDICATE THAT NEARLY ALL STATES ARE INTERESTED IN CONDUCTING THE RECONSIDERATION HEARINGS; ONLY MARYLAND, NEBRASKA AND WYOMING HAVE DECLINED.

I MIGHT MENTION THAT THE RECONSIDERATION HEARING PROCESS IS BEING IMPLEMENTED USING STATE HEARING OFFICERS IN STATES THAT ARE READY TO CONDUCT THE HEARINGS. IN OTHER STATES, FEDERAL HEARING OFFICERS WILL TEMPORARILY CONDUCT THE HEARINGS UNTIL THE STATES ARE READY TO DO SO. (FEDERAL HEARING OFFICERS WILL CONDUCT THE HEARINGS IN THE FEW STATES THAT HAVE DECLINED.)

LET ME NOW BRIEFLY NOTE THE MOST IMPORTANT OF OUR ADMINISTRATIVE REFORMS. THESE REFORMS WERE DESIGNED TO MAKE THE PROGRAM MORE RESPONSIVE TO THE NEEDS OF BENEFICIARIES WHILE STILL ASSURING THAT WE FULFILL OUR OBLIGATIONS TO CONGRESS AND THE TAXPAYING PUBLIC TO ADMINISTER THE PROGRAM IN AN EFFICIENT AND EFFECTIVE MANNER.

- WE REDUCED THE NUMBER OF BENEFICIARIES TO BE REVIEWED EVERY 3 YEARS BY EXPANDING OUR DEFINITION OF PERMANENT DISABILITY. NOW ROUGHLY 40 PERCENT OF DISABLED WORKER BENEFICIARIES ARE EXEMPTED FROM THE 3-YEAR REVIEW.

- WE SUSPENDED THE REVIEW OF MENTALLY IMPAIRED BENEFICIARIES WITH FUNCTIONAL PSYCHOTIC DISORDERS UNTIL THE CRITERIA FOR REVIEWING THESE CASES COULD BE REVISED. THESE BENEFICIARIES WERE THE MOST PRONE TO INCORRECT TERMINATIONS. PART OF THE PROBLEM IN THE REVIEW OF THESE CASES IS THAT DIAGNOSIS, TREATMENT AND STANDARDS OF MEASUREMENT OF THESE DISORDERS ARE VERY DIFFICULT.

- WE BEGIN EACH CDR WITH AN INTERVIEW IN A LOCAL SOCIAL SECURITY OFFICE IN ORDER TO EXPLAIN THE PROCESS TO BENEFICIARIES AND ADVISE THEM OF THEIR RIGHTS AND RESPONSIBILITIES.

- WE INITIATED A TOP-TO-BOTTOM REVIEW OF DISABILITY POLICIES AND PROCEDURES IN CONSULTATION WITH APPROPRIATE EXPERTS AND THE STATES, AND HAVE INCREASED OUR EFFORTS TO SEEK THE ADVICE OF THE MEDICAL COMMUNITY ON THE ENTIRE DISABILITY PROCESS. THERE ARE SEVERAL GROUPS CURRENTLY REVIEWING BOTH PHYSICAL AND MENTAL IMPAIRMENT ISSUES, AND THEY HAVE RECOMMENDED A NUMBER OF SIGNIFICANT ACTIONS.

  -- I AM PARTICULARLY PLEASED WITH THE WORK DONE BY THE GROUP REVISING THE CRITERIA FOR MENTAL IMPAIRMENTS IN THE LISTINGS. THE GROUP, WHICH INCLUDES OUTSIDE EXPERTS AS WELL AS SSA AND STATE AGENCY PERSONNEL, IS CLOSE TO COMPLETING ITS WORK ON EVALUATING MENTAL IMPAIRMENTS AND WILL BE SUBMITTING ITS RECOMMENDATIONS TO US VERY SOON. WE HOPE TO HAVE A REVISED MENTAL IMPAIRMENT LISTING PUBLISHED FOR PUBLIC COMMENT SHORTLY THEREAFTER.

  -- ALSO, WE HAVE ASKED A WORKGROUP TO CONSIDER HOW WE MIGHT MAKE GREATER USE OF WORK EVALUATIONS IN MENTAL IMPAIRMENT CASES TO ASSESS A PERSON'S ABILITY TO WORK.

WE BELIEVE THAT THESE EVALUATIONS COULD BE VERY HELPFUL IN PROVIDING A BETTER PICTURE OF WHAT AN INDIVIDUAL IS ABLE TO DO.

CONSIDERATION OF ADDITIONAL LEGISLATIVE REFORMS

BEFORE MOVING TO A DISCUSSION OF SPECIFIC LEGISLATIVE PROPOSALS, I WANT TO COMMENT BRIEFLY ON THE COST OF THE DISABILITY PROVISIONS IN THE BILL (H.R. 4170) APPROVED BY THE COMMITTEE ON WAYS AND MEANS ON OCTOBER 21, 1983. THE BILL WOULD COST ABOUT $6 BILLION OVER THE FIVE FISCAL YEARS 1984 THROUGH 1988. THIS INCLUDES OASDI PROGRAM AND ADMINISTRATIVE COSTS PLUS SSI, MEDICARE AND MEDICAID COSTS. I SHOULD EMPHASIZE THAT THE ESTIMATE REPRESENTS COSTS ONLY THROUGH FY 1988. WE WILL PROVIDE AN ESTIMATE FOR FY 1989 SHORTLY. THESE COSTS ASSUME THAT UNDER THE LANGUAGE OF THE BILL THE COURTS WOULD BE LIKELY TO REQUIRE THE MEDICAL STANDARD TO BE APPLIED RETROACTIVELY, REQUIRING REOPENING OF CASES DECIDED OVER THE PAST 3 YEARS. (APPLYING THE MEDICAL IMPROVEMENT STANDARD ONLY PROSPECTIVELY WOULD RESULT IN COSTS OF ABOUT $3 BILLION OVER THE FIRST 5 YEARS FOR THE DISABILITY PROVISIONS IN H.R. 4170.)

THIS ADDITIONAL OUTGO FROM THE DI FUND--WITH OR WITHOUT REOPENING OF PAST CDR CASES UNDER A MEDICAL IMPROVEMENT STANDARD--PROBABLY WOULD REQUIRE EARLIER REPAYMENT OF THE INTERFUND LOANS THAT WERE MADE TO THE OLD-AGE AND SURVIVORS

INSURANCE TRUST FUND FROM THE DI FUND IN LATE 1982. UNDER THE SOCIAL SECURITY AMENDMENTS OF 1983, THESE LOANS DO NOT HAVE TO BE REPAID UNTIL 1989, AND OUR ESTIMATES FOR PRESENT LAW INDICATE THAT THE DI FUND WOULD PROBABLY NOT NEED EARLIER REPAYMENT. THESE LOANS MIGHT HAVE TO BE REPAID AS EARLY AS 1985 TO ASSURE CONTINUED PAYMENT OF DI BENEFITS IF H.R. 4170 IS ENACTED. EVEN WITH REPAYMENT OF THE LOANS FROM THE OASI TRUST FUND IN 1985, THE DI TRUST FUND RATIO IS ESTIMATED TO DECLINE TO 11 PERCENT--LESS THAN 2 MONTHS' OUTGO--BY JANUARY 1, 1989.

ALSO, THE INCREASED EXPENDITURES UNDER THE WAYS AND MEANS COMMITTEE'S BILL WOULD REDUCE TRUST FUND ASSETS, INCREASING THE LIKELIHOOD THAT THE AUTOMATIC STABILIZER PROVISION IN THE LAW WOULD BE TRIGGERED. THIS WOULD MEAN THAT THE SOCIAL SECURITY COST-OF-LIVING INCREASES FOR DECEMBER 1984 AND POSSIBLY OTHER YEARS COULD BE REDUCED--BUT ONLY IF WAGES INCREASE AT A LOWER RATE THAN PRICES.

NOW I WANT TO COMMENT ON SOME OF THE MAJOR ITEMS OF DISABILITY LEGISLATION THAT WERE CONSIDERED IN THE FIRST SESSION OF THIS CONGRESS.

CONTINUATION OF BENEFIT PAYMENTS

THE FIRST ISSUE I WANT TO MENTION IS THE CONTINUATION OF BENEFIT PAYMENTS DURING APPEAL. AS I INDICATED EARLIER, THE

PROVISION IN THE LAW EXPIRED ON DECEMBER 6. WE DIRECTED THE STATES TO HOLD TERMINATION NOTICES BEGINNING DECEMBER 7, BECAUSE WE NEEDED TIME TO REVISE THE NOTICES DUE TO THE EXPIRATION OF CONTINUED PAYMENT AND ALSO NEEDED TO ADVISE BENEFICIARIES OF THEIR RIGHTS TO A RECONSIDERATION HEARING EFFECTIVE JANUARY 1.

WE PLAN TO NOTIFY THE STATES THIS WEEK TO RESUME PROCESSING CESSATION CASES, BEGINNING IN FEBRUARY. OF COURSE, THOSE STATES THAT ARE AFFECTED BY COURT ORDERS WILL PROCESS CASES IN ACCORDANCE WITH THE COURT ORDERS. IN THE CASE OF CESSATIONS EFFECTIVE FOR FEBRUARY, BENEFITS WILL BE PAYABLE FOR FEBRUARY AND FOR 2 ADDITIONAL MONTHS--THE LAST CHECK WILL BE PAID MAY 3.

MEDICAL IMPROVEMENT

THE ADMINISTRATION STRONGLY OPPOSES SECTION 901 OF H.R. 4170 WHICH WOULD ESTABLISH A SEPARATE STANDARD OF DISABILITY FOR THOSE ALREADY ON THE ROLLS. ABOUT THREE-QUARTERS OF THE COST OF THE HOUSE BILL IS ATTRIBUTABLE TO THIS PROVISION ALONE.

THERE ARE NO STATEMENTS IN THE STATUTE AS TO WHAT STANDARD TO USE IN DETERMINING A DISABILITY BENEFICIARY'S CONTINUING ELIGIBILITY FOR BENEFITS. WE NOW USE THE SAME STANDARD THAT WE USE IN INITIAL DISABILITY CASES.

BOTH H.R. 4170 AND THE DISABILITY AMENDMENTS INTRODUCED BY SENATORS COHEN AND LEVIN LATE IN THE FIRST SESSION OF THIS CONGRESS WOULD PROVIDE A MEDICAL IMPROVEMENT STANDARD FOR TERMINATING DISABILITY BENEFITS. AS PART OF THE SECRETARY'S DISABILITY REFORMS, WE UNDERTOOK A TOP-TO-BOTTOM REVIEW OF DISABILITY POLICIES AND PROCEDURES, INCLUDING THE ISSUE OF WHETHER AN ACCEPTABLE MEDICAL IMPROVEMENT STANDARD COULD BE DEVELOPED. AFTER MONTHS OF STUDY OF THE ISSUE AND CONSIDERATION OF THE STANDARDS IN BOTH THE SENATE AND HOUSE BILLS, WE HAVE CONCLUDED THAT WE MUST STRONGLY OPPOSE A MEDICAL IMPROVEMENT STANDARD.

A BASIC PROBLEM WITH A MEDICAL IMPROVEMENT STANDARD IS THAT IT WOULD CREATE DIFFERENT STANDARDS OF ELIGIBILITY FOR INITIAL CLAIMS AND FOR CONTINUING DISABILITY REVIEWS. THIS WOULD BE UNFAIR AND INEQUITABLE TO PEOPLE NOW APPLYING FOR BENEFITS WHO COULD NOT RECEIVE BENEFITS EVEN THOUGH THEY ARE IN THE SAME CONDITION AS SOME PEOPLE NOW ON THE ROLLS.

ALSO, A MEDICAL IMPROVEMENT STANDARD IS UNWORKABLE BECAUSE OF THE DIFFICULTIES WITH COMPARING A PERSON'S CURRENT CONDITION WITH HIS OR HER CONDITION AT THE TIME BENEFITS WERE AWARDED. THE TYPE OF EVIDENCE USED TO MAKE A DISABILITY DETERMINATION IN THE PAST FREQUENTLY DIFFERS FROM THE TYPE OF EVIDENCE CURRENTLY USED BECAUSE OF CHANGES IN MEDICAL PRACTICE OR TECHNOLOGY. CONSEQUENTLY, COMPARISON OF THE SEVERITY OF A CONDITION IN THE PAST WITH A CURRENT CONDITION COULD INVOLVE MEASURES MADE ON TWO

DIFFERENT SCALES WITH NO MEANS OF CONVERTING FROM ONE SCALE TO THE OTHER.

IN ADDITION TO THESE SERIOUS CONCERNS, WE BELIEVE THAT REFORMS IN THE DISABILITY PROGRAM NOW UNDERWAY MAKE SUCH A STANDARD UNNECESSARY. THE MOST IMPORTANT OF THESE REFORMS ARE THE FACE-TO-FACE EVIDENTIARY HEARING AT RECONSIDERATION AND OUR TOP-TO-BOTTOM REVIEW OF THE DISABILITY PROGRAM.

MOST IMPORTANTLY, WE BELIEVE THAT MOST OF THE PRESSURE FOR ENACTMENT OF A MEDICAL IMPROVEMENT STANDARD HAS COME BECAUSE OF THE INITIATION OF CDR'S AS MANDATED BY THE CONGRESS IN THE 1980 DISABILITY AMENDMENTS. BENEFICIARIES HAD NOT EXPECTED TO HAVE THEIR ELIGIBILITY REVIEWED. NOW, WHEN A PERSON IS AWARDED DISABILITY BENEFITS HE IS TOLD THAT HIS CONTINUED ELIGIBILITY WILL BE REVIEWED AND THAT SSA WILL PERIODICALLY REDETERMINE WHETHER HE REMAINS SO DISABLED AS TO BE UNABLE TO WORK.

FOR ALL OF THESE REASONS WE BELIEVE THAT A MEDICAL IMPROVEMENT STANDARD IS NOT IN THE BEST INTEREST OF THE DISABILITY PROGRAM, AND WE STRONGLY OPPOSE ENACTMENT OF SUCH A PROVISION EVEN IF APPLIED PROSPECTIVELY ONLY.

FACE-TO-FACE INTERVIEW AT INITIAL LEVEL

ANOTHER PROPOSAL THAT HAS BEEN SUGGESTED BY SOME DISABILITY INTEREST GROUPS AND IS CONTAINED IN H.R. 4170 IS TO ELIMINATE THE

RECONSIDERATION STEP IN THE APPEALS PROCESS FOR DISABILITY CESSATION CASES AND, INSTEAD, PROVIDE A FACE-TO-FACE INTERVIEW AT THE INITIAL LEVEL FOR DISABILITY CESSATION CASES. THE FACE-TO-FACE INTERVIEW WOULD TAKE PLACE AFTER A PRELIMINARY UNFAVORABLE DECISION WAS MADE BUT BEFORE A FINAL DECISION WAS ISSUED. THE DISABILITY AMENDMENTS INTRODUCED BY SENATORS COHEN AND LEVIN WOULD NOT ELIMINATE THE RECONSIDERATION STEP BUT WOULD INSTEAD REQUIRE DEMONSTRATION PROJECTS IN 5 STATES ON A FACE-TO-FACE INTERVIEW AT THE INITIAL LEVEL.

WE AGREE WITH THE NEED FOR EARLY FACE-TO-FACE CONTACT BETWEEN THE DISABILITY BENEFICIARY AND A DECISIONMAKER TO ASSURE CORRECT CONTINUING DISABILITY DECISIONS. THAT IS WHY WE SUPPORTED THE FACE-TO-FACE EVIDENTIARY HEARING AT RECONSIDERATION THAT WAS PROVIDED BY P.L. 97-455. HOWEVER, WE OPPOSE SUCH PRE-TERMINATION HEARINGS BECAUSE THEY WOULD ABANDON THE IDEA OF A RECONSIDERATION HEARING BEFORE IT IS FULLY TESTED. THE NEW RECONSIDERATION PROCESS MANDATED BY P.L. 97-455 SHOULD BE GIVEN A FAIR TRIAL, PARTICULARLY IN VIEW OF THE HIGHLY SUCCESSFUL PILOT PROJECT RESULTS. WE STRONGLY URGE THE CONGRESS TO GIVE THIS APPROACH A FAIR CHANCE BEFORE CONSIDERING MAKING A WHOLESALE CHANGE.

MORATORIUM ON MENTAL IMPAIRMENT REVIEWS

UNDER ANOTHER PROPOSAL--WHICH IS CONTAINED IN H.R. 4170 AND THE DISABILITY AMENDMENTS INTRODUCED BY SENATORS COHEN AND

LEVIN--THERE WOULD BE A TEMPORARY DELAY OF PERIODIC REVIEW FOR ALL MENTALLY IMPAIRED INDIVIDUALS UNTIL THE CRITERIA FOR EVALUATING MENTAL IMPAIRMENTS IN THE LISTING OF IMPAIRMENTS HAVE BEEN REVISED. WE BELIEVE THIS PROVISION IS UNNECESSARY SINCE UNDER THE SECRETARY'S INITIATIVES SSA HAS STOPPED REVIEWS OF ABOUT TWO-THIRDS OF MENTAL IMPAIRMENT CASES--THOSE MOST PRONE TO DECISIONAL ERROR--UNTIL REVISED STANDARDS ARE DEVELOPED. ALSO, BECAUSE WE EXPANDED THE DEFINITION OF PERMANENT DISABILITY, THE NUMBER OF MENTAL IMPAIRMENT CASES SELECTED FOR REVIEW HAS BEEN FURTHER REDUCED.

MORE IMPORTANTLY, THE WORKGROUP, WHICH HAS BEEN REVIEWING THE CRITERIA FOR EVALUATING MENTAL IMPAIRMENTS SINCE JULY 1983, WILL BE SUBMITTING ITS RECOMMENDATIONS, AND WE EXPECT TO BE ABLE TO IMPLEMENT THEIR RECOMMENDATIONS IN THE NEAR FUTURE. IN VIEW OF THIS PROGRESS, A MORATORIUM IN MENTAL IMPAIRMENT CASES IS UNNECESSARY.

APA RULEMAKING

ANOTHER ISSUE THAT HAS BEEN THE SUBJECT OF PROPOSED LEGISLATION IS MAKING THE PUBLIC NOTICE AND COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT APPLICABLE TO SSA RULEMAKING. WE OPPOSE THIS PROPOSAL BECAUSE IT COULD RAISE SERIOUS QUESTIONS AS TO WHETHER AN SSA POLICY IS SUBJECT TO THE APA NOTICE AND COMMENT REQUIREMENTS. THE APA PROVIDES THAT ONLY SUBSTANTIVE--NOT

INTERPRETIVE--RULEMAKING IS SUBJECT TO THE PUBLIC NOTICE AND COMMENT REQUIREMENTS. STATE AGENCIES OR ALJS MIGHT QUESTION WHETHER THEY SHOULD FOLLOW AN SSA POLICY THAT HAS NOT BEEN PUBLISHED UNDER THE APA ON THE GROUNDS THAT IT ESTABLISHES SUBSTANTIVE RATHER THAN INTERPRETIVE POLICY. SUCH A SITUATION WOULD ADD CONFUSION TO THE DISABILITY PROCESS AND WOULD GREATLY IMPEDE OUR EFFORTS TO ASSURE THAT UNIFORM STANDARDS ARE USED TO MAKE DISABILITY DETERMINATIONS. ANOTHER SERIOUS PROBLEM IS THAT THE PROVISION COULD BE INTERPRETED BROADLY BY THE COURTS WITH THE RESULT THAT INTERPRETIVE RULINGS WHICH CONTAIN DETAIL WHOLLY INAPPROPRIATE FOR REGULATIONS WOULD HAVE TO BE ISSUED AS REGULATIONS.

COMPLIANCE WITH COURT ORDERS

THIS PROPOSAL IN H.R. 4170 WOULD REQUIRE US EITHER TO RECOMMEND APPEAL OF CIRCUIT COURT DECISIONS WITH WHICH WE DISAGREE OR TO ACQUIESCE IN THE DECISION AND APPLY IT WITHIN THE JURISDICTION OF THE CIRCUIT COURT.

WE STRONGLY OPPOSE THIS PROVISION. HHS HAS ALWAYS COMPLIED WITH THE TERMS OF COURT ORDERS AS THEY RELATE TO INDIVIDUALS OR CLASSES OF INDIVIDUALS NAMED IN A PARTICULAR SUIT. HOWEVER, OUR POLICY OF NONACQUIESCENCE IS ESSENTIAL TO ENSURE THAT THE AGENCY FOLLOWS ITS STATUTORY MANDATE TO ADMINISTER THE SOCIAL SECURITY PROGRAM NATIONWIDE IN A UNIFORM AND CONSISTENT MANNER. IN A

PROGRAM OF NATIONAL SCOPE, IT WOULD NOT BE EQUITABLE TO PEOPLE TO SUBJECT THEIR CLAIMS TO DIFFERING STANDARDS DEPENDING ON WHERE THEY RESIDE.

THERE ARE SEVERAL REASONS WHY WE DO NOT RECOMMEND APPEAL OF ALL CIRCUIT COURT DECISIONS WITH WHICH WE DISAGREE. FOR EXAMPLE, IF THE SAME ISSUE HAS BEEN DECIDED BY A NUMBER OF COURTS AND THE WEIGHT OF THE DECISIONS AGREES WITH OUR INTERPRETATION, WE MAY DECIDE NOT TO RECOMMEND APPEAL OF THE MINORITY OF CASES WHICH DISAGREE WITH OUR INTERPRETATION. TO APPEAL ALL SUCH CASES WOULD BE ADMINISTRATIVELY EXPENSIVE, WOULD BE AN INEFFICIENT USE OF LIMITED FEDERAL LEGAL RESOURCES, AND WOULD AGGRAVATE THE ALREADY HEAVY BURDEN OF LITIGATION IN FEDERAL COURTS. IF, ON THE OTHER HAND, THE WEIGHT OF THE COURT DECISIONS ON A GIVEN ISSUE DOES NOT AGREE WITH OUR INTERPRETATION, WE GENERALLY RECOMMEND APPEAL OF ONE OR MORE OF THE CASES AND MAY ALSO PURSUE OTHER REMEDIES SUCH AS RECOMMENDING REMEDIAL LEGISLATION.

THERE WOULD BE ENORMOUS PRACTICAL PROBLEMS WITH CIRCUIT-BY-CIRCUIT ACQUIESCENCE SINCE WE WOULD NEED TO KEEP TRACK OF APPLICANTS AS THEY MOVE THROUGH THE DECISIONMAKING PROCESS, DETERMINE WHICH CIRCUIT LAW SHOULD APPLY, AND SEPARATELY HANDLE CLAIMS BY JURISDICTION. SPECIAL PROBLEMS COULD ARISE WHERE THERE ARE CONFLICTING DECISIONS WITHIN A SINGLE CIRCUIT, OR A CLAIMANT OR BENEFICIARY CHANGES RESIDENCE WHILE A DECISION ON APPEAL IS PENDING.

THE PROPOSAL WOULD TAKE AWAY OUR OPTION TO CONTINUE TO LITIGATE ISSUES ALREADY ADDRESSED BY THE CIRCUIT COURTS, THUS UNDERMINING OUR ABILITY TO DEFEND THE MANY SUITS BROUGHT AGAINST THE AGENCY EACH YEAR. FURTHER, REQUIRING US TO APPEAL ADVERSE COURT DECISIONS TO THE SUPREME COURT OR ELSE FOLLOW THEM ALSO IGNORES THE SEVERE LIMITATIONS WE FACE IN SEEKING SUPREME COURT REVIEW. THE SUPREME COURT SELDOM GRANTS REVIEW IN CASES INVOLVING A STATUTORY ISSUE OF FIRST IMPRESSION DECIDED ADVERSELY TO THE GOVERNMENT. I UNDERSTAND THAT THE DEPARTMENT OF JUSTICE ALSO STRONGLY OPPOSES THIS PROVISION AND HAS COMMUNICATED ITS OPPOSITION TO THIS COMMITTEE.

CONCLUSION

IN CONCLUSION, WE THINK THE LEGISLATIVE AND ADMINISTRATIVE STEPS THAT HAVE BEEN TAKEN TO DATE HAVE IMPROVED AND STRENGTHENED THE DISABILITY PROCESS, AND THE PROPOSED LEGISLATIVE CHANGES DISCUSSED EARLIER ARE NOT NEEDED.

Mrs. McSteen. As you are well aware, the periodic review of disability beneficiaries mandated by the Congress in 1980 brought to light the need for a number of fundamental changes in the disability decision-making process. Beginning early in 1982, we began implementing a series of administrative reforms to make the program more responsive to the needs of beneficiaries while still assuring that we fulfill our obligation to Congress and the taxpaying public to administer the program in an efficient and effective manner. In addition, the Congress enacted some important reforms.

The most important of these administrative reforms include: reducing the number of beneficiaries to be reviewed every 3 years expanding our definition of permanent disability; suspending the review of the mentally impaired beneficiaries with functional psychotic disorders until we revise the criteria; beginning each continuing disability review with an interview at a local social security office; and initiating a top to bottom review of disability policies and procedures in consultation with appropriate outside experts and the States.

As part of this review, a group is revising the criteria for mental impairments in the listings. The group will be submitting its recommendations very soon, and we hope to have a revised mental impairment listing published for public comment shortly.

To date, we have finished reviewing about two-thirds of the disability beneficiaries on the rolls who have nonpermanent disabilities, and this is part of the 3-year cycle of periodic reviews.

Before moving to a discussion of specific legislative proposals, I want to comment briefly on the cost of the disability provisions of H.R. 4170, which has been approved by the Committee on Ways and Means. The bill would cost about $6 billion over the 5 fiscal years—1984 through 1988. This includes OASDI program and administrative costs, plus SSI, medicare and medicaid costs. And I should emphasize that the estimate represents costs only through fiscal year 1988. We will provide the 1989 data shortly.

[The following table was subsequently supplied:]

INTERMEDIATE-COST ESTIMATES

Table 1.--Cost Effects of Title IX of H.R. 4170,
As Approved on October 20 by the House Committee on Ways and Means, Fiscal Years 1984-89
(in millions)

With a Medical-Improvement Standard Applied to New Cases:

Program affected	Fiscal year						Total, 1984-89
	1984	1985	1986	1987	1988	1989	
OASDI benefit payments	$ 60	$390	$580	$650	$730	$ 810	$3,220
OASDI administrative expenses	25	105	130	126	131	136	653
Medicare	25	45	65	80	95	105	415
Medicaid	13	21	21	15	20	26	116
SSI	-3	2	9	19	23	29	79
Total	$120	$563	$805	$890	$999	$1,106	$4,483

With a Medical Improvement-Standard Applied to New Cases and to Prior Terminations:

Program affected	Fiscal year						Total, 1984-89
	1984	1985	1986	1987	1988	1989	
OASDI benefit payments	$ 830	$1,200	$840	$ 860	$ 910	$ 970	$5,610
OASDI administrative expenses	109	168	130	126	131	136	800
Medicare	45	95	135	165	195	225	860
Medicaid	19	31	33	30	40	52	205
SSI	8	15	16	25	29	34	127
Total	$1,011	$1,509	$1,154	$1,206	$1,305	$1,417	$7,602

Mrs. **McSteen.** These costs assume that under the language of the bill the courts would be likely to require the medical improvement standard to be applied retroactively, requiring reopening of cases decided over the past 3 years. Applying the medical improvement standard only prospectively would result in costs of about $3 billion over the first 5 years under the disability provisions in H.R. 4170. This additional outgo from the DI fund, with or without reopening of past CDR cases under a medical improvement standard, probably would require earlier repayment of the interfund loans that were made to the old age and survivor insurance trust fund from the DI trust fund in late 1982.

Under the social security amendments of 1983, these loans do not have to be repaid, as you know, until 1989. And our estimates for present law indicate that the DI fund would probably not need earlier repayment. These loans might have to be repaid as early as 1985 to assure continued payment of DI benefits if H.R. 4170 is enacted. Even with the repayment of loans from the OASI trust fund in 1985, the DI trust fund ratio is estimated to decline to 11 percent, less than 2 month's outgo by the beginning of 1989.

Also the increased expenditures under the Ways and Means Committee bill would reduce trust fund assets, increasing the likelihood that the stabilizer provision in the law would be triggered. And this would mean that the social security cost-of-living increases for December 1984 and possibly other years could be reduced, if wages increase at a lower rate than prices.

The first issue I want to mention is the continuation of benefit payments during appeal. This provision expired, as you know, on December 6. And we directed the States to hold the termination notices beginning on the 7th because we needed time to revise the notices and advise the beneficiaries of their right to a reconsideration hearing effective January 1.

We plan to notify the States this week to resume processing cessation cases beginning next month. Of course those States that are affected by court orders will process cases in compliance with the court orders.

As we have in the past, we still support continued payment of benefits, but only through the first evidentiary hearing in the appeals process. We think payment through the ALJ level is unnecessary because the beneficiary can present his case directly to the decisionmaker at the reconsideration level.

The administration strongly opposes section 901 of H.R. 4170 which would establish a medical improvement standard. About three-quarters of the cost of the House bill is attributable to this provision alone. A medical improvement standard would create different standards of eligibility for initial claims and for continuing disability reviews. This would be unfair and inequitable to people now applying for benefits who could not receive benefits even though they are in the same condition as some people now on the rolls.

Also a medical improvement standard is not workable because of the difficulties in comparing a person's current condition with his condition at the time the benefits were awarded. In addition to these concerns about a medical improvement standard, we believe that the reforms in the disability program now underway make such a standard unnecessary. The most important of these reforms are the face-to-face evidentiary hearing at reconsideration, and our top to bottom review of the disability program.

Another issue that has been the subject of proposed legislation is making the public notice and comment requirements of the Administrative Procedure Act [APA] applicable to SSA rulemaking. We oppose this proposal because it could raise serious questions as to whether an SSA policy is subject to APA notice and comment requirements. The APA provides, as you know, that only substantive, not interpretative, rulemaking is subject to the public notice and comment requirements. State agencies and ALJ's might question whether they should follow an SSA policy which has not been published under the APA on the grounds that it establishes a substantive rather than interpretative policy. Such a situation would add confusion to the disability process, and would greatly impede our efforts to assure that uniform standards are used to make disability determinations.

Another serious problem is that this provision could be interpreted broadly by the courts with the result that interpretative rulings which contain detail wholly inappropriate for regulations would have to be issued as regulations.

Another proposal in H.R. 4170 would require us either to recommend appeal of circuit court decisions with which we disagree or to acquiesce in the decision, and apply it within jurisdiction of the circuit court. We strongly oppose this provision.

HHS has always complied with the terms of court orders as they relate to individuals or classes of individuals named in a particular suit. However, our policy of nonacquiescence is essential to insure that the agency follows its statutory mandate to administer this program in a uniform and consistent manner.

There also would be enormous practical problems with circuit by circuit acquiescence since we would need to keep track of applicants as they move through the decisionmaking process in determining which circuit law should apply, and separately handle claims by jurisdiction.

In addition, the proposal would take away our option to continue to litigate issues already addressed by the circuit courts, thus undermining our ability to defend the many suits brought against the agency. Requiring us to appeal adverse court decisions to the Supreme Court or else follow them also ignores the severe limitations we face in seeking Supreme Court review. I understand that the Department of Justice also strongly opposes this provision and will communicate this to the committee.

In conclusion, I would like to make it clear that the administration strongly opposes enactment of disability legislation. As I have discussed in my statement, we believe that the administrative and legislative reforms already accomplished, including the face-to-face evidentiary hearing at the reconsideration level, the expansion of the definition of permanent disability, the suspension of review of certain mentally impaired beneficiaries, the improved initial CDR interviews and our ongoing review of disability policy and procedures make further reforms unnecessary. Therefore, the very high cost of the disability provision in H.R. 4170, about $6 billion in the first 5 years, are unacceptable, especially at the present time when the safety margins of the OASDI trust funds are relatively small.

Thank you, Senator.

The CHAIRMAN. Thank you.

STATEMENT OF CAROLYN KUHL, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

The CHAIRMAN. Carolyn.

Ms. KUHL. Mr. Chairman, I am here to address just one of the number of issues before you here today, the so-called nonacquiescence issue. With your permission, I would ask that my entire statement be put in the record, and I will summarize it.

The CHAIRMAN. The statement will be made a part of the record, and if you could summarize it, it would be very helpful.

Ms. KUHL. Thank you, Mr. Chairman.

[The prepared statement of Ms. Kuhl follows:]

Department of Justice

STATEMENT

OF

CAROLYN B. KUHL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE

SENATE FINANCE COMMITTEE

CONCERNING

SOCIAL SECURITY ADMINISTRATION'S
NONACQUIESCENCE POLICY

ON

JANUARY 25, 1984

Thank you Mr. Chairman. It is a pleasure to be here today to discuss the legal aspects of the Social Security Administration's nonacquiescence policy and to comment on pending legislation on the same subject. As you know, the Department of Justice represents the Social Security Administration in the federal courts and we are currently defending several challenges to the nonacquiescence policy.

In representing agencies of the federal government, the Department of Justice makes important litigation decisions which affect the development of American jurisprudence. The most important of those decisions are made by the Solicitor General who determines which of the hundreds of unfavorable decisions each year the government will seek to appeal to the Supreme Court. These decisions are made not on the basis of the narrow self interest of the federal government, but with a view to promoting the broader public interest and the orderly development of the law. The Department of Justice, as the government's lawyer, has responsibilities far beyond those of counsel representing private parties. Consequently, the government cannot automatically appeal all adverse decisions, but must retain the flexibility to accept some defeats, while refusing to acquiesce in the rule of law they establish pending the resolution of future test cases. Legislation such as that being considered by this Committee thus gives us very serious cause for concern.

As this Committee is aware, the Social Security Administration's nonacquiescence doctrine has been the subject of criticism. Most agencies, upon receiving an adverse ruling from a court of appeals, will almost always acquiesce and follow that ruling for purposes of the agency's future activities within the geographic territory covered by that court of appeals. However, the Social Security Administration has special problems because it is responsible for the implementation of an exceedingly complex and important nationwide benefits program, and understandably is reluctant to operate under different legal constraints in each of twelve separate judicial circuits. Consequently, the general guidance SSA has provided its Administrative Law Judges is that they should follow agency regulations and guidelines without regard to the law in a particular circuit in which a claimant's case will ultimately be appealed. In addition to this "informal nonacquiescence", SSA has sometimes issued formal notices of "nonacquiescence" in particularly significant adverse decisions.

Whenever possible, the government of course appeals an adverse decision which we believe to be incorrect and detrimental to the public interest. However, appeal of adverse decisions is not always realistic. For example, sometimes a court of appeals will decide a case by making two alternative holdings, either of which would sustain the result reached. One of these decisions may be a significant adverse precedent. However, because the decision has an independent, alternate holding, it ordinarily would be inappropriate for further review.

Another example of a circumstance where nonacquiescence is necessary is one in which subsequent judicial decisions cast serious doubt on the continued validity of an earlier adverse holding. For instance, after an initial loss, several other circuits may adopt the government's position, or the Supreme Court may hand down a decision which casts doubt on the continued validity of the first adverse decision. In such cases, the government certainly would be justified in seeking to challenge the adverse holding.

There may be some instances in which lawyers reasonably can disagree about whether a Court of Appeals decision _is_ in fact inconsistent with SSA's regulations. In those instances, SSA of course should remain free to adopt and defend a reasonable construction of the decision that is consistent with its regulations. Such an approach should not be viewed as nonacquiescence.

However, Mr. Chairman, a binding requirement that SSA, or any agency, follow an unfavorable appellate court decision in all future litigation, would create difficulties far beyond those we confront today. Consequently, we are strongly opposed to provisions of the two bills now being considered, H.R. 3755 and S. 476 (as amended by printed Amendment No. 1457) which would require SSA to follow unfavorable appellate court decisions in calculating payments to beneficiaries whose appeals would be within the jurisdiction of such courts. These bills, in addition to overruling SSA's longstanding "nonacquiescence doctrine" would seriously undermine the ability of the Justice Department to defend government action in court, and overburden the Supreme Court with appeals from adverse decisions.

In its recent unanimous decision in United States v. Mendoza (No. 82-849, January 10, 1984), the Supreme Court held that the government is not bound by the doctrine of non-mutual collateral estoppel from continuing to raise issues decided against it in other cases. The district court and the Ninth Circuit held that because the government had lost the constitutional issue presented in the case and had failed to appeal this same legal issue in an earlier suit brought by a different individual, it was bound by the principle of collateral estoppel from litigating that constitutional issue against Mendoza. Although it has expanded the applicability of the doctrine of collateral estoppel in recent years in the interest of judicial economy, the Supreme Court held that "the Government is not in a position identical to a private litigant," id. at 5, and hence should not be bound by all adverse determinations. As the Court explained:

> It is not open to serious dispute that the government is a party to a far greater number of cases on a nation-wide basis than even the most litigious private entity; in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts.***Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action, many consititutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

Mendoza at 5-6.

The legislative proposals pending before this Committee would create many of the same problems identified by the Supreme Court in the application of collateral estoppel to the government. The practical result in either case will be to require the government to seek all possible avenues of review of the first adverse decision in any circuit. This will greatly damage the government's litigating posture and overload the docket of the Supreme Court. In the first place, it simply is not possible for the government to seek certiorari in most instances where a statutory issue of first impression is decided adversely to the government because the Supreme Court seldom grants review in such cases absent a conflict among the courts of appeals.

Even if the Court did not wait for a conflict in the circuits, given its workload it seems unlikely that the Court would be able to rule on more than a handful of social security cases each year. The Supreme Court has recognized that it derives a benefit from "permitting several courts of appeals to explore a difficult question before [it] grants certiorari." Mendoza at 6.

Moreover, the government cannot completely control which cases are decided by the courts of appeals because they may reach that level by virtue of an appeal taken from a case the government has won in the district court. A case which reaches the court of appeals in that manner and is then decided adversely to the government may be inappropriate for further review for any number of reasons. For instance, the adverse appellate decision may be interlocutory, ruling against the government on one point of law, but ordering the case remanded for further proceedings. Interlocutory decisions are often inappropriate for rehearing en banc. Finally, these bills would apparently preclude the government from asking a court of appeals which has ruled adversely to SSA on a particular issue to reconsider its earlier decision in light of subsequent conflicting decisions in other circuits, subsequent Supreme Court precedent bearing on the issue or practical experience.

As a review of some cases will indicate, there is a value in allowing the government to continue to litigate issues which have been resolved by some circuits, because often the passage of time and intervening events will indicate that an earlier decision was not a wise one and should be overruled. For example, in Commissioner of Internal Revenue v. Hallock, 102 F.2d 1 (6th Cir. 1939), the Commissioner of Internal Revenue included certain property in Hallock's estate, even though exclusion was mandated by Helvering v. St.Louis Union Trust Co., 296 U.S. 39 (1935). The Sixth Circuit, being bound by St. Louis Union Trust Co., ruled against the Commissioner. The Supreme Court, which had the authority to overrule its own decision, did so. Helvering v. Hallock, 309 U.S. 106 (1940). But if the Commissioner had previously been subject to a legislative mandate requiring him to acquiesce in the prior decision, the case never would have arisen and the Supreme Court would have been deprived of its power to overrule its own decisions. Hallock is no isolated example. By one count, the Supreme Court has overruled its own decisions no fewer than 171 times through 1980. Congressional Research Service, The Constitution of the United States of America 1789-97 (1973 & Supp. 1980).

Thus, notwithstanding "[d]eviant rulings by circuit courts of appeals," it is a well settled legal principle that "the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case." United States v. Estate of Donnelly, 397 U.S. 286, 294-95 (1970) (emphasis supplied). The Supreme Court reports are replete with uncritical references to agency nonacquiescences, e.g., HCSC-Laundry v. United States, 450 U.S. 1, 11 n.5 (1981); National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 483 n.18 (1979); Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). Indeed, in Dixon v. United States, 381 U.S. 68 (1965), the Court relied in part on a nonacquiescence ruling in reaching its own decision. 381 U.S. 72-75 n.8. See also, Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982) (agency had "reasonable basis" for litigating issues notwithstanding controlling, adverse Sixth Circuit decision).

As the Supreme Court has recognized:

> ***the panoply of important public issues raised in government litigation may quite properly lead successive Administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue.

Mendoza at 7. It would therefore be unwise to bind the Executive Branch for all time by an initial determination not to appeal an adverse decision.

When the Justice Department continues to litigate issues which have been decided against it in certain courts, it in no way challenges the principle articulated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." Id. at 177). SSA has always complied with the terms of judicial decrees and orders whether they affect a single individual or an entire class. As Professor Herbert Wechsler explained, "Under Marbury, the court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared." The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1008 (1965). The nonacquiescence doctrine, like the traditional government practice of challenging settled precedents in test cases, in no way threatens the position of the judicial branch, but is consistent with two hundred years of legal and constitutional practice.

Finally, there is a myriad of practical problems in implementing any such legislation. While SSA is in a better position to address these, one example will suffice to indicate the scope of the problem. Because the agency administers a nationwide program while court of appeals jurisdiction is only regional, a requirement that the SSA obey the court of appeals may simply be unworkable as a practical matter. For example, in both Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976) and Davis v. Califano, 603 F.2d 618 (7th Cir. 1979), two wives applied for benefits as widow of the wage earner. In Davis, the court held that benefits could not be paid to the second wife under the deemed spouse provision in section 216(h)(1)(B) of the Act after the entitlement of the legal widow was established, as the facts of the case so indicated. In contrast, the Rosenberg court divided the full widow's benefit share between a legal widow and a deemed widow. Thus, if an Illinois legal widow and New York deemed widow both applied for the same benefits, the agency would necessarily have to rule contrary to one of those decisions.

For all of these reasons, the Justice Department strongly objects to the provisions of H.R. 3755 and S. 476 requiring compliance with the precedential implications of all adverse appellate court decisions. Any such legislation would constitute an unprecedented interference with the litigation efforts of the government and would restrict the flexibility of the legal system.

Thank you for this opportunity to testify, I would be happy to answer any questions.

Ms. KUHL. It's a pleasure to be here today to discuss with you the legal aspects of the Social Security Administration's so-called nonacquiescence policy, and to comment on pending legislation on the same subject. As you know, the Department of Justice represents SSA in the Federal courts, and we are currently defending several challenges to the nonacquiescence policy.

In representing agencies of the Federal Government, the Department of Justice makes important litigating decisions which affect the development of American jurisprudence. The most important of these decisions are made by the Solicitor General, who determines which of the hundreds of unfavorable decisions each year the Government will seek to appeal to the Supreme Court.

These decisions are not made on the basis of the narrow self-interest of the Federal Government, but with a view toward promoting the broad public interest and the orderly development of the law as well as with a mind toward the caseload faced by the Supreme Court.

The Department of Justice, as the Government's lawyer, has responsibilities far beyond those of counsel representing private parties. Consequently, the Government cannot automatically appeal adverse decisions but must retain the flexibility to accept some defeats, while refusing to acquiesce in the rule of law they establish pending resolution in future test cases. Legislation such as that being considered by this committee thus gives us very serious cause for concern.

As this committee is aware, the Social Security Administration's nonacquiescence doctrine has been the subject of criticism. However, SSA has special problems because it is responsible for implementation of an exceedingly complex and important nationwide benefits program. And it, understandably, is reluctant to operate under different legal constraints in each of the 12 separate judicial circuits.

Whenever possible, the Government, of course, appeals an adverse decision which it believes to be incorrect. However, appeal of adverse decisions is not always realistic.

For example, sometimes a court of appeals will decide a case by making two alternative holdings. Either one of those holdings would sustain the result reached. One of these decisions, one of these holdings, may be a significant adverse precedent. However, because the decision has an independent alternative holding, it would ordinarily be inappropriate to take that case for further review.

Another example of a circumstance where nonacquiescence is necessary for the Government is one in which subsequent judicial decisions cast serious doubt on the continuing validity of an earlier adverse holding. For instance, after an initial loss in one circuit, several other circuits may adopt the Government's position or the Supreme Court may hand down a decision casting doubt on the continuing validity of the first adverse decision. In such cases, the Government certainly would be justified in seeking to challenge that first adverse holding.

There may be some instances, in addition, in which lawyers reasonably can disagree about whether a court of appeals decision is, in fact, inconsistent with SSA regulations. In those instances SSA, of course, should remain free to adopt and defend the reasonable construction of the decision that is consistent with its regulations. In other words, to distinguish the case. Such an approach should not be viewed as nonacquiescence.

However, Mr. Chairman, a binding requirement that SSA or any agency follow on unfavorable appellate court decision in all future litigation would create very serious difficulties for the government's litigation posture. Consequently, we are strongly opposed to the provisions of the two bills now being considered which would require SSA to follow unfavorable appellate court decisions in calculating the payments to beneficiaries whose appeals would be within the jurisdiction of such courts. These bills, in addition to overruling SSA's nonacquiescence doctrine, would seriously undermine the ability of the Justice Department to defend the Government's actions in court, and would overburden the Supreme Court with appeals from adverse decisions.

Mr. Chairman, I would just like to touch upon a very recent Supreme Court decision which bears upon this issue. In its recent unanimous decision in *United States* v. *Mendoza,* the Supreme Court held that the Government is not bound by the doctrine of so-called nonmutual collateral estoppel from continuing to raise issues decided against it in other cases.

The district court in that case and the ninth circuit in that case had held that, because the Government had lost the constitutional issue presented in the case and had failed to appeal this same legal issue in an earlier suit by a different individual, the government was bound to refrain from litigating that constitutional issue in the subsequent case against Mendoza.

The Supreme Court disagreed with the lower courts and held that, and I quote: "The Government is not in a position identical to a private litigant." And, hence, should not be bound by all adverse determinations.

Among other things, the court said that the Government is more likely than any private party to be involved in law suits against different parties which nonetheless involve the same legal issues, and, therefore, should be free to relitigate issues in other cases.

The legislative proposals pending before this committee——

The CHAIRMAN. Since you are just dealing with one point, could you summarize please.

Ms. KUHL. Certainly. I'd just like to add that the Supreme Court has overruled itself in over a hundred cases, by the count of scholars. If this legislation were to be passed we would be prohibited from, in good faith, asking courts of appeals to reconsider, as the Supreme Court does, earlier rulings in the light of different arguments we might have, or intervening in circuit court or Supreme Court decisions. We would be placed in a posture very different from the posture the Government has been in in exercising its litigating discretion heretofore.

In addition, I might mention the myriad practical problems this legislation would cause SSA, which were touched on by Mrs. McSteen, with regard to knowing which litigants would, in fact, be governed by which circuit court precedent.

For all of these reasons, the Justice Department strongly objects to the provisions of the House bill, the Pickle bill, and S. 476, requiring compliance with precedential implications of all adverse appellate court decisions. Any such legislation would constitute an unprecedented interference with the litigation efforts of the Government, and would restrict the flexibility of the legal system.

Thank you again, Mr. Chairman, for this opportunity to testify. And I will be happy to answer any questions you might have.

The CHAIRMAN. Right. Your entire statement will be made a part of the record.

As I recall in efforts of negotiating with different Members who had an interest, they were willing to drop that provision. That when SSA did not follow a decision that it would be announced and the reason stated. But I'm not certain what will happen in the negotiating stage.

I just have one question. I'm going to yield to Senator Heinz who is waiting to ask questions.

I just want to ask this of Mrs. McSteen. How are you going to regain control of the program with all the States in effect saying we don't care what the rules are; we are not going to do anything about it. Your testimony indicates you are not in a position to make any change, which I assume—what is it? Twenty-six States now just disregarding what they should do.

Mrs. MCSTEEN. There are only eight at this point.

Senator LONG. How many?

Mrs. MCSTEEN. There are eight States now.

It is a tremendous problem to us, and has been. The total you mention includes the States, under court mandate as well as Governor's orders or DDS decisions. The Secretary has decided to send a letter this week to these States that are not processing.

The letter would not apply, of course, to the court order States. But in others, we are telling them that they must begin to send the cessation notices on the CDR's, and that they have until next month to get that process fully in order, and that we will expect them to do this. If they fail to do that, they would not be given the option of the face-to-face reconsideration, which earlier the Secretary had offered to the States. And States overwhelmingly wanted that responsibility of the face-to-face interview at the reconsideration level.

There are several options if States still refuse to process the continuing disability reviews. We could give the workload to a neighboring State to process, or we could take over the workload ourselves, or, if there were legislation, we could contract out that particular phase of it.

We have had in this program, as I think you are aware, very good relationships with the States. The disability program has been successful through the years because we have worked with the States. The States have made major contributions to the program, and we need them in this program. And we want to continue to get them to participate. And we are working with them at a regional level as well as central level to persuade them to do so.

Senator HEINZ. Thank you, Mr. Chairman.

Mrs. McSteen, let's focus for a moment on those people who are mentally disabled. Although about 10 percent of the people who receive disability benefits count for nearly one-third of the people who have been reviewed, and even a more substantial number of people who are terminated at the first decision level.

Now I have got two questions for you there. Secretary Heckler last year realized that in at least two-thirds of the cases a big mistake was being made, and she imposed a moratorium. What are you doing about the benefits of the people who were terminated prior to the moratorium? Are you reopening those cases? And if not, why not?

Mrs. McSTEEN. Yes; we have at the present time the American Psychiatric Association, the State agencies and other experts working on the criteria for mental impairments. And until these criteria are available and approved by the American Psychiatric Association and are published, we do not feel that we should go back and take a look at those cases.

Senator HEINZ. So your view is that although you were making so many terrible mistakes, terrible enough, notwithstanding your testimony today, the Secretary said that we can't afford to make any more mistakes like we have been making, the answer is for any mistakes made prior to July or whenever it was of last year, that's too bad, that's somebody else's problem; they are mistakes that we made, but we aren't going to do anything about it. That's the attitude of the Social Security Administration, and by implication, the Reagan administration, which I would like to support.

Mrs. McSTEEN. Well, any individual who has been ceased, of course, has the right to refile an application for disability benefits. And I agree with you that there have been problems, and we have learned a great deal with experience.

Senator HEINZ. Who are we talking about? We are talking about people with functional IQ's of less than 69 percent. That's one of the groups that the Secretary decided to place a moratorium on. Now what chance do you think somebody with an IQ of 68 or 50 or 40 or 30 is going to have with your system?

Let me tell you about your system. I visited one of my constituents, Mrs. Vitrella, in Philadelphia. Fortunately for her, she didn't happen to be mentally disabled. She's just had a heart attack; she's had a stroke, and a few little problems like that. September 1979 she first filed for disability. In 1981 she was notified by the administrative law judge that she was eligible for her disability benefits. In June 1981 she got her disability benefits, including retroactive benefits. And then in January 1983, about 1½ years later, she was notified of termination of benefits effective March 1983. She was deemed able to work. I visited her. She can't stand. She's not mobile. She can't lift anything. Lord knows what kind of work she was supposed to be able to do.

Her benefits were terminated in March. In May she received notification of 1 month's overpayment of benefits. She was instructed to file for reconsideration within 30 days or repayment would be due to SSA. In August she notified my office to ask the status of her reconsideration because she hadn't heard anything. We talked to SSA in September and we were told that her file was at the Office of Hearings and Appeals. She received written notice from the administrative law judge later that month that her benefits were reinstated, but up until Christmas Day she hadn't received them. I won't bore you with the details of the run-around.

Now she didn't have an IQ of 69. She was an intelligent woman. The strokes hadn't impaired her ability to think. Now what about paranoid schizophrenics who may be afflicted with some problem that clearly made it impossible for them to function? We are cutting these people off the rolls. And you are saying, well, we made a mistake; maybe we will go back to the drawing boards in the future, but let's not worry about that now. And where are those people ending up? They are ending up on State welfare rolls so the taxpayers, in my State, and all States, can pay higher taxes. In spite of the fact that these people have contributed a part of their earnings to this program, they are being treated unfairly. It seems to me that you have a responsibility to help these people. These are not welfare people, but we are turning them into welfare people. These are people who contributed to this program throughout their working lives.

And you are saying, well, maybe we will get around to helping the people some day. What do you say to that?

Ms. OWENS. Could I respond to that?

Senator HEINZ. I'd like Mrs. McSteen to respond. If she wants to yield to you, she may.

Mrs. McSTEEN. I would like Pat Owens to respond, since she is responsible for the program directly and has been working much longer than I with the disability program.

Senator HEINZ. But you are here representing the Administration, Mrs. McSteen.

Mrs. McSTEEN. Yes.

Senator HEINZ. And you are the highest ranking person in the administering agency. What I am talking about is not a technical judgment, not a technical judgment. It's to my mind a moral question. To your mind, at the very least, it should be a policy question. That involves the question of fairness. And my question is what is fair about what you are doing? If you want staff to answer the question of what is fair with what you are doing, so be it. But I don't think it reflects very well.

Mrs. McSTEEN. We are trying very desperately to bring this program into full control. We have indicated that there have been serious problems with the review process. And all the activities that we have undertaken have been to attempt to rectify any of the mistakes that have been made in the past.

Senator HEINZ. But you are not doing anything about the mistakes of the people I just described. How can you sit there and say that? My time has expired. I apologize. But I'm not getting an answer to my question.

Mrs. McSTEEN. Well, we have agreed, as I had said, to relook at those cases when the new criteria have been approved.

Senator HEINZ. You are paying benefits to those people right now?

Mrs. McSTEEN. Well, I can't tell from the examples that you gave whether we are or not.

Senator HEINZ. Well, the example I gave was just to give you a little idea of how much fun it is to be redetermined by social security if you are mentally with it. This woman was driven to near distraction by the bureaucracy, by the insensitivity, and she is sane and intelligent. What happens to you if you are neither sane nor intelligent? Do you think it helps?

Mrs. McSteen. Senator Heinz, I also was involved in the field operations during this period of time, and I know on a first-hand basis that it is a very difficult problem. The Social Security Administration has tried to implement what the Congress asked us to implement with the 1980 amendments. True, there were large numbers of people that we were asked to review who had never been told that they would be required to come up for a review because in the beginning we did not have periodic reviews, as you know. The medical diary cases are the ones that we were telling the people initially that you will be reviewed in 18 months. And we have kept up with that schedule. But the periodic reviews en masse did present us with enormous problems. And we found that our medical technique perhaps was not as accurate as it should have been in dealing with these cases.

No one quite recognized the problems that were involved with someone who had been on the rolls for a long period of time with a disability and suddenly was told, "No, you no longer meet the criteria." We recognize that, and that's why we are trying desperately to do these things to try and straighten it out.

Senator Heinz. I hate to interrupt you but our time is running out. I had a lot of other questions I would like to ask. Maybe I will get a chance to ask them later. But it's nice of you to realize when in the case of another of my constituents, Mrs. Ray T. Bevin, of Mechanicsburg, Pa. She got her disability award in 1973 because a large piece of equipment fell on her and kind of made a mess of things. That happened to her at age 52. Do you really think she is not going to have trouble getting back into the work force at age 62? Please come to Pennsylvania and see how much fun it is to try and get a job anywhere in our State even if you are 22.

Thank you.

Senator Bradley. Mr. Chairman, may I inquire as to what your plan is with the other panels and the time that remains available to us?

The Chairman. We hope to continue until about 12:30 and then come back at 1 o'clock. I understand Senator Heinz will preside from 1 to 2 o'clock.

Senator Heinz. Yes.

The Chairman. We hope to finish by then.

Senator Bradley. Thank you.

The Chairman. Do you have questions?

Senator Bradley. Yes, I do.

The Chairman. The record should show that Senator Heinz is open-minded and objective. [Laughter.]

Senator Bradley. Mrs. McSteen, you say in your testimony that the cost of H.R. 4170 is about $6 billion in the first 5 years.

Mrs. McSteen. Yes.

Senator Bradley. CBO has a number considerably less than that. About $1.4 billion. What is the difference? Why the discrepancy?

Mrs. McSteen. I will ask Mr. Enoff to respond to you.

Mr. Enoff. I haven't seen the latest CBO estimates. I would guess that one of the reasons that the CBO estimate is somewhat lower is that they do not presume any retroactivity of benefits. That would account for probably $1½ billion difference, Senator.

Senator **Bradley**. Well, according to your own estimates retroactivity would lead to how much? Four point six billion?

Mr. **Enoff**. I will provide a more complete comparison on the differences between the CBO and SSA estimates for the record.

Senator **Bradley**. On this sheet that has been given to us that I think comes from the Social Security Administration, it says that even if you do retroactivity it costs $4.6 billion. So what I'm wondering is where does the $6 billion come from.

Mr. **Enoff**. The $4.6 billion total, Senator, is OASDI, I believe. The other figure would include administrative costs, medicare, medicaid and SSI to take it up to about $6 billion over the 5 years. That's where the additional $1.4 billion came from. The primary difference that comes about in the CBO estimate versus ours is they assume that 20 percent of the cases would be affected by a medical improvement standard. And our estimate is that it would be about 40 percent of the cases that would be affected. That's the major difference.

[The memo was subsequently submitted:]

MEMORANDUM February 6, 198

FROM: Eli N. Donkar SNS
Office of the Actuary

SUBJECT: Cost Estimates for Title IX of H.R. 4170--Comparison With CBO

The attached table presents a rough comparison between two sets of estimates for the cost effect of title IX of H.R. 4170 as reported by the Ways and Means Committee on October 21, 1983. The first set of estimates (produced by the Social Security Administration and Health Care Financing Administration), shows a total cost for OASDI, Medicare, Medicaid, and SSI of $6,185 million in fiscal years 1984-88. The second set, produced by the Congressional Budget Office (CBO), shows a total cost of $1,494 million.

The main differences between the two sets of estimates are summarized below:

1. Medical improvement (section 901):

   a. CBO assumes a decreasing number of continuing disability reviews (CDR's) in future years. We assume a roughly constant CDR workload for the projection period.

   b. CBO assumes less than 20 percent of present-law CDR cessations could not be terminated under the new medical improvement standard. Based on sample data from the Office of Disability, we have estimated that roughly 42 percent of present-law periodic review CDR cessations and 29 percent of medical diary CDR cessations could not be terminated under section 901 of the bill.

   c. CBO assumes that section 901 would be applied on a prospective basis only. Our cost estimate of $3,800 million assumes that all CDR terminations since March 1981 would have to be reopened. These reopened cases would be evaluated under the medical improvement standard in section 901, and reinstated beneficiaries would receive retroactive benefits from the month of termination. (We recognize that there is some question with regard to the requirement for this retrospective application of section 901. For that reason, we estimated separately the cost of the reopening of past terminations. This cost is approximately $1.9 billion for the period fiscal years 1984-88.)

2. Administrative expenses:

   We estimate total additional OASDI administrative expenses due to the bill to be roughly $700 million for the period fiscal years 1984-88. CBO's estimates do not show administrative costs separately from benefit

Comparison of estimates prepared by the Department of Health and Human Services and the Congressional Budget Office for the disability provisions of H.R. 4170

(In millions)

Type of expenditure	Total additional expenditures in fiscal years 1984-88 estimated by--	
	HHS	CBO
OASDI benefit payments:		
-- Section 901 (medical improvement) 1/	$3,800	$411
-- Section 913 (continue benefits during appeal)	640	565
-- All other sections	160	164
Total, all sections 2/	4,640	1,026
OASDI administrative expenses	664	(3/)
Medicare benefit payments	635	315
Medicaid benefit payments	153	47
SSI benefit payments	93	106
Total, all expenditures	6,185	1,494

1/ Estimates prepared by the Office of the Actuary include effect of applying medical improvement standard to both new cases and prior CDR terminations. See January 13 memorandum by Eli N. Donkar for details.

2/ Estimates prepared by the Office of the Actuary and the Congressional Budget Office include effects of interactions among proposals. Estimates prepared by the Office of the Actuary also include offsetting effects of ending current State moratoria on CDR terminations.

3/ Administrative expense estimates prepared by the Congressional Budget Office are included in estimates shown for benefit payments.

Social Security Administration
Office of the Actuary
February 6, 1984

outlays. However, since our administrative cost estimate alone is almost 50 percent of the total cost for the bill as estimated by CBO, it is reasonable to assume that their projected administrative costs are substantially lower than ours.

3. Effective date:

CBO assumes an effective date for the bill of October 1, 1983. Our revised estimates assume the bill is enacted April 1, 1984. This discrepancy has only a small effect--that of slightly lowering our estimates in fiscal years 1984-85, relative to what our estimates would have been if we had assumed the earlier effective date.

In summary, the CBO assumptions result in substantially lower costs (under each program) for the two most significant provisions of the bill (section 901 and 913). Most other differences are relatively minor. It is our understanding that CBO is currently revising and updating their estimates for H.R. 4170.

Eli N Donkar

Eli N. Donkar, A.S.A.
Supervisory Actuary

Attachment

Senator **Bradley**. Once again, what is the administration's position on the use of the medical improvement standard?

Mr. **Enoff**. We oppose the medical improvement standard.

Senator **Bradley**. You oppose the medical improvement standard. Is it possible then that you could see the criteria changing over time and that someone who was declared disabled based on criteria, in Senator Heinz's case, in 1973 because the present administration of the program might have changed some of the criteria for new entrance into the program that person might be bumped? That's a strong possibility?

Mrs. **McSteen**. Well, one of the problems with the medical improvement issue is that there is not a clear definition of what medical improvement is and with medical improvement we would be employing two standards.

Senator **Bradley**. That's not my question. My question is if a person is declared disabled in 1973 based upon loss of a hand, loss of a leg, whatever, in 1983 you might have changed your criteria and loss of a hand might not be sufficient for eligibility for disability. Is that new criteria then the basis upon which the person would be terminated from the program, if you do not have a medical improvement standard?

Mrs. **McSteen**. Yes.

Senator **Bradley**. What is the fairness rationale for that?

Mrs. **McSteen**. Well, the fairness——

Senator **Bradley**. The person still doesn't have a hand or an arm.

Mrs. **McSteen**. The criteria must be measured on whatever has been established as being a medical impairment at a given time. One of our problems in the program has been that medical treatment has changed so dramatically that a person who had been on the rolls because of a heart condition in 1969 or 1970 today might not be really disabled.

Senator **Bradley**. No one is disputing that. And in Senator Cohen's and Senator Levin's bill they make allowance for that fact. But I'm looking at the other cases where you have severe impairments which unless you have a medical improvement standard you could terminate them by simply changing the benefit structure or changing the eligibility structure in one year. Is that not correct?

Mrs. **McSteen**. Well, I suppose it could be if we changed the criteria that dramatically. Yes.

Senator **Bradley**. Thank you.

The **Chairman**. Senator Grassley and then Senator Long.

Senator **Grassley**. Appreciating the fact that Congress mandated review, appreciating the fact that the Social Security Administration had the tough job of carrying this out, I'd like to have you account for the fact——

The **Chairman**. Senator Grassley, Senator Long is leaving in about 5 minutes

Senator **Grassley**. All right.

Senator **Long**. Just might I ask if these witnesses can make themselves available some time in the afternoon session.

The **Chairman**. Sure.

Senator LONG. Can you witnesses be available later on this afternoon because I would like to ask some further questions, maybe even some questions related to what the other witnesses say?

The CHAIRMAN. About 2?

Senator LONG. I have a commitment that I have to be gone during this noon hour. And I could be back up here maybe at about 1:30. But it would be helpful if they could stay here and hear the other witnesses testify and make themselves available to answer some questions at the end of the day.

The CHAIRMAN. Are you available?

Mrs. MCSTEEN. I could be certain that the staff was available for the entire day.

Senator LONG. Well, how many of you can be available toward the end of the hearing? Just raise your hand if you can be available toward the end of the hearing.

Mr. ENOFF. What time is the end of the hearing?

The CHAIRMAN. We think it will come at about 2.

Senator LONG. It seems to me 2:30, 3 or something like that. Can you?

Mr. ENOFF. We'll be here.

Ms. KUHL. I'll be glad to be present if the Senator has any questions of me, but the chairman has indicated that nonacquiescence may not be central to your concerns.

Senator LONG. Well, I will just ask you the single question. Let me ask you this. Are you familiar with the doctrine of res judicata?

Ms. KUHL. Yes, I am, Senator.

Senator LONG. Now would you explain just exactly what that means? As I understand it, res judicata means that this matter has been decided by the courts and, therefore, it can't be heard again. But if you have a case involving A and B that would apply if the matter was decided between A and B. They had a difference of opinion and the court decided it. But suppose you then had a case between C and D, two different people? Even though the facts might appear to be almost identical or very similar, would the doctrine of res judicata apply to that?

Ms. KUHL. It would not, Senator. The doctrine of res judicata applies, as you say, to two parties who have had a case against each other, and have had that case decided. If one of the parties tries to come back into court and readjudicate that same case against the same party res judicata would prevent that.

However—and this is the point that the Supreme Court addresses in the *Mendoza* case that I talked about—if you have the Government and party A in a case and it is adjudicated in a particular way, and then the Government and party B—the Government is not bound by the doctrine of res judicata or by the related doctrine of collateral estoppel in the second case.

Senator LONG. Now is it not also a theory in law that hard facts make bad law?

Ms. KUHL. We like to tell that to judges quite often.

Senator LONG. So that in other words sometimes you would get a case where a very pitiful looking person that appears before the court—and may have an extremely good lawyer too—and it's just one of those cases where you can't win the law suit no matter how good your case is because the people are impressed with the client, the person sitting in front of them. And one might just say, well, we will throw in the towel on this one. But that's a bad decision. And that decision if applied to other cases, could cost this Government billions of dollars. But rather than go to the Supreme Court on that one, we would rather go up there at a time when they don't have something that is going to jerk at their heart strings like that one does. We would rather take a case where we have a better chance.

Is it not a fact that on some of these cases you just say, well, that's a very poor situation in which to present this issue? We would like to present it where we think the facts are more neutral. Doesn't that apply to some of those decisions?

Ms. KUHL. It does, Senator. There are so many social security cases. We can't appeal all of them. One of the considerations that does come into the play is the facts of the case, whether they are favorable toward one side or the other side. Sometimes even apart from the facts there may be extraneous issues in the case, aside from the central issue which is the Government's main concern, which make the case inappropriate to take up to a higher court. So you are quite correct, Senator, in your suggestion that the Government does to some extent, at least, pick and choose the cases that we appeal.

Senator LONG. Well, would not this provision in the House bill in effect mean that if here is a case that could bankrupt the social security trust fund you wouldn't have any choice about whether to go to the Supreme Court on that case or to wait until you had a similar case involving the same type of problem?

Ms. KUHL. That's essentially correct, Senator.

Senator LONG. So here could be a case that could bankrupt the whole social security system. The other side would have the option as to whether they want to take it to the Supreme Court but you would not.

Ms. KUHL. That's right.

Senator LONG. In a factual situation on which they would like that case to go before the Court, they would have the right to choose whether to appeal, but you wouldn't.

Ms. KUHL. That's correct, Senator. And I might add to that, that if this adverse decision is the first decision in the area, the Supreme Court would not take that case. Except under very extraordinary circumstances, the Supreme Court doesn't take cases involving statutory issues until there is a conflict in the circuits. So you are correct in saying that we would, in fact, be stuck with that first decision under the legislation proposed here, at least within the circuit where it was decided.

Senator LONG. Well, here we are confronted with a runaway spending program, and a proposed act of Congress to say that basically the Government is stuck with a situation of heads the Government loses and tails the claimants win.

Ms. KUHL. I couldn't agree with you more, Senator.

Senator LONG. Thank you.

The CHAIRMAN. All right. We will ask for the three of you to be back at about 2.

Senator Grassley.

Senator GRASSLEY. Again let me say appreciating the fact that SSA finds itself in a difficult position between the people who have needs because of disability and Congress mandate to review these cases, we had a high rate of removal of people from the rolls, and then we have had evidence submitted today about the high rate of reinstatement of those people who were terminated, I want to know, one, what do you attribute the high rate of reinstatement to; and two, how much money have we saved in this whole process? I'd like to make a fiscal judgment of whether or not there is enough money being saved considering all the reinstatements; that it is worth what Congress in 1980 is putting us all through.

Mrs. MCSTEEN. There are a number of things involved in that decisionmaking process. One was when a person was initially notified of a continuing disability review that person was asked to come into the local office and was told about the process and asked if there was any additional medical evidence that he or she might wish to submit.

We worked very hard with the people in our own offices and in the State agencies to insure that if any retraining was necessary that they knew what the rules and the policies and the regulations were, and to make certain that we got additional evidence if that was proper. And I think in addition to those things that we proved through the pilot demonstration of the face-to-face reconsideration that there was additional evidence that must be secured. And some of those decisions, of course, were reversed. And, in fact, we trust that we have prevented cessations by that particular endeavor.

And I think the disability review process has, we estimate, saved about $1 billion.

Senator GRASSLEY. Would you state your last statement again?

Mrs. MCSTEEN. The overall savings have been about $1 billion.

Senator GRASSLEY. $1 billion in the 2 years that we have been in this process?

Mrs. MCSTEEN. Through 1983.

Senator GRASSLEY. Out of how much otherwise would be the cost of the program? Or what is the cost of the program today?

Mrs. MCSTEEN. $18 billion.

Senator GRASSLEY. All right. That $1 billion equals how many people, and what percent of people that would otherwise be on disability if we hadn't gone through this review as opposed to those that are on now?

Mrs. MCSTEEN. Well, we are talking about 20 percent of those reviewed, about 200,000 people since we started these periodic reviews who were removed.

Senator GRASSLEY. In other words, if we hadn't gone through this review we would have 20 percent more people? Maybe with this high rate of reinstatement that 20 percent is going to be done to——

Mrs. MCSTEEN. The 20 percent is the net, sir.

Senator GRASSLEY. The 20 is the net, all right. Let's turn to another matter. Several individuals in my State expressed concern with a letter sent by Secretary Heckler to the States indicating States would have the option of conducting face-to-face evidentiary hearings. Would you clarify for me the reason behind granting the option which some felt would severely weaken the reconsideration process?

Mrs. McSteen. We initially thought that perhaps the only way to go was with the Federal face to face. In consultation with the States initially, they felt that they had such heavy workloads that they perhaps could not cope with the heavy processing—the heavy workloads—and the face to face. Subsequently, as time went on and the results of the pilot reconsideration became known, States were consulted about their role in the process, and they wanted to participate. And the Secretary, therefore, gave them that option. And only three States have indicated that they do not wish to do the face-to-face reconsiderations.

Senator Grassley. Lastly, is it possible that the adoption of either the Cohen-Levin bill or the House bill could trigger the automatic stabilizer that we put in the old age benefit formula last year?

Mrs. McSteen. Mr. Enoff will answer, please.

Mr. Enoff. It is possible. We can't predict for a certainty right now, of course, whether the stabilizer will be triggered. But there is a small safety margin right now. And anything that spends money to the tune of $4 or $6 billion, of course, brings us closer to that possibility.

The Chairman. Senator Pryor.

Senator Pryor. Thank you, Mr. Chairman. First, I have a statement that I would want put in the record.

Senator Grassley. I forgot. I have a statement, too.

The Chairman. They will be made a part of the record.

Senator Pryor. It's my understanding that under the current policy that there are varying standards depending on which level of the CDI process that the determination is being made. That these standards vary. What are the standards which are to be followed on the State level by the disability determination?

Mrs. McSteen. Well, all adjudicative levels in the process are using the same standards. We are all guided by the same definition of disability through the law and regulations, and, most recently, as you know, we had issued policy in the form of rulings, so that they would be binding and we would have uniformity at all levels, including the ALJ level.

Senator Pryor. Well, it was my understanding that the ALJ, that they had separate standards that they were utilizing. Is this correct or incorrect?

Mrs. McSteen. I hope not. I hope that they don't have different standards.

Senator Pryor. And what about at the district and circuit court levels? Are these separate standards or are these the same standards utilized by SSA?

Mr. Gonya. Senator, at the district court level as well at the court of appeals the test then becomes one of substantial evidence, and whether the Secretary's decision is supported by substantial evidence, based upon the criteria that the agency follows in adjudicating disability.

Senator Pryor. It was my understanding that there was a range of difference between standards at the district and circuit court levels, at the ALJ level, and at the State level.

Senator PRYOR. Now how does the SSA now evaluate multiple impairments?

Mrs. MCSTEEN. I understand what you are saying. I would like Pat Owens to respond, if you don't mind.

Senator PRYOR. All right.

Ms. OWENS. Multiple impairments—what we do is we evaluate the combined effect of all the multiple impairments. I think what you are referring to is the question of nonsevere impairments and when you have multiple nonsevere impairments. The concept of nonsevere and how you look at a group of nonsevere impairments is where there has been the most controversy, and the one that the bills are geared to.

But what we look for in any impairment is the degree of functional loss. And if there is a degree of functional loss, then we go on with a test of residual functional capacity. It's the combined effect of multiple impairments that we assess.

The CHAIRMAN. We don't understand your abbreviations.

Ms. OWENS. What we are looking for is a degree of functional loss. What the person has left to deal with, the residual functional capacity that the person has left to deal with. And we look at the combined effects of all impairments to determine what that degree of functional loss is.

Senator PRYOR. Senator Cohen, in his opening statement—and I had to leave during that to go to another meeting—he talked, as I recall, about several cases relating to mental retardation.

Ms. OWENS. Yes.

Senator PRYOR. How is mental retardation considered through this process as to whether it is not debilitating to the extent of not being able to properly function in a work situation?

Ms. OWENS. To answer that question, I have to talk just a bit about the sequential evaluation and the way we make decisions sequentially. The first decision you make is if the person is working. And if the person is working then you presume he is not disabled. The second decision, then, is does a person have a severe impairment at all. If that is, yes, he is have more than a nonsevere impairment, then you go to the next question. And this is where I am going to get to your answer.

There is listing of impairments—if the person has that particular listed impairment then he is deemed to be disabled and unable to work. And mental retardation is covered at that point. There are ranges of mental retardation. From an IQ of zero to 59, if they are in that range, then they meet the listings. And then there is another range of retardation—IQ 60 to 69—where if they have that coupled with other types of severe impairment then they would meet the listing. So that's the kind that meet the listing situation.

Now if the mental retardation is less than that, then you consider that in combination with other impairments and the functional loss from the other impairments.

Senator PRYOR. I know my time has expired.

The CHAIRMAN. You may proceed.

Senator PRYOR. Since March 18, I think, we have been without a Commissioner of the Social Security Administration. Do you have any ideas when we might have a Commissioner of the Social Security Administration?

The **Chairman**. We hope soon.

Mrs. **McSteen**. Senator, I couldn't presume to respond to you since I'm in the Acting Commissioner position.

Senator **Pryor**. I know you are acting, but I'm talking about a permanent.

Mrs. **McSteen**. It doesn't fall within my purview. I serve at the pleasure of the Secretary of the Department.

Senator **Pryor**. Thank you.

The **Chairman**. Do you think you may be nominated?

Mrs. **McSteen**. Senator Dole! [Laughter.]

Mr. **Enoff**. If the Chair wants to move, the staff would be in favor.

Senator **Heinz**. Do you want to come back to this committee? [Laughter.]

Mrs. **McSteen**. After Senator Heinz invited me to appear before his committee, you have invited me, so I'm not sure who else is going to invite me, I will reserve judgment for later, I suppose.

The **Chairman**. We are not too bad when you get to know us. [Laughter.]

Mrs. **McSteen**. I hope that won't be long.

The **Chairman**. As I understand, the social security administration now opposes any comprehensive legislation such as a medical improvement standard. Partly this is because of the double standard implied for new applicants relative to current beneficiaries. Is there any other way we might put together something which would be essential to fair and accurate reviews? I can understand that if you have a prospective medical improvement standard, that may be unfair to many people who have already been terminated. From listening to your statement, I assume the social security administration is really opposed to doing much of anything at this point.

Can you be helpful as we search for ways to be fair and accurate in what we try to do?

Mrs. **McSteen**. Yes. We do feel that our really comprehensive look at the entire program and our definitions and our working with AMA will result in more specific approaches to the decisionmaking process. The AMA has been very responsive as well as the APA, the American Psychiatric Association, in working with us, as well as the States and the doctors there. And I feel very encouraged about their participation and the assurance that they will keep us moving in a direction so that we will always be able to assess a person's disability at any given point in time.

Now I know I'm not saying yes or no to your question because there is no specific answer. And we are still groping for a resolution. But I do think that being more specific and having specific guidelines and the fact that we issue those policies so that we all follow the same criteria in our decisionmaking process will make a great deal of difference in how this program is administered.

The **Chairman**. It is something that we are going to be working on.

I would also like to ask a question about SSI. What are you doing to insure the continuation of section 1619 SSI payments for the severely disabled who work? How are we going to continue this vital program prior to reauthorization by Congress?

Mrs. McSTEEN. The Secretary has agreed that we will continue with the people involved in this program, the section 1619 program, now, and that we would like to take a look in the next year or year and a half and follow those persons through to see if they have been rehabilitated, if they have been able to continue work, if they got what health insurance they needed and what their employment opportunities were. And we would like the opportunity to pursue that demonstration project.

The CHAIRMAN. I understand there has been some increase in allowance rates under the DI program in recent months, yet there has been no legislation to liberalize the program. How do you account for this, and what would the impact be?

Mrs. McSTEEN. Perhaps the only accounting of it that is specific is the fact that there was a reemphasis once we realized that we had great problems with the periodic reviews and cessations. There was an intense effort at all levels of the adjudicative process to make certain that we did what was fair and humane and equitable. And in that connection, I think we have perhaps seen some changes. And I do think the face-to-face reconsideration is going to solve a lot of our problems. I hope that we have an opportunity to truly demonstrate what that is going to mean. But we have to follow it through a period of time.

Mr. ENOFF. I think, Mr. Chairman, the incidence rate has gone up slightly. It's still at the second lowest rate over the last 4 or 5 years. So it's not something that has gone up to a large degree. But we certainly are watching that. It may just be a little aberration but we can't attribute it to any particular activity.

The CHAIRMAN. There may be other questions from Senator Heinz and Senator Pryor. I will just say they will be in constant touch with you, Mrs. McSteen, and Pat and others. There is a lot of interest in this program, many special interests and a lot of political interest.

The periodic review process was initiated in 1980 under President Carter. Yet, when I was in Miami last week, I read about this awful Reagan program. I must stress that it was not initiated in the Reagan administration. I voted for the 1980 legislation, as did most of my colleagues.

It would seem to me that Senator Long is correct in the sense that we ought to make certain that the people who are not disabled are not on the rolls. We are reviewing many programs; not just this program.

There is going to have to be some flexibility on the administration's part if we are going to be able to work out some reasonable compromise. Maybe it can't be done. Maybe Congress passes legislation, the President vetoes it and then we have the battle on the veto itself. But I would hope notwithstanding the official position or the stated position of the administration that there may be some flexibility. I promised a number of Senators and others who are interested in this legislation that we would try to hammer out some reasonable agreement. Obviously, some of the requests in my view are not reasonable. Not that I can make a difference. But I hope that you would be willing to work with us, as you have in the past.

Mrs. McSTEEN. Yes. We will be willing to work with you in any way we can. We have not explored our incentive demonstration projects as fully as we should have. And I think that opens the door for some opportunities for us to work with the private sector as well.

The CHAIRMAN. There must be some way to answer the questions raised by Senator Heinz and other Senators this morning. I know when you have millions of people in a program somebody is going to find some place out there where the program is not working properly. We can all cite specific cases, but we are looking at generally how the program is operated. Do you travel around the country a lot? Do you see a lot of these people and visit with them yourself?

Mrs. MCSTEEN. Yes.

The CHAIRMAN. Are you satisfied the program is probably being fairly administered at this point?

Mrs. MCSTEEN. Well, I think the fact that we did place a moratorium, we recognized that we had problems and that we have instituted as many of these initiatives as we could in working with AMA and others, working with our own people, and getting the face-to-face reconsideration people trained so that they will be sensitive to the issue, and I have to say at this point we are not satisfied, of course. But we have hopes that we will be able to demonstrate in a shorter period of time that this is the way to go.

The CHAIRMAN. Are there other Federal programs where there are provisions for disability? Do they also involve eligibility reviews? Under the Army retirement, as I recall, you are not reviewed, are you?

Mr. ENOFF. There's a basic difference, I think, Mr. Chairman, in that they have partial disability programs in those. And this program, of course, is the one that says that you are unable to engage—it's an in or out program. It's not a matter of percentage of disability.

The CHAIRMAN. As I recall years ago on the Army retirement boards, if you had a nice friendly board, you did not have to be very disabled to be retired. And that program is eating us alive with the cost of retirement. Maybe we ought to start reviewing some others.

Senator Pryor.

Senator PRYOR. Are you opposing any legislation in this field?

Mrs. MCSTEEN. In connection with——

Senator PRYOR. The whole process.

Mrs. MCSTEEN. The whole process. We would like to see continuance of payment through the first evidentiary hearing. We think that's fair and equitable to people, and we would like to see that done.

Senator PRYOR. Is that going to take legislation?

Mrs. MCSTEEN. Yes. The legislation expired December.

Senator PRYOR. And you do support that change?

Mrs. MCSTEEN. Yes, sir.

Senator PRYOR. You do support paying the individual during the whole appeal process?

Mrs. MCSTEEN. Through the first evidentiary hearing, which would, as of the first of this year, be the face-to-face reconsideration in the State.

Senator PRYOR. How would that change from policy at this time?

Mrs. McSteen. Well, under the past directives, we through the ALJ process. And what I am saying now is that we would pay through the first evidentiary hearing, face-to-face hearing, which now is conducted in the States generally speaking. So it would be a lesser period of time.

Senator Heinz. Would the Senator yield for a moment?

Senator Pryor. Sure.

Senator Heinz. When you elect to receive payment through the administrative law judge, are there any conditions that SSA imposes on the beneficiary?

Mrs. McSteen. Yes, you are right. Thank you for bringing that point up. The law allowed a person who appeals to elect to continue receiving benefits if they feel that they are in fact disabled. However, if they are denied, then the payments would be erroneous and subject to repayment.

Senator Heinz. Let me put it in English. What your policy is that you tell someone, sure, you can appeal to the administrative law judge. It will take you about 6 months to get that appeal. We will pay you your benefits for the next 6 months, but if you lose your appeal, you are going to have to pay every penny of that 6 months of benefits, several thousand dollars in effect, back. Now you will have spent it all in the meantime to keep yourself from starving to death or pay your heating bills, and then we will deem it an erroneous payment, and you will go to the poorhouse because you won't have the cash in the bank to repay it. That's our policy right now.

Mrs. McSteen. It's a statutory requirement except for the medicare payment. We will waive repayment if the appeal was made in good faith and repayment would result in hardship.

Senator Heinz. The question that I think Senator Pryor may have been thinking of asking—maybe not, I don't know—regards the continuation of payment through the reconsideration process. Are you going to have the same humane, thoughtful, kind, generous policy of making people repay that amount of benefit too? Is that what you are thinking?

Mrs. McSteen. As I understand it, it is in the proposed bill that the repayment would be required.

Senator Heinz. What's your policy? You are here to tell us what you think.

Mrs. McSteen. That is the current law, and that would be our policy.

Senator Heinz. That you want people to refund it if they are turned down?

Mrs. McSteen. Yes.

The Chairman. That may not be the best one there. There has to be some impediment there or everybody would just go through the appeals process.

Senator Heinz. Thank you, Mr. Chairman.

Senator Pryor. We go back I guess to the Bellman amendment. We all talk about the Bellman amendment or whatever. I don't know if there was a real out and out discussion on the floor of the Senate with regard to Senator Bellman's amendment. I don't know what took place on the House side either. I should research that.

I am inclined to think there was not much debate on it. But after the amendment passed, is it not true that SSA actually implemented this sweeping change before it was actually ready to do so? Isn't that correct?

Mrs. McSTEEN. We believed that we were ready, and we believed that we were directed to carry out the process as soon as possible because we were asked to devote all possible resources to the process. And that is why we initiated the endeavor.

Senator PRYOR. I don't think I have ever seen a Government program get organized quite as quickly as that one did. I have a feeling that a lot of things were done without proper consideration, without proper thought, of how these people would be affected, just like Senator Heinz was talking about, during this process. Not being able to make ends meet while the appeals were going on.

I held a hearing on this issue 1 day about 1½ years ago. Senator Heinz authorized this because I am a member of his Committee on Aging. And I thought there would be about 40 people there. It was in Fort Smith, Ark. There were 700. They came from literally all over the State to come to this. We heard some devastating testimony. And like Senator Dole, I want to find a way to get those people who don't deserve benefits off the rolls. We all have that frame of mind. But I really do think we have done some very inhumane things to a lot of people. And this is why I'm hesitant in accepting your position in saying that there needs to be no legislation.

We have to be out there with people, and we see these problems. We get these letters, and we talk to these poor claimants. And they are caught up in this absolute maze of bureaucracy that many of them don't understand. We are in the business of trying to bring order, and, I hope, some degree of humanity, to this thing. And that's why I think legislation is necessary.

Mrs. McSTEEN. I appreciate your position, and I know you have been very active and interested in what is going on in your State with respect to this particular issue. All I can say to you at the present time is that we have to demonstrate that what we are trying to do will eliminate the inhumanity. And I don't think there are any assurances. I think it will just take time for us to make that process work. And with the support of this committee, perhaps we can do that.

Senator PRYOR. I think those ALJ's out there are literally scared to death of what might happen to them if they are favorable to a claimant. Now I think you have got them under the gun. I know you have said or people in your department have said that you don't have quotas in each State, you don't have magic numbers. I think you could look across the country, and I think you could very easily discern a policy of quotas. And I'm hoping we can bring what I hope would be some more independence at the ALJ level. And once again, I think that's an area of justified intervention by the legislative process for us to look at this. I have legislation to that extent.

One question on pain. What do the SSA regulations say about the consideration of pain? How was this policy adopted? What's the history of this policy?

Mrs. McSTEEN. I would like Pat to answer this.

Senator PRYOR. Yes.

Ms. OWENS. Pain is one of the things that is a difficult area right now. No question. As the procedure now reads, as our policy now is, we do consider pain. There is an additional requirement that there be present an impairment that can reasonably be expected to cause that pain. And we do use pain—it is a symptom. We use signs, symptoms and laboratory findings—the buzz words in relationship to adjudication—and this is a symptom. And as I stated before, the requirement is that there be a medically determinable impairment from which pain can reasonably be expected to come. And we use all kinds of things to document the existence of that pain.

Senator PRYOR. Now it's my understanding—this is my final question—that the language in the Levin-Cohen bill on pain relative to that particular area would be acceptable by SSA. Is this correct?

Mrs. MCSTEEN. We don't oppose that.

Senator PRYOR. You do not oppose it.

Mrs. MCSTEEN. Don't think we need to.

Senator PRYOR. I think that's all.

Mrs. MCSTEEN. Thank you, Senator.

The CHAIRMAN. Senator Heinz.

Senator HEINZ. Well, briefly, Mr. Chairman, I'm going to avail myself of the same privilege of submitting some questions in writing.

But there was the discussion earlier of the number of States that have stopped doing what you tell them to do for one reason or another. Senator Long, I think, asked you the question The response was that there were nine States that weren't doing what they were supposed to be doing.

Now my information is that there are 28 States, more than half of the States in the United States, that have either a partial or full moratorium on continuing reviews. Although it's a few months old, if you would look on page S14400 of the Congressional Record of October 21, 1983, you will find 27 of the States listed with specificity as to the nature of the moratorium. Eight are under Governors' orders, four under State agency ordered moratoria, three follow very different guidelines from those of SSA, eight States are in the ninth circuit where you put in an SSA ordered moratorium as a result of the unfavorable judicial rulings, and six States of the Chicago region have a court ordered moratorium on reviews of the mentally disabled, Colorado has a court ordered moratorium, and New York has reopened cases of mentally disabled terminations, as you heard earlier.

And I guess my question is this, do you take into account these various State and judicial actions when you calculate the cost estimates that you gave us?

Mrs. MCSTEEN. Yes.

Senator HEINZ. Now what is the assumption? Is the assumption that there are going to be no more moratoria or is the assumption that there is going to be a lot more moratoria in those cost estimates you gave us?

Mr. ENOFF. The assumption is that with the enactment of a bill that the moratoria would end.

Senator HEINZ. Well, that's all very well and good, but you are saying that the bill will cost *x* billion dollars more than some baseline. OK? Now let's figure out what that baseline is. Is the baseline imaginary—SSA is never going to lose a case? Are all these moratoria going to disappear? Does the baseline assume these moratoria are going to stay in effect? Does the baseline assume that these moratoria are going to continue to proliferate? What is the assumption? You only save money versus some policy line. What are the assumptions underlying that policy line?

Mr. ENOFF. Let me see if I can address it with talking about the States and the 15 and the 8 because that's important.

Senator HEINZ. Are you going to address the assumption of the current service's budget?

Mr. ENOFF. Yes. I think it's important.

Senator HEINZ. Is it going to take a long time?

Mr. ENOFF. No. It'll take me 1 minute.

Senator HEINZ. All right.

Mr. ENOFF. What you are talking about when you get the 26 States is the 8 not processing cessations under State actions plus the 18 States under certain court orders, but they still are processing cases in accordance with those court orders and still are ceasing cases, so that a number of cases are being processed—that's where the 8 and 26 differ.

Senator HEINZ. I'm asking a budgetary question.

Mr. ENOFF. OK, the budgetary question. You are right; in assuming the cost of this bill, we assume it against present law because that's the base that we use.

Senator HEINZ. Per the law as opposed to current practice.

Mr. ENOFF. Current practice. Our assumption is—and I was going to follow that with what we would presume—that if the moratoria continued some time over a period of the next couple of years, stretching back from when a few States started, that would cost some $90 million. So you could subtract that out.

Senator HEINZ. You are saying that if all these moratoria remain in effect for the next how many years?

Mr. ENOFF. Let me clarify it. Because the legislation would deal with medical improvement——

Senator HEINZ. Can you estimate for us the cost versus current law of all of these moratoria staying in effect for the next 5 years, and alternatively, can you estimate what would happen if the other remaining States imposed or had imposed upon them by the courts an equivalent mix of moratoria? I'm not asking you to do it off the top of your head; I'm asking you to do it for the committee.

By the way, you're not doing very well in the courts, as you know. You are losing just about every single one which is why you don't dare appeal to the Supreme Court.

But we would like an estimate of how much a continuation of these kinds of, from your point of view, I guess, adverse decisions are going to cost the program versus the current law. Can you get us those?

Mr. ENOFF. We can get them to you. I'd go over the assumptions with you perhaps at another time.

[The memo was subsequently submitted:]

MEMORANDUM February 2, 1984

FROM: Harry C. Ballantyne SN
Chief Actuary, SSA

SUBJECT: Effects of Court Decisions and State Moratoria on Cost Estimates for Disability Legislation--INFORMATION

On January 25, several Members of Congress questioned whether the cost estimates prepared by the Office of the Actuary, in regard to recently proposed disability legislation, properly reflect the impact of recent court decisions and State-initiated moratoria on the current administration of the Disability Insurance program. Although we believe that our methodology is proper and correct, we acknowledge that the question is a valid one. This memorandum describes some of the considerations involved.

A cost estimate for any proposal must be relative to some defined "base line." In preparing estimates for any disability bill currently being considered, the cost effects are defined to be the annual differences between the estimated benefit costs for (1) the OASDI program as modified by the bill and (2) the OASDI program under present law. The present-law base line includes, in the near term, the additional benefit costs expected to result from recent court decisions which require SSA to apply a medical-improvement standard before terminating disability benefits as a result of a continuing-disability review (CDR). The present-law estimates also include the additional benefit costs associated with the State-initiated moratoria on disability-benefit terminations. The effects of these court decisions and moratoria, however, are assumed to phase out within 2-3 years--in regard to the court cases, because SSA is assumed to win on appeal, and, in regard to the State moratoria, because they can be ended through SSA action. (After the statutory authority to continue disability benefits during part of the appeals process expired on December 6, 1983, SSA imposed a temporary nationwide moratorium on disability-benefit terminations. This temporary moratorium will end in February 1984, and the cost effects will not be large.)

If the court cases could not be won on appeal or if the State moratoria could not be ended, then the present-law cost effects of these actions would be greater than those reflected in our estimates. Thus, those observers who believe that the SSA position is incorrect and that the court appeals will be lost and/or that the State moratoria will not be ended also believe that our present-law costs are underestimated. They believe that, as a consequence, our cost estimates for the various disability-related bills are overestimated by an equal amount.

We recognize that inclusion, on a permanent basis, of the cost effects for these unfavorable court decisions and State moratoria in the present-law base line would, in fact, cause the cost estimates for the various legislative proposals to be reduced. We believe that our present approach is the proper one, however, for several reasons. First, all of the unfavorable court decisions are being considered for appeal by SSA. It would be presumptuous for the Office of the Actuary to assume that any appeals that are made will be lost. Moreover, such an assumption would be as problematical to those who support the SSA position as our current one is to those who oppose it. To assume that the court orders are all permanent and that all appeals will fail would potentially overstate the cost effects of the court decisions. Thus, the effect would be to understate the cost effects of the various bills.

Second, the enactment of the bills themselves would affect the actions of the courts. Clearly, the enactment of a law requiring the application of a medical-improvement standard would virtually eliminate any possibility of the U.S. Supreme Court agreeing to hear an appeal of a lower court decision requiring such a standard (if the Department of Justice would even agree to appeal). Thus, the enactment of such a law would increase the likelihood of the unfavorable court decisions becoming permanent, and, at the very least, the associated increase in cost (if it could be determined) should be properly attributed to the bills. Considering the uncertainty regarding the court cases on the basis of present law, as compared with the certainty of the situation on the basis of such legislation being enacted, the attribution of the costs to the bills seems appropriate.

In regard to the State-initiated moratoria on CDR terminations, the situation is somewhat clearer. The Secretary of Health and Human Services has the authority, under the Social Security Act, to take certain actions against States which fail to administer the OASDI program in accordance with regulations promulgated by the Secretary. We do not believe that the Secretary (and SSA) would allow the present situation, involving a relatively small number of non-processing States, to continue indefinitely. Our assumption of a 2-3 year phase-out is consistent with the estimated time required to implement the various administrative actions and either to convince the States involved to resume processing CDR terminations or to process their workloads in some other way.

We have not assumed that any additional unfavorable court decisions occur, nor have we assumed that any additional States impose moratoria on CDR terminations. These assumptions reflect the fact that such actions are by nature unexpected. If such additional actions were to occur, they would be handled in a manner consistent with that used for the existing court orders and State moratoria.

As a final point, we must note that these questions concerning the cost effects of the court decisions and State moratoria are matters of attribution only. We understand that the decisions regarding whether costs are associated with present law or with a specific piece of legislation are important ones. We believe, however, that the more important questions concern the "bottom line"--that is, the financial soundness of the OASDI program--and the answers to those questions are not affected by decisions regarding where costs are assigned.

Harry C. Ballantyne

Harry C. Ballantyne

Senator HEINZ. Sure. It's going to be a little detailed and a little complicated.

Mr. ENOFF. Sure.

Senator HEINZ. But we're going to need that because one of the arguments you are making, and presumably Senator Long will make, is that any legislation is going to cost a lot of money. I want to be convinced that there is any truth to that at all. I suspect that the court decisions are going to cost you one heck of a lot of money. Maybe more than if we fashioned intelligent legislation. But I don't want to guess at that. I would like to see some numbers.

The only other question of your statement I have, Mr. Chairman, is this. I agree with you. I think the administration would be very well advised to work cooperatively with us to get a solution here. I'm frankly shocked at Mrs. McSteen's position which is that you oppose any legislation.

Senator Dole, myself, other interested Senators had a meeting with then Secretary Schweiker where I thought we were pretty darn close to agreement on a package we could all support—Senator Levin, Senator Cohen, Senator Dole, then Secretary Schweiker, the administration. Frankly, I know people have short memories. I know there is turnover. And I know that Secretary Schweiker really enjoys his new job in the private sector and so forth. But if this impass continues, and the administration maintains what I think is a shortsighted and unreasonable position, I may just put on some kind of a road show. I'm perfectly willing to conduct a number of hearings as chairman of another committee which has an advocacy and oversight responsibility here. I'll hold hearings in a dozen States, or 20 States or all 50 States if necessary. I think when the people of the United States will know what's fair, what's just, and what makes sense.

Now let me tell you something. The President that is in the White House right now is my President. I support him. I'm going to support him for reelection. I don't think he understands just how bad the position of his administration is on this issue and how much it is going to hurt him if it is allowed to stand.

And sometimes decisions get taken at lower levels without Presidential review. In fact, there are an awful lot of them. I think this is one of them. But so help me because I believe that there is so much hurt being imposed here I'm not afraid to hold this up to the light anywhere in the United States and show people what it is. And then the people will make up there mind whether this is good policy.

The CHAIRMAN. Thank you, Senator Heinz. I think you asked a good question. I mean if the administration claims it is going to cost $6 billion in 5 years, tell us how you get the cost. Others are going to tell us it won't cost anything. We are going to make them give us what assumptions they base that on. Somebody always says it is going to cost more and somebody always says it is going to cost less. We are generally wrong.

But if you can furnish that for the record.

Mr. ENOFF. Our assumptions for the $6 billion are there. And I will be glad to respond to Senator Heinz's request for some additional assumptions to be used. We can do that.

The **Chairman**. Obviously, depending on what happens in all these different courts and everything else, I assume the cost figures will go up and down.

Senator Heinz, you can commence again at 1?

Senator **Heinz**. Yes, Mr. Chairman, be happy to.

The **Chairman**. We will ask the three of you from the social security administration to come back. Carol, I think you are safe.

Ms. **Kuhl**. Thank you, Mr. Chairman.

The **Chairman**. Or else know where to find you.

Now let me say that I know the next panel is here and waiting. Is there anybody on that panel that cannot be here at 1? It's now 27 minutes of 1. If somebody on that panel would like to briefly summarize their statement, we can do that right now. But I am supposed to be at two places between now and 1. I could stay for 5 or 10 minutes if that would help anybody on the panel who has another commitment.

[No response.]

The **Chairman**. Dr. Flemming, is that all right?

Dr. **Flemming**. Yes, sir.

The **Chairman**. Senator Heinz will be here at 1. I should be here sometime shortly after that.

[Whereupon, at 12:35 p.m., the hearing was recessed.]

AFTERNOON SESSION

Senator **Heinz**. The Finance Committee hearing will come to order. We have a very distinguished panel of witnesses, and I would ask Dr. Flemming to come forward; Dr. Arthur Meyerson, Ms. Carol Garvin, Mr. Joseph Manes.

Ladies and gentlemen, as Chairman Dole indicated earlier, we appreciate your patience. We are sorry we couldn't continue at 12:30. We thank you for having the patience to stick it out.

Dr. Flemming, you are certainly no stranger to this committee or my own committee. We welcome you. And I would like for you to be our leadoff witness.

STATEMENT OF DR. ARTHUR S. FLEMMING, FORMER SECRETARY OF HEALTH, EDUCATION, AND WELFARE, AND COCHAIR, THE SAVE OUR SECURITY COALITION, WASHINGTON, D.C.

Dr. **Flemming**. Thank you very much.

Mr. Chairman, I will make a very brief statement and then request that my testimony in full be made a part of the record.

Senator **Heinz**. Without objection, so ordered.

[The prepared statement of Dr. Flemming follows:]

TESTIMONY OF THE HONORABLE ARTHUR S. FLEMMING

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to appear here today on behalf of the Save Our Security (SOS) Coalition, to share our views with you on the Social Security disability programs and legislative proposals to modify them.

Today I am representing the Save Our Security Coalition which I co-chair with Wilbur J. Cohen, another former HEW Secretary who served in President Johnson's Administration. SOS is a nationwide Coalition of more than 140 organizations representing a cross-section of American life. I am attaching a list of the affiliated organizations. There are organizations representing the elderly and the disabled, trade unions representing workers in the public and private sector, social welfare groups, women's groups, civil rights groups and religious organizations. Together, these affiliated organizations have a membership of between 35 and 40 million adult Americans, almost equally divided between beneficiaries of, and contributors to, Social Security.

The manner in which the Social Security Administration has operated the Social Security Disability Insurance and Supplemental Security Income programs since early 1981 is well documented. Our basic message today is simple - Social Security disability applicants and beneficiaries need the protection from arbitrary and capricious actions that Congressional action can provide them. They are counting on Congress for legislation to reform and improve the Social Security disability determination, review and appeal processes. SOS urges this Committee to take immediate action on this matter so that the unfair treatment of disabled persons by the Social Security Administration will be halted, and new policies and procedures implemented to ensure that the disabled people in our country receive those benefits for which they are eligible and to which they are entitled.

The situation relative to the manner in which the Social Security disability programs are operating and the plight of vulnerable disabled persons seeking benefits, whether initially or following termination, has not changed in any meaningful way during the past three years. The number of lawsuits (approximately 41,000) and state actions (now numbering 25) to alter or at least temporarily halt the arbitrary policies and practices of the Social Security Administration are indicative of the continued, extreme situation created by SSA's administration of the Social Security disability programs.

During the past three years SOS, along with numerous other concerned organizations, developed and presented to the Congress legislative proposals to remedy the problems created by SSA's continuing disability investigations (CDI) and to improve in a broader sense the disability determination, review and appeal processes. A detailed description of these proposals and their rationale is attached to my testimony. Many of these proposals are embodied in the House bill H.R. 3755, (now Title IX of H.R. 4175) the "Social Security Disability Benefits Reform Act of 1983" sponsored by Representative Pickle. SOS fully supports this legislation, which has been reported by the Committee on Ways and Means with bipartisan support. SOS also supports S. 476, (sponsored by Senators Cohen and Levin) the "Disability Amendments of 1983" as it was originally introduced (February 15, 1983) with the amendments which were subsequently introduced on June 29, 1983. Overall, we prefer the legislation before the House but certain provisions of S. 476, which is a more limited bill, are meritoriuss and will be discussed in my testimony.

First, SOS wishes to point out that the problems for new applicants are similar and certainly as critical as those for beneficiaries subjected to the CDIs. Second, Supplemental Security Income recipients are being subjected to the same processes and abuses of the law being applied to Disability Insurance beneficiaries. Third, many persons with physical disabilities encounter problems with the Social Security system which are as severe as those faced by persons with mental impairments. Consequently, the legislative proposals of SOS are meant to apply equally to new applicants as well as beneficiaries undergoing review, to the SSI program as well as the Disability Insurance program and to the needs of physically impaired individuals as well as those with mental disabilities. We urge this Committee to address these various factors in its deliberation on the Social Security disability programs.

Each of the legislative proposals supported by SOS are explained in detail in the attachment to my testimony. However, I would like to highlight certain provisions.

Standard of Review

SOS feels strongly that specific language must be incorporated in the Social Security law stating that before a person's disability benefits can be terminated there must be clear and convincing evidence that (a) there has been significant medical improvement which enables the person to perform substantial gainful activity, or (b) new medical evidence and a new assessment of residual functional capacity must show that the person has benefitted from advances in medical or vocational therapy or technology which has resulted in an ability to perform substantial gainful activity, or (c) the prior decision was clearly erroneous or fraudulently obtained, or (d) the person is currently performing substantial gainful activity.

Such a standard of review will prevent the Social Security Administration from terminating benefits to individuals whose medical condition has not improved unless one of the stated conditions is met. For the past three years SSA has terminated beneficiaries despite a lack of medical improvement without a showing of ability to work. This practice has been repudiated by the courts but SSA has not altered its standard of review as a result of these court decisions. Both H.R. 3755 and S. 476 address this issue.

Multiple Impairments

The Social Security Administration has taken the position that the combined effects of impairments will be considered only when at least one of the impairments, considered independently of others, is found to be severe. This position is unfair on its face. An individual who suffers from two, three or even four impairments which, if reviewed individually, would not be disabling, may nonetheless be extremely disabled by their combined effects. What difference does it make if a person is disabled by a single impairment or multiple impairments? Surely, Congress, when it enacted the Social Security disability programs, did not contemplate such a departure from the concept of fairness--a departure which has led to unjustifiable suffering.

SOS urges the Committee to approve language requiring that the combined effects of an individual's impairments shall be considered in determining whether the individual is unable to perform substantial gainful activity, even if none of the impairments, considered separately, is severe. Again, both H.R. 3755 and S. 476 contain such a provision.

Payment of Benefits During Appeal

SOS recognizes that on November 18, 1983 the Senate passed an amendment to extend the continuation of SSDI benefits and Medicare through the administrative law judge hearing. We wholeheartedly support this provision.

The availability of continued Supplemental Security Income benefits and Medicaid through the ALJ hearing to SSI disabled recipients who are appealing the termination of their benefits is current practice within the SSA. However, we have learned that SSA in issuing some proposed rules revealed its intent to terminate the extension of benefits of SSI recipients at the reconsideration level once face-to-face interviews are provided for at this level of appeal.

We vigorously oppose any attempt on the part of SSA to terminate benefits for those disabled persons who wish to appeal their case to an ALJ. Payment of benefits through any level of appeal should not be based on the particulars of the process of appeal or the percentage of "correct" or "incorrect" decisions made at any one level of appeal. Rather, the continuation of benefits recognizes that a final decision has not been made and avoids placing emphasis on any particular level of decisionmaking as being more correct than another. SOS believes that individuals who, for whatever reason, decide to exercise their appeal rights are entitled as a matter of equity to a continuation of benefits through their ALJ hearing. We urge the Congress to include legislative language requiring that under the Social Security disability law benefits be continued to persons who wish to appeal an adverse determination through the ALJ hearing and determination.

Pre-Termination Notice and Right to Personal Appearance

The Congress and the SSA have recognized the value of face-to-face interviews with beneficiaries appealing termination decisions by providing for such interviews at the reconsideration level of appeal. SOS supports such interviews but feels their usefulness would be substantially increased if they were applicable to initial disability cases. Such an interview would allow the disability examiner to personally assess the individual's limitations and provide the disabled person with an opportunity to rebut the initial findings with additional medical and other information. We believe this process would result in fairer decisions, fewer costly appeals and would eliminate the necessity for the current reconsideration procedures. SOS finds the pre-termination notice and right to personal appearance provision in S. 476 as amended on June 29, 1983 to be preferable to that in H.R. 3755 and recommends that the Committee endorse the language of S. 476.

Evaluation of Pain

The evaluation of pain is a complex area. However, research, studies and findings of the courts all indicate that pain is often debilitating even when such pain cannot be fully explained by conventional diagnostic techniques. Medical technology is far from being able to offer an explanation and to trace the cause in many instances of severe and persistent pain. The pain, in these circumstances, is no less real or debilitating. SOS believes that debilitating pain or other symptoms, including statements of the individual as to the intensity and persistence of such pain or other symptoms, and corroborating evidence by family, neighbors or behavioral indicia should be considered when deciding whether an individual is disabled. We believe that subjective evidence may lead to a conclusion that the individual is disabled even if such evidence cannot be fully corroborated by clinical or laboratory diagnostic techniques.

While S. 476 does not incorporate totally the recommendation of SOS, we are supportive of the language in the Senate bill as interpreted by the co-sponsors, Senators Cohen and Levin.

Other Provisions Supported by SOS

There are other provisions which SOS believes must be incorporated into the Social Security disability law to ensure that the necessary clarifications and improvements are made to the Social Security Disability Insurance and Supplemental Security Income programs. Among these are:

1. Uniform Standards for Disability Determinations
2. Moratorium on Mental Impairment Reviews
3. Compliance with Certain Court Orders
4. Benefits for Individuals Participating in Vocational Rehabilitation Programs
5. Evaluation of Ability to Work

SOS urges the Committee to study the description and explanation of each of these as well as the other provisions contained in the attachment which follows this testimony.

I want to thank you for this opportunity to share the views of the Save Our Security Coalition. The time for meaningful change to the Social Security disability programs is long overdue. Too many deserving disabled persons have suffered. SOS urges the Committee to mark-up and report to the Senate comprehensive Social Security disability legislation on the earliest date possible.

Dr. FLEMMING. I do appreciate the opportunity of appearing here today on behalf of the Save our Security Coalition to share our views with you on the social security disability programs and legislative programs to modify them. Today I'm representing the coalition which I cochair with Wilbur Cohen, who as you know is another former HEW Secretary who served in President Johnson's administration.

SOS is a nationwide coalition of more than 140 organizations representing a cross section of American life. I'm attaching a list of the affiliated organizations.

The manner in which the Social Security Administration has operated the social security disability insurance and supplemental security income programs since early 1981 is well documented. Our basic message today is simple. Social security disability applicants and beneficiaries need the protection from arbitrary and capricious actions that congressional actions can provide them. They are counting on Congress for legislation to reform and improve the social security disability determination review, and appeal process.

During the past 3 years, SOS along with numerous other concerned organizations developed and presented to the Congress legislative proposals to remedy the problems created by SSA's continuing disability investigation and to improve in a broader sense the disability determination review and appeal process.

A detailed description of these proposals and their rationale is attached to my testimony.

Many of these proposals are embodied in the House bill, H.R. 3755. SOS fully supports this legislation which has been reported by the Committee on Ways and Means with bipartisan support.

SOS also supports S. 476, sponsored by Senators Cohen and Levin, as it was originally introduced February 15, 1983, with the amendments which were subsequently introduced on June 29, 1983. Overall we prefer the legislation before the House, but certain provisions of S. 476, which is a more limited bill, are meritorious and are discussed in detail in my testimony.

Mr. Chairman, I've listened to the testimony this morning with a great deal of interest. I have had the opportunity of being in and out of the Government over a period of 45 years.

Senator HEINZ. We've noticed.

Dr. FLEMMING. And I've developed great respect for our system of government. But I do not recall any situation where there has been the bipartisan conviction that exists in this case that our system is operating in such a manner as to treat people in an arbitrary and capricious manner. I understand the problems connected with the operation of the disability program. There isn't any doubt in my mind at all but that it should be administered in such a way as to do everything possible to keep off the rolls people who have no right to be on those rolls. But that objective can be achieved by the introduction of procedures which adhere to concepts of fairness, equity, and concepts of due process. And I believe that the career civil servants at the State level and at the Federal level who are tied in with this particular process are capable of developing the kind of a system that will help to insure keeping people off the rolls who shouldn't be on the rolls. But they've got to have the opportunity of operating under sound policies in order to achieve that particular objective.

I've noted the objection on the part of the administration to any legislative reform. I think that that is a very unfortunate position. I have noted their objection to being involved in the Administrative Procedures Act. Personally I feel that that act is a sound act, and I believe that this procedure should be subject to the Administrative Procedures Act. If they are going to change policy, it ought to be worked out and published in the Federal Register. The people of the country ought to have the opportunity of commenting on it. They should be required to give consideration to those comments before implementing a new policy.

I've also noted their objection to Congress taking issue with the nonacquiescence doctrine, so to speak. That's a new term to me. One that we have been hearing over the period of the last few years. I think it is a dangerous concept, this idea that an administration can decide that it is not going to acquiesce in a decision by the courts. I've read the opinion to which reference was made this morning by Senator Moynihan. And I can assure you that if I were serving as Secretary of HHS or the old HEW and read that kind of an opinion from the U.S. District Court judge, I would decide there was something wrong with the policies that were being followed by the department of which I had responsibility. I've read the opinion of a number of the circuit court of appeals where they have taken sharp issue with this nonacquiescence doctrine. I don't think it's unreasonable to say to the Department of Health and Human Services—if you get a circuit court of appeal opinion, you should follow it. If you want to appeal to the Supreme Court, all right. If the Supreme Court decides to hear it, fine, you will get an opinion from them. But if they decide not to listen to it, then you ought to adhere to that circuit court of appeals' opinion within that particular circuit.

They say, well, that administratively creates some problems. Yes, it is difficult at times from an administrative point of view to adhere to concepts of due process and fairness and equity. But that, I have always felt, is one of the great characteristics of our Government, that we will try to operate it in such a way that the concepts of fairness and due process are given top priority. And if that creates some administrative problem, all right, we work out solutions to those administrative problems, but we don't say we are going to deviate from concepts of due process and fairness because of the existence of the administrative problem. There's no question in my mind at all but that this situation has deteriorated to the place where under our system of checks and balances the Congress and the Congress alone can get it back on the right track. The courts, certainly, have been doing everything that they can to get it back on the right track, the decision virtually unanimous in the positions that they are taking. So that branch of Government is functioning as far as this particular issue is concerned. And I don't believe that in the light of the record that has been established up to the present time that the Congress can say, well, we will wait and see if the executive branch will correct the kind of a situation that has developed.

This calls for congressional action. I believe that the House bill and that the bill that is pending before the Senate at the present time do provide the Congress with the opportunity of getting this program back on the track, a program that means so much in the lives of many, many persons, many of whom, as you know, Senator Heinz, are older persons. And as has been pointed out here, we are not talking about a welfare program. We are talking about some rights that these people have. Those rights are being violated, and I think the Congress should take action to correct the situation.

Senator HEINZ. Dr. Flemming, thank you very much.

Also no stranger to many of us here is Dr. Arthur Meyerson. Dr. Meyerson, among other things, serves as a member of the Task Force on Social Security Disability Insurance, serving part of the American Psychiatric Association. He also has provided assistance to the work groups, which, I gather, is due to report in about 2 weeks on guidelines for the mentally disabled.

STATEMENT OF DR. ARTHUR MEYERSON, CHAIRMAN, COMMITTTEE ON REHABILITATION AND TASK FORCE ON SOCIAL SECURITY DISABILITY INSURANCE, AMERICAN PSYCHIATRIC ASSOCIATION, WASHINGTON, D.C.

Dr. MEYERSON. I'd like to ask that my written testimony be accepted into the record.

Senator HEINZ. Without objection, so ordered.

Dr. MEYERSON. Thank you.

[The prepared statement of Dr. Meyerson follows:]

PREPARED STATEMENT OF ARTHUR J. MEYERSON, M.D.

Mr. Chairman, and members of the Committee, my name is Arthur T. Meyerson, M.D. I am Associate Professor and Vice Chairman of the Department of Psychiatry at Mount Sinai Medical School and Clinical Director for Psychiatry at the Mount Sinai Hospital.

On behalf of the American Psyciatric Association, a medical specialty society representing over 28,000 psychiatrists nationwide, and as chairman of both the APA's Committee on Rehabilitation and its Task Force on Social Security Disability Insurance, I am pleased to present to the Committee our views and concerns regarding the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs.

We shared this concern before this Committee two years ago, and reiterated it upon two other occasions at House and Senate Committee hearings. On each of those occasions, we recommended statutory changes which we believed, and still believe are necessary to assure that the SSDI program operates in the most medically appropriate fashion. Many of those changes are embodied in either H.R. 3755 (now Title IX of H.R. 4170) or S. 476, or both. Both bills have our endorsement as well as that of other concerned organizations and individuals.

The APA continues to be very much aware that periodic review of disability cases, whether on the SSDI or SSI rolls, is necessary not only to reduce fraud and abuse, but also to confirm that SSDI/SSI beneficiaries continue to meet eligibility requirements and remain unable to work. The GAO report which prompted the 1980 Social Security Disability Amendments found that perhaps 20 percent of those then on the SSDI rolls were probably not eligible for such benefits. In other words, the system of standards and guidelines and the process of evaluating medical evidence was allowing too many "false positives" into the system at the time of the GAO report. Regrettably, the Administration's approach to this problem focused on reducing Federal expenditures, rather than ensuring a policy consistent with both the letter and the spirit of the careful review mandated by those 1980 amendments.

Since the accelerated reviews began in 1981, approximately 421,000 or nearly 40% of the 1,134,000 persons reviewed have been terminated because they were found not to be disabled at the initial review level. Of those appealing their terminations, about two thirds have been reinstated. Most telling in the case of the mentally impaired was a 1983 GAO study that found that 27 of 40 sampled terminations of individuals with mental impairments reviewed by GAO were individuals who could not function in their daily living without a good deal of support and could not work in a competitive or stressful environment. The remaining thirteen cases, GAO found, had been terminated based on "inadequate data." The GAO stated that the unwarranted terminations stemmed from SSA's overly restrictive interpretation of the criteria defining mental disability, inappropriate assessment of individual's daily activities, inadequate development and use of medical evidence and a lack of sufficient psychiatric resources in the DDS. In other words, just three years after the GAO report criticizing the SSDI program for allowing too many "false positives" into the system, the GAO found that there were too many "false negatives" in the system of accelerated reviews, particularly among the mentally impaired.

Taken together, these figures bear out our concern that the SSA reviews, both in terms of their actual conduct and the policy underlying them, have been undertaken in a manner contrary to sound medical practice and sound professional clinical practice. Not only is the program administratively confusing and awkward for the beneficiaries, physicians, health and mental health professionals, state officials and judges involved with it, but it works a special hardship upon the mentally ill SSDI beneficiaries who, by virtue of their illness itself, are particularly vulnerable.

We share SSA's concerns and those of this Committee that the SSDI program must survive between the twin concerns of unwarranted disability payment (and the loss of Federal revenues it engenders) and inappropriate termination of thousands of legitimate beneficiaries (and the costs it engenders in the conduct of appeals proceedings, in expenditure of state and county welfare and service funds and worst, in human coin). We believe, however, that H.R. 3755 and S. 476 propose responsible, fiscally prudent solutions to these problems to the benefit of legitimate SSDI beneficiaries and ultimately to the continuing integrity of the SSDI program itself.

Our concerns were first expressed almost two years ago by the APA in a letter to then Secretary Schweiker, then in testimony before the Senate Finance Committee, in more recent testimony before the Senate Special Committee on Aging and House Ways and Means Committee and in comments in 1982 on proposed revisions to the so-called "medical listings," the SSA's regulations regarding the determination of disability based on medical criteria alone.

Further, since our communication with Secretary Schweiker, we have met on numerous occasions with SSA officials, both formally and informally, regarding our concerns. This summer, for example, the APA, along with other professional organizations, joined with the SSA in an effort to rewrite the regulations surrounding mental disability under the program (section 12.00 of the "listing of impairments"). That activity, which continues as I testify, has met with significant agreement about the inadequacy of current medical listings for mental impairment and equally significant reworking and updating of the mental impairment listing. While certain that the recommended changes reflect the current state of the psychiatric knowledge and evaluation -- based on sound medical practice -- we are not certain that these thoroughly considered and carefully developed regulatory changes will be accepted as final regulations. More recently, in fact in the past three weeks, we received a proposal request from SSA regarding the use of the APA's peer review system for validation and assessment of SSDI decision making in the mental impairment field. That proposal, as members of this Committee may recall, was first proposed last April when SSA appeared before the Senate Special Committee on Aging. Our response to the proposal request was submitted this past Monday. We hope it will be entertained positively.

Notwithstanding our efforts to work with SSA both on the medical aspects of impairment and on the use of psychiatric peer review as an independent check on SSDI decision-making, many of the concerns we have expressed in the past persist. We were gratified by a number of Secretary Heckler's proposed changes in the SSDI program in June, 1983, and were equally gratified by her decision to impose a moratorium on disability terminations during the month of December and into the start of this year. However, we remain cognizant of her June comment that "we (SSA) have no reason to believe that there have been any unjust findings" in the SSDI determination process, and remain disturbed about the implications of that statement for future evaluation of those cases which are either yet to be decided or which will be subject to reevaluation. We still believe the SSDI process to be fraught with problems -- some related to the determination process per se, some related to the standards underlying the review (some of which have varied over time based strictly on the adjudicative climate under which they are enforced) and others related to personnel issues.

In our considered judgment, legislation now pending before the House (H.R. 3755) and before this Committee (S. 476 and S. 2002) represent serious and responsible means of recodifying current SSDI law (and similarly, SSI law) to assure that both fraud and abuse are eliminated from the SSDI and SSI rolls, and at the same time provide protection for those who should remain on or be placed on the rolls. The legislation addresses such issues as:

-- accurate assessment of a person's ability to work;

-- whether a person's medical condition had improved;

-- the use of appropriate personnel to make informed medical decisions regarding both a person's impairment and disability;

-- the need to update and improve existing medical criteria for the assessment of disability before further reviews are conducted;

-- the provision of a face-to-face meeting at the initial stages of the disability review process;

-- appropriate assessment of multiple impairments and psychogenic pain;

-- a statutory and regulatory based set of uniform standards by which claimants are adjudicated at all levels of review.

Others testifying at this hearing will address some of these issues, and will certainly address others which I have not identified. As a representative of the APA, I would like to address some of the process, standards and personnel issues with which I am particularly familiar, with which the APA and others have grappled for some time, and which are most directly related to the medical assessment of impairment and determination of disability.

REGULATIONS/STANDARDS

As a physician, I am most seriously concerned with the proper interpretation of medical history in establishing a finding of disability. I am concerned about the accurate and complete development of that medical history, its interpretation into a statement regarding levels of impairment, and its ultimate relationship to a finding of disability. The APA, as a medical organization, has similar concerns. It was because of these concerns as they relate to the SSDI program and our belief that current medical understanding has yet to be applied to the medical and vocational assessment process under the SSDI program, that we recommended adoption of a moratorium on Continuing Disability Investigations for the mentally impaired. Such a moratorium would continue pending: a thorough rewrite of SSA's regulations surrounding mental impairment, and a reconsideration and redevelopment of how vocational capacity is assessed for the mentally impaired. Our efforts with SSA hold out hope that the "listings" for mental impairment will be upgraded to current medical standards in the near future. We understand assessment of how better to handle vocational capacity (RFC) is also ongoing. Unfortunately, we are concerned that OMB cost concerns may yet take precedence over the best medical advice and that our efforts may be frustrated. Hence, we still believe a full moratorium to be necessary. I will detail our reasons for continuing in our concern in these two areas hereafter.

The APA has taken internal action to help assure that APA members understand how to provide full and necessary information in a medical history for the proper conduct of SSDI reviews (whether CDIs or initial claims). Our Board of Trustees approved for publication a document (copy appended) for our members providing guidance on how best to provide case history material for SSDI and SSI reviews -- what facts to include, whether judgments are relevant, when to amplify by example a particular medical point to assure clarity. Further, in conjunction with the President's Committee on Employment of the Handicapped, we are preparing a conference on medical aspects of SSDI.

As we better educate our own members about the process and the nature of the reports requested of them by SSA, we are concerned that SSA is not educated to the flaws in its own standards -- its regulations and policy interpretations -- some of which have not been revised in almost a decade, and some of which have been revised to the detriment of claimants in today's adjudicative climate. Yet, these regulations and policy interpretations form the basis for the interpretation of that medical history into a finding of disability, and the subsequent decision regarding disability.

I would like to address several of these in turn.

MEDICAL IMPROVEMENT

Since 1979, the Social Security Administration has formally taken the position that disabled beneficiaries must establish that they continue to be disabled under the standards currently in use by the SSA. Under this approach, benefits can be terminated even if there is no evidence of medical improvement and, in many cases, even if the person's condition has actually deteriorated since the original determination of disability. No use is made of medical or other documentation which is over one year old. Thus, an individual who has been on the rolls for several years is treated the same as a new applicant. No weight is given to the original determination of disability, even though it was valid at the time rendered. While as many as 20 court decisions have required the Secretary to continue benefits unless there is evidence that the person has medically improved or that the original decision was clearly erroneous (the most recent, a mere three weeks ago) SSA, relying upon its non-acquiescence policy (also addressed in both bills before this Committee) has refused to apply this standard.

From a medical perspective, a medical improvement standard makes excellent sense. It assures that a full longitudinal look is taken at a patient's case history, and that there is substantial evidence contained in that record to justify a determination that the patient is no longer disabled. This is especially true for those suffering from mental impairments which are frequently subject to fluctuation or periodic remission. A single temporary fluctuation away from a profound psychosis, then, would not be sufficient to terminate such a beneficiary whose condition is in remission and therefore found to be "not severe" at the time of the review.

Further, a medical improvement standard which requires substantial evidence prior to termination assures that a physician's note that his patient had improved at a particular point in time will be reviewed against the patient's full record. Certainly there are instances in psychiatry where a physician would indicate that his patient had improved, yet when taken in conjunction with the prior history, it would show that the physician meant that the patient who previously had hallucinated for eighteen hours of the day, now only hallucinates for sixteen. That is improvement, but not necessarily of sufficient magnitude to permit a person to perform substantial gainful activity. For that reason, we believe that the inclusion of a medical improvement standard which requires both substantial evidence and a finding that 'improvement' indicates an ability to work is critical.

This standard is medically sound from yet another perspective. It assures that if patient has benefitted from new medical techniques or technology which has allowed his or her previously disabling condition no longer to be disabling, he or she may be dropped from the rolls.

Coupled with the requirement that SSA consider the complete medical and vocational history, including all evidence in the file from prior evaluations, and develop a complete medical history of the beneficiary covering at least the preceeding twelve months, we believe a medical improvement standard will help assure that the intermittent and fluctuating nature of mental illness will not be used to the beneficiary's detriment in determining whether or not he should remain on the SSDI/SSI rolls. AS GAO noted in a 1982 report, "While the need for current evidence is obvious, we also believe there is a need for a historical perspective in these CDI cases. Many of these individuals coming under review have been receiving benefits for several years. To base a decision only on the recent examination ... could give a false reading of that person's condition. This is especially true for those impairments subject to fluctuation or periodic remission, such as mental impairments."

The House Ways and means Committee Report notes that:

> "The committee recognizes that the problems with the current review have arisen, at least in part, because the criteria for termination of benefits as a result of review were left unstated in the law. SSA has therefore had wide discretion to apply whatever standards it deemed appropriate -- and since the standards of the current program apparently are stricter than those in the past, applying today's standards has meant eliminating benefits for many more beneficiaries than was anticipated when the 1980 Amendments were enacted."

We believe the establishment of a statutory standard -- with the caveats provided in the Pickle legislation -- will help accomplish two separate goals. First, it will help assure that appropriate decision making occurs in the five-step sequential evaluation of disability, particularly in the telling second step when those suffering from "non-severe" impairments (based on current interpretation of such phrase) are dropped from further consideration under the program and dropped from or not added to the rolls. Second, it will help immeasurably in mooting the issue of "adjudicative climate." Whether the intent is to add to the rolls or purge the rolls, claimants will be judged by ongoing statutory criteria.

MULTIPLE IMPAIRMENTS/PAIN

Under current law, the first step in the sequential evaluation process through which the disability determination is made is to determine whether the applicant has a severe impairment. If SSA determines the claimant's impairment is not severe, the consideration of the claim ends at that point. In cases where a person has several impairments, SSA regulations on unrelated impairments state "We will consider the combined effect of unrelated impairments only if all are severe and expected to last twelve months" (20 C.F.R. 404.1522) (emphasis added). Thus, the only time multiple impairments are actually cumulated is in cases in which an individual suffering from a constellation of severe impairments does not meet or equal the medical listings for any one of those severe impairments. According to the regulations, if not practice, cumulation of impairments occurs in assessing residual functional capacity only, and only when all of the impairments to be considered are severe.

This does not represent a realistic policy with respect to persons with several impairments which may in many cases interact and effectively eliminate a person's ability to work. While, as the House Ways and Means Committee noted "it is clear that the determination of disability must be based on the existence of a medically determinable impairment, there are plainly many cases where the total effect of a number of different conditions can safely be characterized as disabling, even if each by itself would not be." The effect of multiple impairments can vary substantially from individual to individual depending on the impairments involved and vocational factors such as age, education and work experience. Thus, case-by-case examinations are essential in this area.

The legislation pending before the House and before this Committee require that SSA consider the combined effect of all the individual's impairments without regard to whether any individual impairment considered separately would be considered severe. We urge adoption of this recommendation as the most appropriate means of assuring that medical impairments are appropriately judged in the disability process.

Another medical area of serious concern to the APA relates to pain. The Social Security statute currently provides no guidance on the use of allegations of pain by the claimant in the disability determination process. Because the definition of disability states that inability to work must be "by reason of a medically determinable impairment," the SSA has allowed pain to be considered only if a specific physical impairment exists to which the pain can be reasonably attributed, through diagnostic techniques and laboratory justification of the cause of the pain. What such provision does, however, is exclude what is known as psychogenic pain, pain with no demonstrable physical cause, yet pain just the same.

A provision in S. 476 would require SSA to consider in the determination process the level of impairment inflicted by pain whether or not a clinical cause of such pain could be established. It does not rely upon a claimant's allegations, however. Rather it relies upon medical findings that prove the pain does in fact exist and impose limitations upon the claimant. In our work with SSA to develop more reasoned medical impairment regulations, we have agreed to include somatoform disorders, characterized by physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms. These disorders include psychogenic pain, a matter of particular concern within several of the regional offices of SSA itself.

Adoption of this provision of S. 476 would be consistent with the collective recommendations of the work group now developing these new medical listings for mental impairment.

MEDICAL LISTINGS/RESIDUAL FUNCTIONAL CAPACITY/WORK EVALUATIONS

The Medical Listings -- or Listing of Impairments already mentioned in this testimony -- is a list of conditions, signs and symptoms which are deemed by the Secretary to be so severe that their presence alone, without further evidence of inability to work, justifies a finding that an individual is entitled to disability benefits. If someone "meets or equals" the listings, he is held to be per se disabled. If he does not, the law requires that capacity to work be examined. I will discuss these in turn.

Two years ago, the SSA republished the Listings in draft form for public comment. Regrettably, the draft made no substantive changes in the mental impairment section, notwithstanding the publication over two years before of a new Diagnostic and Statistical Manual of Mental Disorders (DSM-III) which sets forth current psychiatric nomenclature. Thus, the terminology utilized in the Listings today bears little resemblance to the nomenclature utilized in medical case histories of mentally ill SSDI recipients. SSA state claims examiners, in effect, are forced to "translate" case record statements to language contained in the regulations and POMs before they can begin the evaluation process. Since they are not trained in the psychiatric nomenclature, such translation is difficult if not impossible. Thus, case histories which are wholly complete may be found to be insufficient based on the discrepancies in terminology utilized. The only safeguard could be the professional medical staff in the state agency, but many are not trained psychiatrists and are therefore not current on DSM-III nomenclature.

The draft regulations posed yet other problems in their construction. The APA commented to SSA on the precise changes we recommended in the Medical Listings. These included: changes in the requirement that certain signs and symptoms be manifest at the time of the evaluation -- not necessarily the case in most forms of mental illness which is characterized by intermittent persistence (Part A) -- and a modification in the impairments which, in combination with the signs and symptoms, form the basis for a determination of medical disability (Part B).

Notwithstanding our comments, the regulations were not altered. Since the increased publicity surrounding the SSDI issue, SSA has reached out to the APA and other organizations and individuals for help, as noted earlier in this testimony. We hope these efforts will resolve these per se regulatory problems with the evaluation of psychiatric impairment.

The essential function of the medical listings is to help segregate the population into two categories: those so medically impaired (meeting or equalling the listings) as to be disabled based on medical factors alone; and those severely impaired persons for whom further assessment or residual functional capacity (RFC or ability to perform substantial gainful employment) and vocational factors is necessary to ascertain disability. Regrettably, until late in 1982, as the result of a sweeping court decision, SSA policy had been to "deem" those mentally ill who do not meet or equal the Listings to be able to perform unskilled labor.

On January 25, 1982, the Regional Medical Advisor for the Chicago Region, Dr. Sandor Berendi, wrote that it is "practically impossible to meet the Listing.... for any individual whose thought processes are not completely disorganized, is not blatantly psychotic, or is not having a psychiatric emergency requiring immediate hospitalization...." Dr. Berendi, noted that "....In fact an individual may be commitable due to mental illness according to the State's Mental Health Codes and yet found capable of 'unskilled work' utilizing our disability standards...."

SSA's policy of utilizing the Listings as a means of ability to work has been halted in the Chicago region as the result of the Minnesota suit. A Federal District Court Judge in New York has just held for the plaintiff in a similar class action brought by the City and State of New York on behalf of the mentally impaired in that state. SSA, in the wake of the first decision, halted its practice across the nation, though only through class action or reexamination of all mental impairment terminations since March 1981 will those persons who were terminated from the rolls be identified and reinstated.

It has been found by both Courts that there are factors which more reliably predict whether a chronic mental patient can work. Where work is not obviously precluded by severe symptoms or other factors, analysis of recent prior work history, analysis of the reaction of the patient to stressful situations, and evaluation in a work setting or work-like setting can identify mentally impaired persons who, as a result of their illness, cannot work.

Yet, SSA resists the establishment of a better test of residual functional capacity. We do not argue with the criteria which have been established by SSA for evaluating capacity to work. We are, however, concerned that SSA has not articulated techniques for evaluating an individual's capacity to work against these criteria. The criteria alone do not permit adequate response. Capacity to work must be viewed within the context of present illness and treatment. A work-like evaluation can assess whether the skills a person was able to perform in the past when employed either can still be performed or that other work can be performed.

SSA has argued against workshop or work-like evaluations on the basis of cost. However, I would suggest that assessing whether a psychiatric patient has the capacity to work -- to be either denied SSDI/SSI or terminated from the SSDI/SSI rolls -- should not cost substantially more (and probably would be less) than some of the cardiac-pulmonary assessments required by SSDI for heart disease. If you add up the cost of electrocardiograms, scanographs, stress tests, physician's fees for all of that, and compare it to the cost of an adequate work assessment program, I would imagine that the latter is not as expensive.

The APA does not believe that every patient suffering from a psychiatric disorder and undergoing a CDI or initial SSDI review needs to go through an entire work assessment. There will be patients who obviously cannot work, based on the Listings -- though as I have mentioned, these are very few in number. However, those applicants who fail to meet the Listings and for whom an evaluation of their work history, course of illness, history of stress tolerance, etc. does not lead to a finding of disability, should have the benefit of a work assessment before they can be terminated. We believe that absent other findings which would remove someone from the SSDI/SSI rolls, (such as current employment, substantial medical improvement, etc.), terminations based on capacity to work should only occur upon a full work evaluation.

The House Ways and Means Committee noted in its report that:

> "The committee is also concerned that the evaluation of the person's ability to work be made in a context that accurately reflects the capacity to work in a normal, competitive environment. Such an evaluation does not necessarily require a full 'work evaluation' by a vocational expert in each case, although such evaluations are desirable and should be used wherever feasible where the additional information provided by such evaluations would be helpful in deciding close cases. The committee particularly urges that such evaluations should be used if at all possible in cases of mental impairment, where necessary to aid in determining eligibility in 'borderline' cases, at the point in the sequential evaluation process where such evaluations would normally be done under current policy.
>
> It is also important in such cases to evaluate the person's entire work history, rather than to examine only recent evidence of work activity, in order to determine whether the person can really engage in substantial gainful activity. The committee emphasizes

> that in any evaluation of work activity, the presence of work in a sheltered setting or workshop cannot in and of itself be used as conclusive evidence of ability to work at the substantial gainful activity level. Such work may be used in conjunction with other evidence that the beneficiary or claimant is not disabled, but benefits should not be denied simply because of sheltered work experience.

We urge this Committee to consider no less than the adoption of comparable report language.

PERSONNEL/CONSULTATIVE EXAMINATIONS

Yet another problem has been that the case records of SSDI beneficiaries have not been reviewed appropriately and accurately by state agency medical staff qualified to make an appropriate (if necessarily different from the claims examiner) judgment about a mentally ill patient. We know, for example, from a July 1982 letter from then Secretary Schweiker, following a meeting by the APA's Medical Director with the Secretary on the SSDI issue, that fully twenty-seven states did not at that time have sufficient numbers of psychiatrists on their medical staffs to perform appropriate reviews of mentally ill SSDI beneficiaries' records.

While the APA undertook and continues a targeted effort across its District Branches to seek means of relieving this tremendous short-fall of personnel with some success in locating interested psychiatrists, to our knowledge SSA has never informed DDS offices of our activities; and hence interested APA members have not yet been utilized in any significant way. This lack of meaningful SSA follow-up has not, of course, gone unnoticed by other interested psychiatrists who otherwise might have expressed further interest and participation.

In its report on the subject, GAO found that, in the five DDSs it visited, there were "no psychiatrists and limited psychiatric training was provided to examiners. Because the process encompasses a medical (psychiatric) evaluation that is highly complex, we asked SSA's psychiatrists whether a lay person or non-psychiatric physician had the expertise to make such an assessment. They said examiners would not be technically qualified nor would most physicians of other medical specialties. The chief medical consultant at one DDS said neither he nor the other staff doctors feel qualified to make a severity of psychiatric review form assessment."

Our proposal that each state agency hire psychiatrists or psychologists to assess mental impairment is critical. It is also entirely feasible. There are currently 28,000 APA members in the country, and perhaps as many as an additional 10,000 non-member psychiatrists. Each state should be able to fulfill our proposed requirement through full-time or part-time employment or consultative services of a psychiatrist or psychiatrists. States could even develop special relationships with teaching hospitals' and universities' departments of psychiatry, providing a mutually helpful relationship whereby psychiatric residents could provide their expertise in psychiatry, and at the same time learn about the disability program and its conduct.

We would also recommend that the Subcommittee review the existing fee rates established by the States against current competitive rates, with an eye toward establishing more appropriate minimum fee rates which will be more conducive to hiring and retaining full or part time physicians and consultants.

Similarly, we believe that more appropriate use of personnel performing consultative examinations needs to be made, and our legislative proposal addresses the quality and cost issues in this regard. Appropriately trained personnel to perform the CEs, and assurances that the CEs are of sufficient length and depth to "capture" the nature of the patient's problem are both critical, particularly for the mentally impaired. We note that SSA has been conducting an experiment in New York and Georgia designed to respond to our concern regarding the value of consultative examinations for the mentally ill. While we are not cognizant of any effort to assure that the duration of the examination is of a more appropriate length (certainly they should be longer than fifteen minutes), we do know that SSA has, in those two states, implemented the practice of two consultative examinations, spaced several weeks apart. SSA has indicated that this has been implemented in an effort to ascertain whether such multiple consultative examinations may better "capture" the actual condition of the mentally ill SSDI applicant or recipient under CDI. We understand that these consultative examinations are scheduled approximately two weeks apart. We applaud SSA's attempt in this regard, but, as in their prior activities, we have concerns about the efficacy of this new mechanism. First, we are not certain that a two week span is sufficient to "capture" the changes and fluctuations in the medical as well as functional aspects of the mentally ill. Second, we are not certain that the beneficiary is seeing the same examiner on both occasions -- something we believe should occur if the value of multiple consultative examinations is to be accrued.

Nonetheless, we are gratified by SSA's efforts to better manage the case development for the mentally ill SSDI beneficiary but believe that work in the way of personnel requirements is necessary.

THE PROCESS

Many of the severely mentally ill, the disabled capable of living in community-based settings as long as they receive proper therapeutic services, medication (if necessary), and social services to control their symptomology are unable to understand the meaning of a CDI review. They do not understand that their only source of income is being threatened, that their Medicare benefits (and/or Medicaid in the case of SSDI beneficiaries receiving SSI supplementation) -- the source of payment for their continued treatment -- is being threatened. They often do not understand the complexity of the forms they are asked to complete, or the necessity of such forms being completed in the first place. Further, given the nature of mental illness itself, it is often inappropriate, if not impossible, to receive an accurate self-evaluation from a mentally ill beneficiary. It is the very nature of the illness itself which causes a patient to deny or distort the medical significance of such illness. In a sense, much of what a mentally impaired individual may provide by way of narrative, either oral or written, is almost by definition going to be inaccurate, based on the nature of the illness itself.

Federal District Court Judge Jack Weinstein, in rendering his decision in New York on January 11, 1984, noted that "the mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA. Others are afraid of the system. Even with help from social workers, many do not appeal denials or terminations."

We believe that the proposals to streamline the multi-level process have particular merit for the mentally impaired. The elimination of at least one step -- reconsideration -- and the movement of face-to-face meeting to the earliest steps in the process (at a beneficiary's request) makes good sense. Through such a face-to-face meeting, the initial State DDS adjudicator would best be able to explain to the applicant the basis for a preliminary decision to terminate or deny initial application. Often, physically and mentally impaired persons are easily discouraged and lack the capacity for sustained conflict and confrontation. The shortening of the process, the "uncomplicating" of the process, will remove what can best be described for some as an insurmountable obstacle. As Secretary Heckler announced at her press conference last June, the objective is to end the insensitivity of the existing process, to "humanize" the routine -- we believe our proposal achieves that objective.

COST

The cost of the proposals contained in H.R. 3755 and S. 476 have been hotly disputed -- with SSA estimates running nearly double those of the Congressional Budget Office, and assumptions upon which such cost estimates are based varying widely. The savings originally envisioned by the GAO in 1980 have been far exceeded as the result of the adjudicative climate surrounding the accelerated review process. Yet at the same time, the cost of the accelerated review process, and its subsequent "fallout" in terms of appeals and suits, has been substantial -- perhaps costing more than the savings already achieved and nearly reaching the cost of the legislation at issue today.

Federal District Court Judge Weinstein's memorandum preceeding his recent order in City of New York, et. al. v. Margaret Heckler case pointed out that in New York alone, the City and State have suffered economic injury in having to meet the needs of those removed from the disability rolls. "Their shelter programs, welfare system and hospitals have been burdened. The project coordinator for an SSI outreach program in the City's shelter program for the homeless estimated that 40% of those housed in shelters had been denied or terminated from SSI and SSD benefits. At least one third of those housed in the system had a history of psychiatric hospitalization." He further noted that "a study by the New York State Department of Social Services estimated that if 80% of those terminated from Social Security in 1982 applied for public assistance, a $26.9 million increase in annual expeditures would be expected, of which the State and local governments would bear over $8 million.' Further, testimony was heard in the case that it costs approximately

$1000 in staff time by the New York State Office of Mental Health Community Services to help a mentally ill client pursue an appeal of denial of benefits to the Administrative Law Judge level.

The Committee should bear in mind that these costs are in one state alone, and that almost $20 million of the increased expenditure in public assistance is from Federal, not state or local coffers.

Perhaps most interesting in the Court's decision was the point that "the Social Security Disability and SSI programs were enacted in part to relieve state and local welfare burdens. The purpose is apparent, in the first place, from the statute itself." What we see in New York, and elsewhere, is a shifting of the burden to the State and locality from whence it was lifted in 1956, not an outright cost savings.

There is another cost to the accelerated review process -- that of the readjudication of allegedly improper decisions. There are now 18,000 SSDI cases pending in Federal District Court around the country. Those represent cases which had been adjudicated to that level (itself a costly process). The costs to the Federal government to hear these 18,000 cases are substantial in and of themselves. Added to those costs are the award of back benefits if the plaintiff succeeds in his or her case. In both Minnesota and New York, SSA has been ordered by the court to locate and review those individual mentally ill beneficiaries who were terminated from the rolls under an erroneous SSA interpretation of residual functional capacity. That second review of these beneficiaries also costs substantial Federal dollars.

While I am not an actuary or accountant, and cannot place a dollar value on many of these points, I do know that court proceedings are not inexpensive. I do know that it costs more to review cases twice than it would to review them correctly once. To argue that legislation such as H.R. 3755 or

S. 476 costs too much is to deny the actual cost savings which would accrue if the program were not subject to the kinds of Federal, state and local expenditures now being experienced to litigate issues which would be addressed and resolved were this legislation adopted.

CONCLUSION

The need for legislation like H.R. 3755 and S. 476 is clear. I have outlined the sound medical reasons the APA believes statutory change envisioned by these bills is necessary to protect the mentally ill impaired as well as to protect the intent of the SSDI program itself. I do not need to remind this Committee that over 30 states in the country have themselves decided that change is necessary -- change in the form of more reasoned standards based on more clear statutory authority, and change in the current adjudicative climate -- and have registered their concern by taking unilateral action with respect to the SSDI program by either imposing a moratorium or applying their own evaluation standards.

The hue and cry about the SSDI program has been ongoing for the past two years. The legislation has been developed, debated, revised and reviewed. Cost analyses have been developed and redeveloped, with different assumptions deriving differing costs. Throughout the time, the disabled have waited -- some fearing review, some undergoing review, some appealing the decision to terminate them, some living, some dying.

It is time to respond.

The APA is grateful to the Committee today for giving us the opportunity to share our concerns about the SSDI program as it has been affecting the mentally impaired. Your efforts and those of your staff to work with the APA and other concerned organizations both in the past and in this session, we hope, will allow substantial and meaningful reform to the SSDI and SSI programs.

Guidelines for Psychiatric Evaluation of Social Security Disability Claimants

Reprinted from Hospital and Community Psychiatry,
November, 1983

American
Psychiatric
Association

Introduction: *The Social Security Disability Insurance (SSDI) program, which pays benefits to those too disabled to continue working, has been under serious scrutiny during the past year by Congress, the executive branch, the media, and concerned organizations such as the American Psychiatric Association. APA has fostered changes in the program that are now pending in Congress and in the Social Security Administration—changes that will work to the benefit of individuals with severe mental impairments.*

Concern about the program has arisen from the changed adjudicative climate within which it operates—stressing terminations and denials over continuances and allowances—and the all-too-hurried manner in which disability adjudication has taken place in the past year. Current interpretation of the law and regulations further exacerbates the problems.

These issues are being addressed by APA through legislation and regulations, but there are also other concerns. Of special importance is the adequacy of the medical records provided to disability determination officers for the adjudication of claims for the mentally impaired. Simply stated, improved psychiatric case records provided by psychiatrists, other physicians, and nonphysician mental health professionals can help ensure that proper disability determination decisions can be made.

This document can help. By using the information it presents, clinicians can prepare medical information and histories for their mentally impaired patients that will help assure that such patients do not risk inappropriate denial of SSDI benefits.

The nature of the SSDI program dictates the need for certain case-building information that might not appear to be part of a usual medical record. Its requisites for detail are substantially different from and more demanding than those imposed by third-party insurers.

The goal of this document is to assure that clinicians are providing the best medical evidence to the Social Security Administration about their patients, and that they are able to act as advocates for their patients by being informed not only about the medical implications of disability, but also about the disability determination process.

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This document was prepared by a subcommittee of the American Psychiatric Association's Committee on Rehabilitation and approved by the APA Board of Trustees at their meeting on June 24-25, 1983. James Folsom, M.D., is chair of the committee; Melvin M. Lipsett, M.D., and David E. Raskin, M.D., were members of the subcommittee, and Ronald A. Bortman, M.D., and James P. Krajeski, M.D., served as consultants. Additional copies of these guidelines, as well as current information about changes in laws or regulations governing disability determinations, are available from the Division of Government Relations, APA, 1400 K Street, N.W., Washington, D.C. 20005.

This document has been prepared to familiarize psychiatrists and other clinicians with the process, the procedures, and the preparation of reports for the Social Security Administration (SSA) disability evaluation programs. Although some of the procedures may vary from state to state, the basic criteria for psychiatric reports are set by federal laws and regulations and apply nationwide.

In 1956 Congress passed legislation enabling the Social Security Administration to provide Social Security Disability Insurance, and in 1972 it enacted the Supplemental Security Income program. Since then many psychiatrists have participated in preparing reports of the assessment of the medical records and conditions of individuals making application for these benefits. Because clear guidelines have been lacking, often these reports do not serve claimants as well as they might. The reports must follow a predetermined format and include certain specific information for the SSA reviewer.

Programs for the disabled

The Social Security Administration administers a number of programs—providing both direct financial support and health insurance—for which a disabled person may qualify. They include:

Social Security Disability Insurance (SSDI) (Title 2, Social Security Act). This program covers individuals who have worked a certain number of years (determined by the age of the claimant) and have paid into the SSA disability fund (part of a payroll deduction during one's working tenure). SSDI is funded by employee payroll taxes (FICA) and is a federal program not unlike workers' compensation.

Supplemental Security Income (SSI) (Title 16, Social Security Act). SSI provides welfare-type benefits for aged, blind, or disabled individuals who have limited income and property or who have not worked long enough, or have never worked, and thus have not paid into the SSDI fund and are ineligible for SSDI. SSI funds come from general federal revenues.

Medicare (Title 18, Social Security Act). SSDI beneficiaries, once on the SSDI rolls for a period of two years, or once attaining age 65, whichever comes first, qualify for the federal health insurance program for the aged, blind, and disabled. Psychiatric benefits under Medicare are limited to 190 days per lifetime for psychiatric hospitalization and $250 per year in federal dollars for outpatient treatment (when matched dollar for dollar by the beneficiary).

Medicaid (Title 19, Social Security Act). Medicaid provides a federal-state shared health insurance benefit (varying from state to state) to SSI beneficiaries and others who are categorically needy (and in some states, also medically needy—above the poverty line, but close enough to make health care a severe financial burden).

It is possible, if a disabled worker is also poor, that he or she could qualify for SSDI (based on disability), SSI (based on lack of income, coupled with the disability), Medicare (after two years on SSDI rolls), and Medicaid (based on SSI status or "medically needy" status).

The focus of this document is on the financial support programs, and more specifically on the first, Social Security Disability Insurance. Both SSDI and SSI cover physical and mental disabilities. The medical criteria for rating the degree of impairment—and thus testing the level of disability in a claimant—are the same for both.

A disability application can be filed at any local Social Security office. Addresses and telephone numbers are in all telephone directories under United States Government, Social Security Administration. Ordinarily, making application is a fairly simple process. When a patient cannot do that, however, a claim may be filed for him or her. An attorney is not necessary.

The determination process

If a local Social Security office determines that an applicant meets the eligibility requirements for either SSDI or SSI, the applicant's file is forwarded to a disability determination service (DDS). The DDS is an agency of the state government that operates under regulatory agreement with the federal government to make disability determinations. This agency, among its other responsibilities, is charged with helping the claimant obtain medical evidence needed for adjudication of the claim.

The DDS requests medical reports (evidence) from a claimant's treating physician(s) and from other medical sources, such as hospitals or clinics where the claimant has been treated, as well as from nonmedical health and lay sources. If the claimant has no treating source (physician, clinic, or hospital), or if the medical report from treating sources is inadequate or incomplete, then the DDS may purchase additional reports (consultative examinations) from other physicians or psychologists.

The DDS tries to provide a decision within a reasonable length of time (about 45 days). Promptness in rendering a decision is facilitated by prompt receipt of medical evidence from the treating physician or consultative examiner. When a requested medical report is not received within a reasonable time, it may be necessary to decide the case on other medical evidence, such as that provided through a purchased medical consultation.

A treating physician is better able to provide the needed data than is someone who sees the claimant just once for a consultative examination, and so it is in the best interest of the patient for his or her physician to respond personally and promptly with a concise, thorough report. (Some states provide a telephone dictating service to facilitate these reports.) The government pays for medical reports obtained from physicians; the fee varies from state to state. A physician may have to request a fee, since payment processes also vary among the states.

The DDS uses a team composed of a disability evaluation analyst and a physician to make each disability decision. The DDS analyst, a nonmedical person with specialized training in disability analysis, will assist in obtaining the appropriate medical evidence. The DDS physician (unfortunately not always a psychiatrist in the case of a mentally impaired claimant) studies this evidence, rates the degree of medical impairment, and determines the functional limitations imposed by the medical condition.

All disability claims are subject to a process of sequential evaluation by the team. In this evaluation, the DDS reviewing physician determines, from the medical evidence, if the claimant has a condition that is "not severe." A "not severe" condition is one that does not significantly limit the individual's ability to perform basic work-related functions or does not significantly interfere with the claimant's day-to-day functioning.

If the claimant's condition is found to be other than "not severe," the reviewing physician must determine if the claimant has a condition of such severity that it precisely matches ("meets") or is equivalent to ("equals") specific medical findings described in the "listing of impairments" in the federal regulations. A claimant whose condition matches or is equivalent to these criteria is, on the basis of medical factors alone, determined to be disabled. If the claimant has a condition whose severity is judged to fall between one that meets or equals the listings and one that is considered "not severe," then the DDS physician must delineate the residual functional capacity (RFC) that the claimant has.

Residual functional capacity refers to those abilities or skills the claimant retains in spite of the medical condition. The reviewing DDS physician describes the work-related functions the claimant can do. For example, can the claimant understand, carry out, and remember simple or complex instructions? Can he or she respond appropriately to supervision, co-workers, and job pressures in a work setting? The assessment of RFC by the state DDS is to be based on all evidence in the claimant's file, including reports from treating physicians, consultants, and nonmedical sources.

After the DDS physician has completed the medical assessment, the DDS analyst determines whether the claimant is legally disabled. One of three outcomes is possible:

1. A claimant whose condition is determined medically to be "not severe" is considered capable of performing work, or substantial gainful activity, and the claim is then disallowed.
2. An individual with a "severe" impairment that meets the criteria in the listing of impairments is judged to be disabled.
3. An individual whose condition falls between "not severe" and "severe" is assessed on the basis of whether he or she can be expected to perform work done in the past (usual occupation) or other work that exists in substantial numbers in the national economy—not necessarily in the claimant's area of residence. Factors such as the claimant's age, education, and vocational experience are taken into consideration.

Definition of disability

The law defines disability as the inability to carry out any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. Substantial gainful activity may be equated with our usual understanding of the term work or job. Technically substantial gainful activity refers to work that involves significant and productive physical or mental duties and is done (or intended) for pay or profit.

A medically determinable impairment is considered to result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. A mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings (psychological testing). The definition of disability established through law is a strict one that in essence means the claimant is unable to do any type of work that exists in substantial numbers in the national economy.

Appeal process

Once a decision is made, the claimant receives a written notice. A claimant who is dissatisfied with the decision may ordinarily appeal the decision through four levels:

1. Reconsideration. If a claimant requests reconsideration, the decision is reviewed by another state disability adjudication team (DDS physician and analyst). As a result of enactment of the emergency SSDI legislative amendments contained in P.L. 97-455, a face-to-face meeting with a special hearing officer will be included in reconsideration reviews for beneficiaries undergoing continuing disability review, though not for new applicants.

2. Hearing. If reconsideration is unfavorable, a claimant may request a hearing before an administrative law judge who is empowered to consider any new evidence or witnesses the claimant wishes to present. Until enactment of P.L. 97-455, this was the first opportunity for a face-to-face meeting.

3. Review. If the decision of the administrative law judge is unfavorable, the claimant can ask for review by the SSA's appeals council in Baltimore.

4. Suit. If the appeals council declines to review the case, or if the claimant disagrees with the council's decision, suit may be initiated in federal district court.

At each level the claimant ordinarily has 60 days from date of receipt of the decision to appeal it. The claimant may be represented by legal counsel in any step in the process. A claimant who decides to appeal a decision may seriously consider seeking legal counsel.

Continuing disability review (CDR)

Under Social Security amendments passed by Congress in 1980, individuals receiving disability payments whose disabilities are not included in SSA's list of permanent disabilities will be subject to case review at least once every three years to see if they continue to meet eligibility requirements. This continuing disability review (CDR) (formerly continuing disability investigation, or CDI) requires that the state agency review the claimant's current medical status. The extent and depth of this medical investigation is similar to that required for the initial application. Under the amendments many individuals whose cases had not been reviewed for a number of years are now subject to periodic review.

Medical criteria

Physicians who review the disability applicant's file in the state agency are guided by federal regulations in determining how severely an individual is impaired. These criteria are described in what are commonly called the listing of impairments or simply "the listings."

Basic to the adjudication of claims for all medical conditions is the principle that there must be objective medical evidence that permits an independent reviewer to ascertain the nature, limiting effects, and duration of an impairment and any residual capacity to perform work-related physical or mental activities. A determination cannot be based on conclusions from a physician without the objective evidence to support those conclusions. The psychiatric listings embody two concepts:

There must be *documented* signs (that is, specific and detailed descriptions) indicating the existence of a mental disorder, *and*

There must be *documented* evidence of how the mental disorder interferes with the claimant's ability to function in the everyday world. The psychiatric listings divide mental impairments into four categories:

- Mental retardation
- Functional psychotic disorders (mood disorders, schizophrenias, paranoid states)
- Functional nonpsychotic disorders; psychophysiologic, neurotic, and personality disorders; addictive dependence on alcohol or drugs
- Chronic brain syndromes (organic brain syndromes)

Guidelines for evaluation

The primary purpose of the psychiatric evaluation for a Social Security applicant should be to establish objectively the existence of a mental disorder and to describe any impairment of functioning resulting from that disorder (or combination of disorders). The presence of a mental disorder without impaired functioning, or impaired functioning that is not attributable to a mental disorder (for example, lifestyle choice), will likely result in a finding that an individual is not disabled.

The Diagnostic and Statistical Manual of Mental Disorders, third edition, (*DSM-III*) provides a model for the kind of objectivity required for the disability report. Formulating a diagnosis under *DSM-III* requires that there be specific objective observable or measurable criteria before one can conclude that a mental disorder is present. Axis V of *DSM-III* calls for assessment of adaptive functioning, which is necessary in the disability report. Elaboration of the criteria leading to a diagnosis of a mental disorder and specific examples that lead to an axis V assessment of impaired functioning are both necessary for the disability report.

Claims are initially adjudicated by individuals who have never seen the claimant and who are generally not specialists in psychiatry. Therefore, it is important to supply *objective* data free of jargon and ambiguity that will permit the independent reviewer to arrive at a clear picture of the nature of the claimant's condition and its effect on functioning. Conclusions or diagnoses that are not supported by specific findings cannot be used as a basis of a disability determination. Symptoms alone are also not a sufficient basis to determine that someone is disabled.

Federal regulations require that the presence of a mental impairment be supported by symptoms, signs, and laboratory findings (laboratory findings ordinarily refer to psychological testing). "Sign" evidence refers to descriptions of behavior, affect, thought, memory, orientation, and contact with reality. Statements such as "This patient has a severe ongoing depression that completely immobilizes him," are inadequate. The reviewing physician must know what symptoms, signs, and laboratory findings indicate that the claimant is depressed and must cite specific examples of what the claimant can or cannot do as a result of depression.

The disability regulations address four general areas of functioning in determining whether someone is disabled. They are:

- Restriction of daily activities
- Constriction of interests
- Deterioration of personal habits
- Inability to relate to others

In preparing a disability report, it is essential to describe any limitations in each of these areas. It is useful to include in this assessment the claimant's ability to understand, carry out, and remember instructions and the ability to respond appropriately to supervision, co-workers, and work pressures in a work setting, citing relevant examples.

If claimants are receiving medication that affects their functioning, the specific effects of the medication should also be described. It would also be appropriate to describe the claimant's level of functioning when under stress or when treatment is interrupted. Again, objective clinical material should support any conclusion the physician submits. For example, what specific stresses have precipitated what specific alteration in the claimant's condition?

Because mental disorders are subject to exacerbations and remissions, it is also necessary to describe, as specifically as possible, any alterations in the claimant's condition over time. The report ought to include descriptions of the claimant during periods of good and poor functioning. The duration of the exacerbations and remissions should be included, as well as dates and lengths of any hospitalizations.

Problems that limit the value or usefulness of disability reports are frequently encountered. They include confusing terminology or diagnoses; failure to provide specific findings that establish the presence of a mental disorder; failure to describe clearly through examples the claimant's level of functioning; failure to show some link between the claimant's mental disorder and his or her inability to function adequately; and failure to provide sufficient data to determine if the claimant will meet the program requirement that the illness can be expected to be disabling for at least 12 months.

Terminology that is vague or not a part of standard nomenclature should be avoided. For example, the observation that the claimant "exhibits very poor ego functioning" or "poor reality contact" is meaningless to the disability reviewer. Unless the DDS physician is provided with the specific findings that led to these conclusions, the conclusions will have to be disregarded or additional medical reports will have to be obtained to clarify the reasons for them.

Diagnoses that are not part of our standard nomenclature should be avoided. Diagnoses such as "psychotic disorganization," "pseudoneurotic schizophrenia," or "anxiety reaction" may confuse a reviewer rather than assist in clarifying a claimant's condition. Diagnoses without the specific findings leading to the diagnosis have little significance to the DDS physician. Diagnoses, when given, should conform to *DSM-III* terminology and be consistent with the findings of the report.

Faulty documentation of the existence of a mental disorder may include inadequate mental status examinations, incomplete history of the illness, and the use of conclusions rather than specific findings. It is not unusual for DDS physicians to find reports in which claimants with conditions diagnosed as anxiety disorders, depressive disorders, or major psychotic disorders such as schizophrenia have an essentially normal mental status examination. If such a mental status examination is reported to be indicative of the claimant's usual condition, then the DDS physician is likely to conclude that the claimant does not actually have a medically determinable impairment and disregard the diagnosis.

Reports indicating that a condition is in remission also frequently lead to confusion. Unless there are specific findings explaining this observation, it may be concluded that the claimant has no current pathology and is therefore not disabled. (Confusion about remitted conditions has been found in discussions with SSA officials and in hearings and constitutes a major problem.)

The disability program emphasizes the need to have "signs" that substantiate the presence of a medically determinable impairment. Therefore, the mental status examination carries a great deal of significance in the adjudicative process. Conclusions such as "the claimant exhibited a mild degree of organicity" or "moderate anxiety" cannot be adequately assessed by the reviewing DDS physician without the actual testing or observations that led to the conclusion. The soundness of disability decisions would appear to relate directly to the extent to which psychiatric reports contain objective descriptions rather than unsupported conclusions.

The level of functioning of an individual is often poorly described in psychiatric reports. Common conclusions that a claimant is "not able to take care of himself" or is "never able to get along with anyone" or "has no interests" must be questioned because of their lack of specificity. Of more help to the DDS physicians would be specific examples of what the claimant actually does or is capable of doing on a daily basis. How do claimants spend their time? How do they get along with others? How do they take care of their personal needs such as food, clothing, finances?

The DDS physician must attempt to determine the *quality* and *extent* of an individual's functioning. Sometimes reports misleadingly suggest that claimants engage in a wide range of activities such as going to movies, cooking, shopping, or taking public transportation when in fact they do so only because they are highly supervised. For claimants who are in highly supervised or highly structured living situations, the treating physician should attempt to describe the extent to which the claimant is capable of initiating and carrying out activities independently. Specific examples drawn from the claimant's day-to-day life should document any conclusions.

A problem sometimes encountered in psychiatric reports is the failure to establish a link between the claimant's impaired level of functioning and the signs of mental disorder. Someone who is described as leaving the house only once a week to shop for groceries with a spouse might be considered to show some restriction on daily activities. For purposes of the disability program, this restriction is only significant if it can be attributed to a psychiatric condition. Restricted activities due to paranoid fears have a far different meaning than restricted activities due to life-style preferences or factors such as lack of transportation.

It is important that the connection between findings on a mental status exam and the restriction of function be made. For example, if a claimant is found on examination to have an extensive delusional system and markedly restricted activities, the independent reviewer cannot determine if there is any relationship between the two without details about the nature of the delusional system and the reasons why the claimant has restricted activities. Therefore the disability report should attempt to provide the data that will help the DDS physician link the restricted function to the psychiatric disorder.

The law requires that the inability to work be expected to last or to have lasted for 12 continuous months. Disability reports may present problems for the reviewing physician if they do not give sufficient detail about the course of illness.

Because many psychiatric disorders are subject to exacerbation and remission, the extent and severity of episodes of the illness must be described. Reports that indicate only that a claimant was hospitalized three times during the past year, or had three manic episodes during the past year, are not adequate. Without some indication of how rapidly the claimant responded to treatment, how deteriorated the functioning was during the acute episodes, and what level of functioning was attained between episodes, it is impossible to determine if the duration requirements of the program are met.

It should be noted that there is an attempt to look at the claimant's overall level of functioning over a 12-month period to determine if the duration requirement is met. Periods of relatively good functioning during the period are not necessarily construed to mean that the claimant does not meet the duration requirement.

An outline for an evaluation report

Below is an outline that includes all the necessary components for a psychiatric report. It is followed by a sample report based on the outline. Subheadings are recommended because they reduce reader fatigue and the possibility that any part of the report will be misinterpreted.

1. Introduction

This section should include basic identification information on the claimant: name, age, sex, Social Security number, and any other relevant information.

2. History of present illness

This section should clearly establish date of onset and clinical course. Include symptoms described by the claimant, any hospitalizations and other milestones indicative of change in clinical condition, and changes in clinical course due to specific stresses. Describe treatment, if any, and response to treatment. Finally, include an explicit description of the claimant's functioning over the course of the illness, with examples. A description of the claimant's daily activities, interests, habits, and ability to relate to others should be given to clarify the claimant's functioning.

3. Past history

This section should include a brief relevant description of the claimant's history prior to acute onset of illness. This description can include important family history, as well as any developmental or physical problems that have contributed to the current clinical picture.

4. Mental status exam

The mental status examination is the most significant part of the evaluation. This section assists in clearly establishing the presence or absence of mental illness. Presentation of the actual results of formal testing and clear descriptions of signs and symptoms establish an objective basis for the disability determination. The findings of the mental status examination should be organized in a logical sequence with actual descriptions of behavior and direct quotations from the claimant.

This section of the report should describe the following:

General appearance, attitude,
    and behavior
Orientation
Affect and mood
Thought content
Ability to abstract, calculate,
    and remember
Intelligence
Insight
Fund of knowledge

In this section it may also be necessary for the examining physician to explain the significance of the data obtained. For example, a primarily Spanish-speaking claimant might have difficulty interpreting standard English proverbs. In addition, such a claimant might not fully understand questions and thus respond inappropriately.

If it is suspected that a claimant is having difficulty because of cultural, education, or physical problems, that should be clearly stated at an appropriate point in the description of the results of the mental status exam. If an individual with a high level of education shows intellectual and cognitive functioning that seems inconsistent with prior achievement, then the examiner should note the significance of the test results.

5. Summary of information

This section ties together the information contained in the report, with any appropriate additions to clarify and complete the presentation of the findings of the mental status exam. If the history does not include a specific and complete description of daily activities, interests, personal habits, and ability to relate to others, that information should be included in this section.

6. Diagnosis

At this point an appropriate *DSM-III* diagnosis should be made, based on material contained in the earlier sections of the report, and should be clearly tied to that information.

7. Prognosis

Here a clear statement of the prognosis is important in supporting a claim of disability. The prognosis may assist in determining if the duration requirements of the program will be met. The rationale for the stated prognosis must be provided.

8. Ability to handle funds

An assessment of this ability is required as part of the report.

Sample evaluation report

1. Introduction

Mr. X (SSN: 111-11-1111) is a 24-year-old Caucasian high-school graduate.

2. History of present illness

Mr. X has at least a four-year history of serious mental illness. He states that he was hospitalized four years ago after "being picked up by the police" for "disturbing the peace." He was hospitalized at Napa State Hospital for two months, receiving 20 to 30 mg of Haldol a day. Prior to his hospitalization, the claimant had been working at the post office as a "loader." He relates that he became increasingly certain that "my co-workers were trying to force me out of my job." He had feelings that "my mind was being controlled by a special device placed under the counter" by another clerk and that "they were following me home at night to continue disturbing my thinking."

Symptoms became so severe that he "took a week off to rest at home." While at home, he began to "hear messages from people at work bad-mouthing me," and, he stated, "a ray machine was installed next door to my home to turn my brain to mush." The night of his hospitalization, Mr. X ran from his apartment trying to "get away from the rays." He was picked up by the police, taken to the county hospital, and after 24 hours transferred to the state facility named above.

On his release he was referred to a community mental health center for follow-up. Mr. X has continued to see a psychiatrist at the center twice a month. He has remained on 20 to 30 mg of Haldol a day since his hospitalization.

Mr. X has required rehospitalization on two occasions in the past two years. These episodes were characterized by increased delusions that his mind was being "controlled by outside sources" and by agitated and confused behavior. Both times he was involuntarily hospitalized at the state hospital for one month, with appropriate increase in antipsychotic medications to control severe symptoms. On release from the hospital, his medication was reduced to 30 mg of Haldol per day. He has lived in various hotels or rooming houses during the past four years.

Mr. X states that he "has not returned to work because every time I think about it I become confused and certain they are attacking my mind." Mr. X currently lives alone in a rooming house and participates in no organized social activities. He states that he does not talk to the five other residents of the rooming house because "they want to know too much."

He states that he gets along with them except for one time when "someone was trying to poison me" and he got into a fight with another resident. He denies any difficulty in getting along with people "as long as they leave me alone." He would not be more specific than that. He says he occasionally plays checkers with "someone" at a local park.

His usual day consists of getting up at 10 or 11 a.m. and fixing instant coffee for breakfast. He says that he usually stays in his room and "just thinks" for a couple of hours. In the afternoon he often goes for a walk and returns home around 5 p.m. He spends most of the rest of the time listening to the radio, but sometimes he feels the radio announcer is "tuned in" to him and he won't listen for a few days. He rarely reads magazines or newspapers, but sometimes will read a Bible.

He ordinarily takes his meals at a nearby fast-food restaurant. He occasionally prepares soup on a hot plate in his room but he does not do more extensive cooking. He takes a shower once or twice a week and does his laundry about every two or three weeks, he says. He is able to manage his money well enough to pay rent and purchase necessities. He has no contact with his family, which includes his parents and one brother. Says Mr. X, "Every time I go to their house, I argue with them."

He does not ride public transportation because he becomes extremely anxious in crowds and fears that "someone will jump me." He walked to this appointment today. He continues to complain about hallucinations, especially threatening voices at night, and he has had moderate difficulty sleeping.

Increased doses of antipsychotic medication lead to what Mr. X describes as "side effects," and he has refused increases in dosage or change of medication.

Mr. X denies abusing alcohol or taking street drugs. He has had no other hospitalizations or medical treatment and does not take any medication except Haldol.

3. Past history

Mr. X was born in the San Francisco Bay area. His mother and father, in their fifties, are alive and well. He has one brother, four years younger, who reportedly has a "drinking problem" and has been hospitalized on several occasions in a state facility.

Mr. X attended grade school and high school. However, his academic performance deteriorated markedly during the two years before graduation. He describes himself as a "loner" during his adolescence and adulthood, saying he has had few friends and has never belonged to any club or organization.

4. Mental status exam

General appearance and behavior. Mr. X was 15 minutes late for his appointment, stating that he "looked around the building to see if anyone was watching" him. He was somewhat disheveled. His shirttail was hanging out and he had on unmatched socks. His hair was uncombed and he was unshaven. However, he was otherwise reasonably clean. He entered the examining room hesitantly and appeared to be anxious, glancing around as if looking for something. He sat quietly during the interview, hunched forward in his chair holding the arm rests tightly. He answered questions in a goal-directed, brief manner. He was not spontaneous but was reasonably cooperative. There were no physical deformities, but he did have a slight hand tremor.

Orientation. Mr. X was oriented to time, place, and person. He generally understood the purpose of the interview, stating that "I'm here to find out if I can get SSDI" and "I know what I say to you goes to the government."

Affect (to include mood). Mr. X's affect was somewhat flattened. He rarely smiled or looked sad when discussing his history. He appeared generally tense but with no evidence of abnormal mood.

Thought content. There was evidence of hallucinations. Mr. X described "hearing people in back of me talking about me even on the way to the office." As he sat during the interview, he would glance around the room suddenly as if attending to an internal stimulus or a "voice." At times he appeared distracted, having to be asked a question more than once, saying, "Oh, I'm sorry I didn't hear."

The presence of delusions was quite dramatic. Mr. X stated that he "was looking around the building prior to coming in, knowing that people from the post office are still after me because of what I know." When asked to explain more fully, Mr. X became quiet and said with some anger, "I can't tell you, it will go in that report to the government and they will know."

He made several other references to delusions, such as "I know that my mind is being controlled from outside; even now when I talk to you they are putting thoughts in. Some of them I wouldn't even say out loud." At one point he did stand up suddenly and turn and look at the door, without explanation, and then sat back down.

There was no evidence of suicidal ideation. In spite of the severe symptoms described, he was cooperative enough to complete the interview.

Ability to abstract, calculate, and remember. In response to the proverb "People who live in glass houses shouldn't throw stones," the claimant said that this meant that you shouldn't criticize people or they might hurt you. He gave appropriate responses to similarities such as apple and orange ("They are both fruits."), chair and desk ("furniture"), and car and wagon ("ways to get around"). At one point he became more tense, stating, "I don't understand. Why did you ask that? There is nothing wrong with my thinking."

Calculation, as tested by serial sevens and simple multiplication, was performed with no errors. He was able to name three objects after 10 minutes and recall seven digits forward and six digits backward. His fund of general information was somewhat limited. Mr. X stated that he doesn't read newspapers. He was able to name the governor and the president, but he did not know the names of the two senators. He could not give information about what had happened in the national elections two weeks ago. Based on the above, his memory was judged to be within normal limits.

Intelligence. Based on the claimant's past school history, his work history, the mental status examination, and his interaction with the examiner, Mr. X's intelligence is judged to be at least average.

Insight. Mr. X had little insight into his condition, stating that he had been "damaged by the mind control performed by my co-workers." However, he did relate that he would take his medication since that seemed to "protect me from further damage."

5. Summary of information

Mr. X has at least a four-year history of significant mental illness characterized by severe thought disorder and social withdrawal. He has had three documented hospitalizations and has continuously received antipsychotic medication in substantial dosage. His response to treatment has been marginal, as evidenced by his condition during the examination. His social functioning has diminished in that he now lives alone and has no social activities except an occasional game of checkers with an acquaintance. Although Mr. X is capable of taking care of his own immediate needs, his general appearance indicates some deterioration of personal habits.

At this time Mr. X seems capable of following simple verbal instructions, but he also appears to be distractible and suspicious that his thoughts are frequently interrupted with preoccupations. He would be likely to have difficulty working around or with other people because of his suspiciousness. His daily activities are significantly limited mainly by his paranoid concerns and narrow interests. He would probably have difficulty attending any activity regularly.

The prospect for Mr. X's improvement is poor. After four years of appropriate treatment, his condition seems to be stabilized at a marginal level of functioning. He is quite anxious and states that his "voices increase" when he is subject to minimal stress, such as riding a bus or being involved in group activities. Thus Mr. X seems to be a poor candidate for vocational programs or rehabilitation requiring social interaction.

6. Diagnosis

Axis I: 295.30 Paranoid schizophrenia
Axis II: 71.09 No diagnosis on axis II
Axis III: None
Axis IV: Psychosocial stressor: no information, 0, unspecified
Axis V: Highest level of adaptive functioning past year: 5, poor

7. Prognosis

Prognosis for Mr. X is poor. He remains withdrawn and symptomatic even with antipsychotic drugs and supportive psychotherapy twice a month for several years. Marked improvement is unlikely.

8. Ability to handle funds

Mr. X's ability to handle funds remains intact.

This example covers the essential points in preparing a psychiatric report. However, special attention is required in cases where response to treatment has been better than in this illustration. Many individuals with serious chronic mental illness appear superficially intact during a formal evaluation. Such people are generally maintained on antipsychotic medication and may be involved in ongoing supportive therapy. There may be no active hallucinations, and delusions may be well defended against during the mental status exam.

These individuals may show some impairment in daily activity, such as social withdrawal, as well as restriction of interest and low capacity to tolerate stress. Description of daily activity in such cases can illustrate this impairment. For example, a person who goes to a day treatment center three times a week and lives in a board-and-care home may seem superficially intact with no significant limitation of daily activities. However, a comment such as "I cannot ride a bus or go downtown because I always get lost or have to be brought home by the police" illustrates a marked inability to deal with new situations and indicates significant limitations not evident from a routine description of daily activities. In such cases the psychiatrist must be careful to describe the actual deficits that exist when the individual is outside the highly structured or supervised environment.

Conclusion

The evaluation report must be organized and logical, presenting material that establishes the presence of a mental disorder, links that disorder to an impaired functioning, and describes the impairment in detail. The report must establish the presence of an illness for at least 12 months, either prior to the time of the evaluation or, with sufficient evidence, predict that the illness will last 12 months.

A poorly written report may delay or prevent award of appropriate benefits. It may also prejudice later determination if the case is appealed. The written report becomes part of the claimant's SSA record. It will be reviewed if a case is appealed or at the time of continuing disability investigations.

Each SSDI and SSI applicant deserves an appropriate and thorough psychiatric evaluation based on complete and objective evidence. Psychiatrists should remember that the report they submit may well have lifelong implications for the individual they are assessing.

Dr. **Meyerson.** I'm here to represent the American Psychiatric Association and its 28,000 members, and we are a part of a consortium of more than 40 provider and consumer organizations representing disabled people affected by the changes and shifts within the Social Security Administration's administration of these programs.

The hue and cry about the social security disability income program has been ongoing for the past 2 years. The legislation has been developed, debated, revised, and reviewed. Throughout that time, the disabled have waited, some fearing review, some undergoing review, some appealing the decision to terminate them, many living but some dying.

The APA has worked with the Social Security Administration in ironing out many of the regulatory issues and problems surrounding mental disability. Throughout last summer the APA and other professional organizations began cooperative efforts to rewrite the listings of impairments that would automatically qualify a patient for SSDI benefits.

More recently, the Social Security Administration requested that the APA submit a proposal on the use of its peer review system for validating and assessing SSDI decisions in mental impairment issues. Despite such cooperation, many of the concerns we have expressed in the past persist. In fact, all of the concerns we have expressed in the past persist. Legislation is needed. It is needed to insure that mentally disabled individuals continue to receive SSDI benefits and that waste and fraud are eliminated.

The debate would end if key provisions of two bills under congressional consideration—the Social Security Disability Reform Act of 1983, H.R. 3755, and the disability amendments of 1983, S. 476—were approved. Numerous studies and court orders support APA's position that current SSDI review methods, staff and philosophy need improvement. State and Federal courts have repeatedly overruled the Social Security Administration's decisions to terminate mentally ill patients' benefits and ALJ's have done so in two-thirds of the appeals brought before them. In fact, that's been repeated often. But in many jurisdictions for the mentally ill that's closer to 90 percent.

Most recently, Federal District Judge Jack Weinstein, as has been noted several times, stated that the Federal Government's methods failed to affect the cost savings sought when the Social Security Administration accelerated SSDI reviews for mentally impaired patients.

In reviewing the facts presented in *New York et al.* v. *Margaret Heckler,* Judge Weinstein's January 11 decision found that the terminations increased the State's burden in meeting these persons' needs, despite the fact that the social security disability and SSI programs were enacted, in part, to relieve State and local welfare burdens. What we see in New York and elsewhere is a shifting of the burden to the State and locality; not an outright cost savings. Those figures of $6 billion, whatever the assumptions made, didn't appear to include the costs shifted to other programs. I would ask that you, as you did this morning, question the assumptions, but go on to question what, in fact, the human costs? Who pays? Is it that patients go back to work? I don't think so. Not in large measure, and certainly not among the mentally ill.

Moreover, as you know, in 1983 the General Accounting Office studied 40 mentally impaired individuals who had been removed from the rolls and found 27 couldn't function in their daily living without a good deal of support, and couldn't work in a competitive or stressful environment. In the remaining 13 cases, GAO found that the SSA hadn't had enough documentation to make any decision, although they made it.

In other words, just 3 years after the GAO report criticizing SSDI programs for allowing too many false positives into the system, the so-called 20 percent, the GAO found that there were too many false negatives in the system of accelerated reviews; particularly, among the mentally impaired. The pattern, as I have stated before and our organization has stated before, of only 11 percent of the people on the rolls being mentally impaired, but over 30 percent of those thrown off the rolls being mentally impaired, speaks of an institutionalized governmental practice of prejudice against the mentally ill.

Passage of a combination of the two SSDI reform bills would eliminate many of the current system's flaws. We support a moratorium on continuing disability investigations until the Social Security Administration rewrites its regulations on mental impairment, psychiatrists or psychologists evaluate mentally impaired patients' ongoing disability, and a medical improvement standard taking a full longitudinal look at the person's case history—which better indicates the ability to work than some nonprofessional looking at a limited array of data—is in effect.

Moreover, we have called for a requirement that would recognize the cumulative effect of several impairments. The legislation pending before the House and before this committee requires that SSA consider the combined effect of all the individuals' impairments without regard to whether any individual impairment considered separately would be, by itself, severe.

The need for legislation is clear. More than 30 States—not the 9 that was referred to by the Commissioner this morning—have themselves decided or have had courts decide for them that change is necessary and have registered their concern by taking unilateral action with respect to the SSDI program or by imposing a moratorium or applying their own evaluation standards. It is time for a legislative response. SSA not only has a nonacquiescence policy with regard to court orders, it has a nonacquiescence policy with regard to humanity and a nonacquiescence policy with regard to fact.

What has happened in this administration of the periodic reviews is that without a change in regulation, without a change in legislative mandate—other than to conduct the reviews—with regard to the mentally ill, SSA adopted new standards for what they consider to be disabled and eligible under the program. They effected arbitrary changes, for what was once considered disabled is now considered not disabled. They did that through a change in their adjudicative climate, through pressuring local offices, through issuing policy statements without public notice. We do not trust that, without legislative action, this may not occur again. In fact, there is no assurance that this will not occur again even under pressure of judicial order, and so we ask as strenuously as we can that this committee and the appropriate House body put forth legislation along the lines proposed that will reassure the disabled of this country that they will not be arbitrarily kept from the rolls of programs for which they have paid for entitlement nor be thrown off those rolls in an arbitrary way in order, to put it as plainly as possible, to save money whether mentally ill or physically ill and disabled people are entitled to that money or are not.

Thank you for your time and attention.

Senator HEINZ. Thank you very much, Dr. Meyerson.

STATEMENT OF CAROL GARVIN, MEMBER, PUBLIC POLICY COMMITTEE, NATIONAL MENTAL HEALTH ASSOCIATION, AIKEN, S.C.

Senator HEINZ. Ms. Garvin.

Ms. GARVIN. Thank you. My name is Carol Garvin, and since I am somewhat of a stranger in these areas, I will tell you that I am immediate past president of the South Carolina Mental Health Association and am a member of the public policy committee of the National Mental Health Association. I'm speaking not only for the National Mental Health Association but also the Association for Retarded Citizens, and the National Association of Private Residential Facilities for the Mentally Retarded, as well as for a coalition of over 40 national organizations concerned about the plight of disabled Americans.

And I would appreciate it, Senator, if my full written statement could be entered into the record at this point.

Senator HEINZ. Without objection, your entire statement will be made a part of the record.

Ms. GARVIN. Thank you.

[The prepared statement of Ms. Carol Garvin follows:]

PREPARED STATEMENT OF MS. CAROL GARVIN

My name is Carol Garvin, and I am from Aiken, South Carolina. I am a member of the Public Policy Committee of the National Mental Health Association and I am Immediate Past President of the Mental Health Association in South Carolina. The National Mental Health Association (NMHA) is a citizen organization, representing approximately one half million consumers and citizens interested in the treatment and prevention of mental illness and the promotion of the mental health. My statement today is presented on behalf of the NMHA.

During the past two years of my volunteer service in South Carolina, I have become increasingly aware of very serious difficulties posed to the mentally ill by current Social Security Disability and Supplemental Security Income Disability programs. On numerous occasions the hardships imposed by current policy have been brought to our attention by family members, professional care-givers, and when they are able to communicate, people affected themselves. One of the more distressing aspects of the problem has been that people affected have been able to resume a measure of community living until their disability eligibility has been denied.

I must emphasize that this is a current and continuing problem. A few months ago I attended a meeting to discuss current commitment laws in South Carolina. Also present was the Probate Judge of Cherokee County. When it was his turn to speak, he said he was indeed concerned about current state law but that the greatest problem presented by people coming into his court was losing their disability payments, even though they were truly handicapped, and that they "did not know which way to turn."

Shortly after this, our office received a copy of a letter sent to one of our Senators by a woman from Spartanburg County whose husband had lost his disability payments. Of her husband, diagnosed paranoid schizophrenic, she wrote, "I think the judgement on the mentally handicapped is unfair because if you could just hear and see my husband, not sleeping at night and crying his heart out because of his situation then you would understand a little better."

Only two weeks ago I was in a meeting with four community mental health center directors from my state. Two of them represented urban areas in South Carolina; the other two represented betweenn them twelve rural counties. I asked them if their clients continued to have problems with disability. They all agreed immediately that it continues to be a major problem, and one said, "It is just so discouraging, because we're talking about people who are simply too sick to work, but still they lose their disability."

I have had many confirmations that these problems are not unique to my part of the country. I mention them to indicate that the pattern of serious problems with the federal disability system in the last several years persists, even though the results have been well documented. In March 1982, the Mental Health Law

Project published the results of careful study of mentally ill and other disabled persons which showed the large number who had been very inappropriately terminated from the rolls. Shortly after that time, the Minnesota Mental Health Asssociation filed a law suit in federal court on behalf of mentally disabled people, as a class, in HHS Region V.

The court ruled in that case that SSA must reinstate an estimated 15,000 to 20,000 mentally ill people who were terminated from the disability program since March 1981. Judge Larson found that the standards used for evaluating psychiatric disability cases were "arbitrary, capricious, irrational and an abuse of discretion." His ruling has now been upheld by the U.S. Appeals Court. As a result, mentally ill people in Region V who were terminated will be reinstated,.and must be re-evaluated using improved criteria (yet to be promulgated). In addition, those who made an initial application for benefits since March 1981, and who were denied, must be found and permitted to reapply.

Just recently, in a similar case, a U.S. District Court Judge in New York ordered SSA to restore benefits to thousands of mentally ill New Yorkers who lost them since 1980, because of a "fixed, clandestine policy against those with mental illness." As many as 62,000 people could be affected by the New York ruling and retroactive benefits could be awarded worth approximately $125 million.

Both of these law suits could easily have been avoided. Both now cause chaos for beneficiaries and for the Administration as it tries to rectify past mistakes. Yet despite these cases, SSA continues its discredited policies in other parts of the country.

In addition to the courts, the General Accounting Office has also found serious flaws with SSA's policies. At the request of Senator Heinz and the Aging Committee, GAO investigated policies for assessing mentally disabled persons. After looking at the situation in four district offices and examining 75 actual cases, the GAO investigators found that it is "virtually impossible" for younger chronically mentally ill patients to meet the medical listings of impairments issued by SSA regulations. SSA's policies, which presumed that a mentally ill person whose condition did not meet the listings could therefore work, resulted in many inappropriate terminations, according to the GAO. In addition, GAO found other problems: that insufficient time is given to developing a psychiatric case (which often requires more work than the average disability case): that only 10 states have either a psychologist or psychiatrist on the staff to complete the psychiatric evaluation form; that insufficient assessments are made of an individual's functioning skills and that disability examiners are looking for positive signs of functioning and giving insufficient weight to indications that the patient cannot function adequately.

States have not stood idly by while these problems persist.

Despite requirements that they follow federal directions, nearly half the states have implemented moratoria on further reviews, or substantially changed the criteria used to assess beneficiaries (such as, for example, requiring evidence of medical improvement before a beneficiary is cut from the rolls). These understandable state responses have helped many individuals who otherwise would have been adversely affected by federal policy. At the same time the program is losing its national uniformity. As a result, beneficiaries rights and chances of obtaining disability payments depend significantly upon where they live. This is a situation which cannot continue.

Nevertheless, despite all the well documented case histories, despite court orders and other measures, despite some changes in Administration policy, the problems have not yet been dealt with and cry out for a national solution provided by Congress.

Clearly these problems have been particularly harmful to those suffering from the debilitating effects of serious mental illness. As the GAO and the courts have found, the Social Security Administration relied primarily upon the medical listings as the basis for a disability decision. Yet the medical listings, as currently written, do not assess a psychiatric patient's ability to function in a job. Significant detail has been provided to SSA by the American Psychiatric Association, American Psychological Association and other associations of mental health professionals indicating the numerous problems with the medical listings. As a result of this law suit, and the insistence of these mental health organizations SSA is now revising the medical listings, and we hope more appropriate standards will be published sometime in 1984. But this has not yet occurred.

For those individuals who have a severe impairment, but whose condition does not meet or equal the medical listings, SSA is required by law to make an assessment of the patient's ability to function and make a judgement as to whether the individual's functioning is such that he/she is able to work. Both GAO and the courts have found SSA criteria to be totally inadequate. Ruling in the Minnesota case, Judge Larson found that "scientific research and clinical data in the fields of psychiatry and rehabilitation psychology demonstrate that the Listing of Mental Impairments does not measure ability to work," and that the "psychiatric review form is not relevant to determining whether someone has the residual functional capacity to work." SSA has not denied this.

These problems, of accurately assessing the ability to work of a patient with a chronic mental illness, have been addressed in a SSA sponsored work group which involved mental health and rehabilitation experts. Totally new criteria, together with a system which ensures a meaningful work evaluation for these applicants, are needed. These reforms have not yet been put into place, however, and SSA continues to use the old, discredited listings and vocational criteria in assessing all new applicants, and worse yet, continues to use these discredited criteria to terminate beneficiaries already on the rolls.

As a result, unknown thousands of people are being inappropriately terminated. Secretary Heckler moved, last June-- many, many months after these problems first came to light-- to exempt from review those patients suffering from a psychotic disorder. This still leaves many severely mentally ill patients at risk of being inappropriately terminated. No system has been suggested nor put in place by HHS to correct these errors.

This situation is all the more serious since mentally disabled persons constitute a substantial proportion of those on the SSDI and SSI rolls. Approximately 30% of the 2.3 million disabled SSI beneficiaries are mentally ill, and about 11% of SSDI recipients are mentally ill. The combined effect of being mentally disabled and unable to work is very debilitating. `Threatening the tenuous hold that these disabled individuals have had on economic security by removing or denying disability benefits produces depression anxiety and a sense of hopelessness which has too often culminated in suicide. I know of such a case in my home, Aiken County, Judge Larson, in the Minnesota case cited above, found that members of the class (i.e., psychiatric patients) had "suffered severe and irreparable harm" as a result of SSA's terminations.

The impact of erroneous decisions has been extremely serious for many patients. According to several studies, many have died from their disability while appealing a decision by SSA that they had recovered sufficiently to return to work. Many others have committed suicide. Appended to this testimony are a few brief citations of mentally ill persons who have suffered severe psychological effects as a result of a termination decision, including many who committed or attempted suicide. I cite these cases, because there are still some who will tell us that the situation is exaggerated, or that the problems have been solved. This is simply not the case, as my earlier remarks should indicate.

The hardship and economic distress as these people try to keep from losing everything they have, including their shelter and personal effects, as they attempt to live without benefits simply overwhelms the fragile hold many chronically mentally ill people have on their stability. Even a successful appeal is a lengthy process often lasting six months or more, during which profound anxiety continues. The major relief afforded by continued payment of benefits during appeal is unfortunately often destroyed by anxiety over repayment should the appeal be lost.

The information which has come to light as a result of law suits, data produced by national organizations, by the GAO and by Congressional committee investigations is devastating. Yet nothing has yet been done by the Congress to remedy the fundamental problems in the program.

The NMHA has worked as part of a very large coalition of organizations representing disabled people on a set of proposed reforms to the disability law. NMHA also, as I mentioned earlier, has worked directly with SSA to bring the specific problems with the listings, criteria and procedures as they impact upon mentally ill persons to SSA's attention and to facilitate a process whereby medical and vocational experts have worked to produce suggested revised listings, criteria and procedures. However, we believe substantial legislative changes are also needed to protect the rights mentally disabled people.

There are various proposed bills pending before this Committee which could reform the SSDI/SSI programs. NMHA supports HR 4170 as reported by the House Ways and Means Committee and S 476, introduced by Senators Carl Levin and William Cohen together with 33 Cosponsors. Both these bills contain important provisions for reform which we urge the Finance Committee to adopt. Legislation is needed which incorporates provisions addressing changes both in standards and in procedures.

The following are the most critical legislative changes. Such amendments to the law would ensure a fair evaluation for mentally ill and other disabled persons.

Standard of Review for Terminations of Disability Benefits

A specific standard should be met before a disability beneficiary is found to be no longer disabled. Many of the current problems could have been avoided if such standard were in place. The CDI process has been terminating many disabled persons whose conditions have not improved and who have been out of the work force for many years. A clear medical improvement standard should be met before anyone loses disability benefits. Exceptions may be allowed for cases where the beneficiary is working, where medical or rehabilitation techniques enable the individual to work (as demonstrated by a complete reassessment of his/her vocational and functional capacity), or where there were originally clearly erroneous decisions or outright fraud. A complete reassessment of the claimant must be made, and adequate medical and vocational evidence collected to clearly demonstrate that the beneficiary can work before that person is terminated from the program. In other words, for those already in the program who are now being reassessed, the burden of proof should lie with the government to show that this person is no longer disabled. Under current policies, the burden lies with the beneficiary who has to prove, once again, that he/she is disabled.

The Combined Effect of More Than One Impairment Should Be Considered

Individuals disabled by more than one serious medical condition currently are assessed only on the disabling effect of each condition separately. No attempt is made to judge the combined, cummulative impact of more than one impairment on someone's ability to work. This is simply unrealistic, and has caused some of the most serious adverse decisions in recent years. A new provision requiring that SSA consider the combined effect of all the individual's impairments, without regard to whether any individual impairment considered separately would be considered severe by SSA standards, is needed.

Moratorium on Review of Mentally Ill Patients

Because of the overwhelming problems with the assessment of mentally impaired individuals, a complete halt needs to be called to any further reviews of this group of beneficiaries, pending publication and implementation of new criteria. As mentioned above, SSA has instigated work groups to revise both the medical listings and the vocational evaluation criteria which are used to assess the mentally ill. These work groups have completed their assignments and have recommended fundamental and major revisions to these policies. It is inappropriate and totally unfair to continue to terminate mentally ill people from the program (in those areas where courts have not yet halted such a practice) under these outdated listings and vocational criteria. A complete moratorium, as suggested a year ago by Senator Heinz, is essential and should be enacted as soon as possible.

Continuation of Benefits to SSDI Recipients While They Appeal

Legislation to extend the temporaty law authorizing payment to SSDI beneficiaries while they appeal a termination decision failed to pass the House at the end of the last session. In place of a series of extensions of this importaht provision, we urge enactment of such legislation on a permanent basis. Providing for continuation of benefits during appeal clearly helps to ease the severe financial hardships suffered by these disabled people.

Qualifications of Medical Professionals Evaluating Mental Impairment Cases

As cited above, the GAO found that few states have either a psychiatrist or a psychologist to assess mentally ill clients and to complete the Residual Functional Capacity form. Knowledgeable psychiatric/psychological consultation is essential to make an accurate determination about a mentally disabled applicant, whose disability may not be readily apparent to lay people or to other physicians. It is especially critical that a qualified mental health professional assess claimants who are about to receive an unfavorable decision so as to assure that such decisions are accurate.

Uniform Standards Which Ensure That All Levels of the System Follow the Same Procedures Which Must Be Consistent with Federal Law and Publication for Public Comment of All Standards and Policies.

The totally inadequate system used by SSA to assess the vocational ability of mentally ill clients did not fully come to light until documents were released to the court in the Minnesota class action suit filed by the MHA of Minnesota. As it turned out, the beginning of the appallingly inappropriate policy which presumed that any younger chronically mentally ill person could work if his/her condition did not meet the listings, was a 1978 SSA memo, part of its update to the manual (POMS). This major shift in policy, which was completely at odds with recent research in the field, was issued in secret and there was no way for mental health organizations to know that this had occurred.

This is an example of why policy changes must be published by SSA for public review and for public comment. Only routine implementing instructions should be issued through the POMS. The published regulations, representing agency policy then should be completely binding on all levels of adjudication, including the Administrative Law Judges. This will then address the problem of uniform standards for the system, while at the same time ensuring that those standards are as appropriate as possible.

Compliance With Court Orders

SSA's policy of not following in other areas major court decisions made in one jurisdiction makes for extremely uneven application of federal policies. For instance, the Minnesota decision will be applied only in Region V, until or unless similar decisions are made in all area. This situation leaves those who have the resources to bring a suit at an advantage over those who cannot. A provision, such as the one in HR 4170, which requires that SSA either follow or appeal a court ruling would be of great assistance in ensuring a nationally coherent and consistent policy.

Benefits for Those Participating in a Rehabilitation Program

A number of changes should be made to improve the rehabilitation of mentally disabled beneficiaries under both SSDI and SSI. At this time, NMHA supports the provisions in HR 4170, which are extremely modest, and which would give rehabilitation agencies some incentives to serve the SSDI/SSI population. It would also be appropriate for the proposed Advisory Council to study and recommend improved ways of assuring the provision of rehabilitation services for beneficiaries who might be able to leave the rolls with the help of such services.

The provisions I have described are all contained in HR 4170, and most are also included in S 476, although the exact language may vary. NMHA is not wedded to one particular piece of pending legislation, but does believe that both these bills contain essential elements to reform the disability programs.

Until changes such as these are enacted, and as long as the Administration continues its review and termination process without regard to an adequate assessment of the capacity of mentally ill people to engage in substantial gainful employment, tragedies will continue. For the deeply depressed and chronically despairing patient who constantly debates the value of his or her life, withdrawal of benefits can precipitate the most tragic withdrawal symptoms of all -- suicide.

As a volunteer and a concerned citizen, I petition on behalf of millions of mentally ill persons -- persons who can't come here to petition on behalf of their own interests. We ask for no special considerations -- just benefits to which mentally disabled people are fairly and honestly entitled.

In conclusion, I want to urge you to act, and to act very soon. I believe without a doubt that we have more than enough evidence that current policies have hindered recovery by handicapped persons, and must be reformed. What is required is a solution enacted by Congress, rather than a piece-meal approach. We cannot defend the current policy on the basis of cost-saving when we are taking money from truly handicapped people with no alternatives. On behalf of these, and out of the deep concern I share with my fellow volunteers across the nation, I urge you to enact this vital legislation promptly and before this session of Congress ends.

ATTACHMENT

Arizona

1. Male, age 38

   Disability - Neurofibromatosis, depressive neurosis

   Psychological effect - suicide following termination of benefits

   CDI Outcome - Benefits restored posthumously

2. Female, age 60

   Disability - Disequillibrium, depression, heartfailure

   Psychological effect - suicide

   CDI Outcome - Benefits restored posthumously

3. Male, age unknown

   Disability - Unknown

   Psychological effect - attempted suicide following termination of benefits

   CDI Outcome - Case in appeal

4. Male, age 50

   Disability - Cataracts, glaucoma, heart condition, stroke, diabetes

   Psychological effect - severe psychological strain, divorce

   CDI Outcome - Benefits restored posthumously after death from natural causes

Arkansas

1. Male, age 56

   Disability - Fibrodysplasia

   Psychological effect - suicide following benefit termination

   CDI Outcome - Unknown

2. Male, Age Unknown

   Disability - severe heart problems

   Psychological effect - severe depression

   CDI Outcome - Benefits reinstated posthumously following death due to natural causes

3. Female, Age Unknown

   Disability - Paranoia

   Psychological effect - suicide following mental deterioration

   CDI Outcome - Benefits reinstated posthumously

4. Male, Age 55

   Disability - Ten year history of psychiatric impairment

   Psychological effect - Attempted murder of wife and children and attempted suicide

   CDI Outcome - Benefits reinstated

5. Male, Age 45

   Disability - Unknown

   Psychological effect - Severe psychiatric regression (inability to talk or speak) with resultant depression

   CDI Outcome - Benefits reinstated

6. Male, Age unknown

   Disability - Psychiatric impairment

   Psychological effect - Severe psychological deterioration

   CDI Outcome - Benefits reinstated

7. Male, Age 35

   Disability - Psychiatric Disability

Psychological effect - Emotional deterioration with violent reaction

CDI Outcome - Benefits reinstated

California

1. Female, Age Unknown

Disability - Psychiatric impairment, immune system deficiency

Psychological effect - Attempted suicide

CDI Outcome - Unknown at present although the ALJ declared the claiment disabled. Information available at present indicates that disability benefits have not been reinstated

2. Female, Age 26

Disability - Schizophrenia, depression, alcohol and drug abuse, health destructive behavior

Psychological effect - Deterioration of previous emotional gains, rehospitalization of five occasions within six months.

CDI Outcome - Benefits reinstated

3. Male, Age 43

Disability - Nerve damage to arms, obesity, high-blood pressure, Arthritis

Psychological effects - Major depressive disorder with memory lapses and suicidal ideation following termination, diabetes and development of peptic ulcer.

CDI Outcome - Unknown

4. Male, Age 52

   Disability - Heart condition

   Psychological effect - Depression, dementia, psychological deterioration

   CDI Outcome - Reinstatement following rehabilitation attempt which determined via work evaluation that he was unable to work

5. Male, Age 33

   Disability - Quadraplegia

   Psychological effect - Severe depressive reaction following termination of benefits

   CDI Outcome - Benefits reinstated in 1980 then terminated again in 1982. Suicidal ideation following second termination.

   CDI Outcome of second termination unknown

6. Male, Age 42

   Disability - Dysthymic disorder

   Psychological effect - Deterioration precipitated by elemination of benefits, diagnosis changed to major depression with psychotic features, attempted suicide

   CDI Outcome - Awaiting ALJ decision

7. Female, Age 53

   Disability - Involutional paranoid psychosis

   Psychological effect - Psychological deterioration with severe depression

   CDI Outcome - Benefits reinstated

8. Female, Age 37

   Disability - Alcoholism and depression

   Psychological effect - Psychological deterioration with repeated hospitalization

   CDI Outcome - Benefits reinstated on appeal

9. Male, Age 40
    Disability - Severe depression
    Psychological effect - Attempted suicide twice, and subsequent psychiatric rehospitalization
    CDI Outcome - Benefits reinstated
10. Male, Age 30
    Disability - Borderline personality disorder with opiate dependence chronic severe fluctuating depression, social anxiety and paranoid tendency
    Psychological effect - Suicide
    CDI Outcome - Unknown
11. Male, Age 58
    Disability - Unknown
    Psychological effect - Successful suicide following two previous suicide attempts
    CDI Outcome - Unknown
12. Female, Age 30
    Disability - Latent schizophrenia and chronic depression
    Psychological effect - Attempted suicide twice
    CDI Outcome - Benefits reinstated
13. Female, Age 39
    Disability - Chronic undifferentiated schizophrenia; bipolar affective disorder
    Psychological effect - Multiple hospitalizations due to exacerbation of psychiatric impairment (unable to appear at hearing due to hospitalization)

CDI Outcome - Benefits reinstated

14. Male, Age 42

Disability - Unknown

Psychological effects - Suicide

CDI Outcome - Unknown

15. Male, Age 52

Disability - Angina, high blood pressure, multiple heart surgeries, depression

Psychological effect - Death due to natural causes brought on by stress

CDI Outcome - Unknown

Connecticut

1. Male, Age Unknown

Disability - Paranoid schizophrenia

Psychological effect - Attempted suicide, multi hospitalizations since termination

CDI Outcome - Result of appeal unknown

2. Female, Age Unknown

Disability - Paranoid schizophrenia

Psychological effect - Severe psychological regression with cessation of medicine

CDI Outcome - Unknown

3. Female, Age Unknown

Disability - Paranoid schizophrenia

Psychological effect - Attempted suicide

CDI Outcome - Case on appeal

4. Female, Age Unknown

   Disability - Psychiatric impairment

   Psychological effect - Psychological deterioration, rehospitalization

   CDI Outcome - Appeal denied

5. Male, Age Unknown

   Disability - Unknown (Childhood spent in state institution)

   Psychological effect - Deterioration, rehospitalization

   CDI Outcome - Benefits denied

6. Female, Age Unknown

   Disability - Unknown (psychiatric impairment suspected from documentation supplies)

   Psychological effect - Deterioration, increased anxiety, tremors, rehospitalization

   CDI Outcome - Benefits denied

7. Male, Age Unknown

   Disability - Paranoia, anxiety, alcoholism

   Psychological effect - Rehospitalization which required surgery for severe alcohol related complications

   CDI Outcome - Benefits reinstated

8. 4 of 8 individuals residing in a community transition residence

   Disability - Psychiatric impairment

   Psychological effect - 4 of 8 individuals experienced accute episodes following termination

   CDI Outcome - Benefits of 4 individuals reinstated on appeal, 4 others still awaiting decisions on appeal

Florida

1. Male, Age Unknown
   Disability - Unknown
   Psychological effect - Miocardial infarction as a result of termination
   CDI Outcome - Because of overwhelming evidence that the emotional stress from the termination precipitated the miocarcial infraction, total and permanent disability benefits were awarded.

Illinois

1. Male, Age Unknown
   Disability - Heart disease
   Psychological effect - Death due to heart attack following termination
   CDI Outcome - Unknown
2. Male, Age 89
   Disability - Back injury
   Psychological effect - Suicide
   CDI Outcome - Unknown

Iowa

1. Male, Age Unknown
   Disability - Heart disease
   Psychological effect - Suicide
   CDI Outcome - Unknown

2. Female, Age 50

   Disability - Psychiatric impairment, moderately severe physical problems

   Psychological effect - Suicide

   CDI Outcome - Benefits reinstated

3. Female, Age late 20's

   Disability - Psychiatric impairment

   Psychological effect - Seizures, psychological deterioration, hospitalization, attempted suicide

   CDI Outcome - Benefits reinstated

4. Female, Age 34

   Disability - Psychiatric impairment

   Psychological effect - Deterioration, depression, suicidal ideation, rehospitalization

   CDI Outcome - Appeal pending

5. Male, Age 50

   Disability - Chronic pulmonary disease, severe duodenal ulcer, arthritis, degenerative disk of the lumbar spine

   Psychological effect - Heart attack following termination

   CDI Outcome - Benefits reinstated posthumously

<u>Maryland</u>

1. Female, Age 51

   Disability - Alcoholism, psychiatric impairment

   Psychological effect - Suicidal ideation, physical and mental deterioration

   CDI Outcome - Appeal pending

Massachusetts

1. Male, Age 18

   Disability - Mental retardation, severe depression

   Psychological effect - Attempted suicide

   CDI Outcome - Benefits reinstated

2. Male, Age 48

   Disability - Work related injury of unknown diagnosis

   Psychological effect - Suicide

   CDI Outcome - Unknown

Michigan

1. Male, Age 46

   Disability - Back injury

   Psychological effect - Suicide

   CDI Outcome - Appeal denied

2. Male, Age 49

   Disability - Severe diabetes since childhood, blind left-eye, tunnel vision right-eye, stroke

   Psychological effect - Death due to heart attack as a result of stress suffered by termination

   CDI Outcome - Unknown

3. Female, Age 50

   Disability - Psychiatric impairment

   Psychological effect - Emotional deterioration which resulted in exposure and frostbite resulting in several toes being removed. As an aside, the elderly retarded man for whom she worked as a housekeeper was found dead in his home with no heat and no food.

CDI Outcome - Appeal pending

4. Female, Age Unknown

Disability - Psychiatric impairment

Psycho~~logical ef~~fect - Emotional deterioration resulting in loss of 25 pounds, attempted suicide and rehospitalization

CDI Outcome - Appeal in process

5. Male, Age Unknown

Disability - Schizophrenia, depression, paranoia

Psychological effect - Emotional deterioration

CDI Outcome - Benefits reinstated

6. Male, Age 28

Disability - Schizophrenia

Psychological effect - Emotional deterioration

CDI Outcome - Appeal pending

7. Male, Age Unknown

Disability - Psychiatric impairment

Psychological effect - Emotional deterioration

CDI Outcome - Benefits reinstated

8. Male, Age Unknown

Disability - Herniated lumbar disk

Psychological effect - Suicide

CDI Outcome - Unknown

Minnesota

1. Female, Age 38

   Disability - Retardation, personality disorder, obesity

   Psychological effect - Emotional deterioration with subsequent autistic behavior and severe weight gain

   CDI Outcome - Benefits reinstated

New York

1. Female, Age 29

   Disability - Paranoid schizophrenia

   Psychological effect - Suicide

   CDI Outcome - Benefits reinstated

2. Male, Age 42

   Disability - Psychiatric impairment

   Psychological effect - Emotional deterioration, rehospitalization (first time in 15 years)

   CDI Outcome - Unknown

3. Male, Age 30

   Disability - Psychiatric impairment

   Psychological effect - Emotional deterioration resulting in rehospitalization

   CDI Outcome - Unknown

4. Male, Age 62

   Disability - Asthma, heart disease

   Psychological effect - Depression

   CDI Outcome - Benefits awarded posthumously following death due to natural causes.

Ohio

1. Male, Age 52

Disability - Head injury

Psychological effect - Suicide

CDI Outcome - Unknown

Oregon

1. Male, Age 45

Disability - Polio, paranoid schizophrenia

Psychological effect - Suicide

CDI Outcome - Unknown

Pennsylvania

1. Female, Age 40

Disability - Paranoid schizophrenia

Psychological effect - Suicide

CDI Outcome - Unknown

2. Male, Age 37

Disability - Cancer

Psychological effect - Suicide

CDI Outcome - Benefits reinstated posthumously

Rhode Island

1. Male, Age Unknown

Disability - Unknown

Psychological effect - Emotional deterioration, divorce, psychiatric hospitalization

CDI Outcome - Benefits reinstated

Tennessee

1. Male, Age 48

   Disability - Heart disease, intestinal problems, chest and back problems

   Psychological effect - Emotional deterioration

   CDI Outcome - Unknown

2. Female, Age 34

   Disability - Arthritis, seizures

   Psychological effect - Attempted suicide

   CDI Outcome - Unknown

3. Male, Age 25

   Disability - Dermatological problems

   Psychological effect - Emotional deterioration, potential suicide

   CDI Outcome - Unknown

4. Male, Age Unknown

   Disability - Unknown

   Psychological effect - Suicidal ideation

   CDI Outcome - Unknown

5. Male, Age 30

   Disability - Unknown

   Psychological effect - Attempted suicide

   CDI Outcome - Unknown

Wisconsin

1. Male, Age 56

   Disability - Paranoid schizophrenia

   Psychological effect - Suicide

   CDI Outcome - Unknown

2. Male, Age 30

   Disability - Paranoid schizophrenia

   Psychological effect - Emotional deterioration, rehospitalization, suicidal tendencies

   CDI Outcome - Appeal pending

3. Male, Age 30

   Disability - Psychiatric impairment

   Psychological effect - Emotional deterioration, rehospitalization

   CDI Outcome - Benefits reinstated

The summary of cases from the 18 states listed above details only those cases in which a documentation of psychological trauma was provided. There are countless other reports of individuals who have been terminated from the Social Security Disability rolls, many of whom died while their appeal was in process. However, they were not included in this report if there was no clear documentation that the individual had experienced psychological harm as a result of the CDI process.

Several other writers have spoken of the obvious psychological trauma experienced by individuals who have been notified that their benefits have been terminated. In a letter to Senator Dennis DeConcini, an attorney from Phoenix, Arizona stated, "I have personally seen the hardship and economic distress as these people try to keep from losing everything they have, including their shelter and personal effects...this period

Ms. GARVIN. My written statement recounts the long history of appalling administration of the SSDI and SSI programs. As previous speakers have indicated, we have had repeated congressional hearings and numerous congressional and other studies over the past 2 years, all of which indicate a pattern of erroneous decisions with the most dire consequences. In major court cases, SSA has been found to be acting outside the law and arbitrarily terminating thousands of people from the SSDI rolls, and denying the initial applications of others. Failing congressional action to address these problems, Governors in about half the States have instituted moratoriums or made other substantial changes to the review procedures, as we have noted earlier. And this has left the program in chaos.

While people die from disabilities for which SSA has denied them benefits, while others commit suicide, and while still others suffer enormous emotional and economic hardships, the administration, in our view, is tinkering around the edges of the program and making a few reforms. Now my presence here today is not only because of this dismal and well documented situation, but because we have continued confirmation of serious problems. And as you noted, Senator, piecemeal solutions. And in my rounds as a volunteer in South Carolina, I have continuously heard recently of serious problems that people are experiencing.

While the House committee has reported a comprehensive reform bill, this committee has taken over a year to fill the personal commitment of the chairman for hearings in early 1983, with prompt action thereafter. We are very pleased at the announcement this morning of the chairman that he intends to report out the bill because, in our view, disabled Americans are waiting for justice.

Not only has the Senate Finance Committee taken no positive actions on these actions, neither did it take any positive actions in 1983, which was a great disappointment to us, but when Senators Levin and Cohen offered a compromise for an amendment at the end of the last session, senior members of this committee actively opposed it.

H.R. 4170 is a good bill. It does not contain all of the reforms that we believe are necessary. But because of cost considerations, it has had to be scaled down. Nonetheless, the most important reform provisions remain, provisions based on hours of testimony, months of in-depth study, and miles of newsprint. I'm happy to have the opportunity to present our views today since we feel so strongly about them, yet it is past time for hearings. And we have brought here just part of the testimony that has been gathered in past hearings to indicate how much time has been spent on that, and how slow we have been to move toward solutions.

So we urge this committee to move rapidly.

Senator HEINZ. Let the record show that the testimony is easily a foot high.

Ms. GARVIN. Easily. And that's not all we could have brought. So we urge this committee to move rapidly to bring a bill to the Senate floor. And we remain eager to work with the committee on specific language of such a bill.

Thank you, Senator.

Senator **Heinz**. Thank you very much, Ms. Garvin.

STATEMENT OF JOSEPH MANES, SENIOR POLICY ANALYST, MENTAL HEALTH LAW PROJECT, WASHINGTON, D.C.

Senator **Heinz**. Mr. Manes.

Mr. **Manes**. Thank you, Senator. My name is Joseph Manes. I'm with the Mental Health Law Project. I'm testifying on behalf of myself and the project, and Eileen Sweeney, who is further down this table, is the staff attorney of the National Senior Citizens Law Center.

The Mental Health Law Project is a public interest organization that represents mentally ill and developmentally disabled persons. And the National Senior Citizens Law Center is a national legal service support center specializing in legal problems of elderly poor people.

The Mental Health Law Project has been involved in three significant cases involving mentally disabled persons challenging their termination from the social security disability and SSI rolls. And I would like to have my statement inserted in the record, and I will try to deal with a few issues that have come to our attention and we are familiar with very briefly.

Senator **Heinz**. Without objection, your entire statement will be made part of the record.

Mr. **Manes**. Thank you.

[The prepared statement of Mr. Manes follows:]

PREPARED STATEMENT OF JOSEPH MANES

We are Joseph Manes, senior policy analyst at the Mental Health Law Project, and Eileen Sweeney, staff attorney at the National Senior Citizens Law Center, appearing today at the written request of Senator David Pryor. We are most appreciative of the opportunity to appear before the Committee today and to submit written testimony.

The Mental Health Law Project (MHLP) is a not-for-profit public interest organization that represents mentally ill and developmentally disabled persons and those so labeled. The Project is primarily funded through foundation grants and individual contributions. It is also a support center for the Legal Services Corporation working with legal services attorneys on problems affecting their mentally disabled clients, including SSDI and SSI issues.

The National Senior Citizens Law Center (NSCLC) is a national support center, specializing in the legal problems of elderly poor people. NSCLC is funded by the Legal Services Corporation and provides support services to legal services attorneys throughout the country with respect to the legal problems of their elderly and disabled clients. NSCLC responsibilities include working with legal services and aging advocates on the Social Security and Supplemental Security Income problems of their clients.

Our testimony will focus on (1) the current problems with continuing disability investigations (2) a number of issues related to the standards and procedures utilized by the Social Security Administration (SSA) in assessing disability and our recommendations regarding actions this Committee should take to remedy these problems; and (3) a discussion of the cost implications of our recommendations.

In reviewing the issues set forth below, a number of underlying factors should be noted. First, with the exception of the medical improvement standard and the availability of payments pending ALJ appeal, the problems for new applicants are identical to those of recipients subjected to the CDIs.[1] Second, the problems faced by the physically impaired with the system, particularly those with multiple impairments, cardiac conditions and difficult-to-diagnose diseases, such as lupus and multiple sclerosis, are no less severe than those faced by mentally impaired persons. Third, the changes we recommend are applicable to both the SSI and OASDI programs. As discussed further in section II D, infra at page 31, the Secretary's immediate plans to undercut the constitutionally protected right of SSI disability recipients to a full and fair hearing before termination of benefits requires that this Committee act quickly to statutorily mandate that SSI benefits will continue through the administrative law judge level of appeal. This provisión is included in both S. 476 and Title IX of H.R. 4170.

Fourth, we must stress that the need for legislative action to correct inequities in the OASDI and SSI disability programs have not diminished. The changes announced by Secretary Heckler in June 1983 emphasize, rather than mitigate, this need. Fur-

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[1] For example, the disability insurance allowance rate has dropped from 46% in 1977 to only 29% in 1982. Table 10, page 14, "Staff Data and Materials Related to the Social Security Act Disability Programs," Committee on Finance, U.S. Senate (Sept. 1983).

ther, the decisions of numerous federal courts and the actions of over two dozen states to protect claimants and beneficiaries from SSA's lawlessness only serve to emphasize the need for congressional initiative in this area. We note that the notice for this hearing focused on the states' actions. This focus is inappropriate and will not solve the underlying problems. Many of the states have felt obligated to act precisely because the Congress has not.

Finally, we join with others today in stating our belief that another simple extension of benefits through the ALJ appeal level is inadequate. That extension only serves to delay the inevitable illegal termination. Substantive changes must be made in the standards which SSA is applying in these cases. We see Title IX of H.R. 4170 or S. 476, with certain modifications which will be discussed below, as the most appropriate congressional response to these problems.

I. THE STANDARDS UTILIZED BY SSA IN EVALUATING DISABILITY SHOULD BE CHANGED.

In our experience, there are essentially five problems in the area of standards which currently are creating the greatest hardships for disabled beneficiaries and applicants:

A. SSA's insistence on terminating benefits despite the absence of medical improvement;

B. SSA's failure to consider vocational factors in assessing whether an impairment is severe;

C. SSA's refusal in many cases to consider the combined effects of multiple impairments;

D. SSA's failure to consider the existence of pain and the effect which debilitating pain has upon the ability to perform substantial gainful activity; and

E. SSA's failure to properly evaluate the impairments and limitations of mentally disabled individuals.

The following is a brief discussion of each problem area.

A. SSA should be required to continue benefits unless there is evidence of medical improvement or that the original decision was clearly erroneous.

Numerous courts have issued rulings requiring SSA to have evidence of medical improvement or to demonstrate that the original decision was clearly erroneous before terminating disability benefits.[2] This has been the position of courts in SSI, SSI "grandfathered," and DI worker's disability cases. Other courts have ruled that once a person has been found to be disabled, there is a presumption that he/she remains disabled and that SSA has the burden of proving that he/she is no longer disabled.[3] SSA has issued "rulings of non-acquiescence" in at least two of these cases, *Patti* and *Finnegan*.[4]

It is worth noting that SSA already applies the "medical improvement" analysis in two contexts: First, in determining whether any individual whose impairment is on the list of

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2. *See*, for example, *Finnegan v. Mathews*, 641 F.2d 1340 (9th Cir. 1981); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Musgrove v. Schweiker*, 552 F. Supp. 104 (E.D. Pa. 1982); *Singleton v. Schweiker*, 551 F. Supp. 715 (E.D. Pa. 1982); *Shaw v. Schweiker*, 536 F. Supp. 79 (E.D. Pa. 1982); *DeVault v. Schweiker*, No. 81-0070-C (N.D.W. Va. 1982); *Dudley v. Schweiker*, No. 81-0004-C (N.D.W. Va. 1982); *Trujillo v. Heckler*, No. 82-K-1505 (D. Colo. August 16, 1983); *Graham v. Heckler*, No. 83-0202-C(K) (N.D. W. Va. November 14, 1983).

3. *See*, for example, *Kuzmin v. Heckler*, No. 82-5705 (3d Cir. August 18, 1983); *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Luke v. Schweiker*, CCH Unemp. Ins. Rptr. ° 17, 933(c) (D. Miss. 1981).

4. Social Security Rulings 82-10c (*Finnegan*) and 82-49c (*Patti*). The issue of SSA's non-acquiescence is discussed, *infra*, at pp. 22-29.

"permanent disabilities" (and is thus exempt from CDI review) will be reviewed despite the exemption. Second, the notion of "medical improvement" is the basis for SSA's system of "diarying" cases for reviews. If SSA staff believe that an individual's condition is likely to improve, his/her case will be "diaried" for a particular time, at which a review will take place. In other words, SSA utilizes the concept of medical improvement when it is likely not to be beneficial to recipients (in terms of continuation of their benefits), but not when it could assist the recipient to retain eligibility. In addition, SSA is familiar with the concept of medical improvement, since it was applied regularly for a lengthy period ending in 1976.

The numerous court decisions and SSA's own current use of the medical improvement standard raise serious questions about SSA's alleged need to study the issue further (as proposed in June 1983 by Secretary Heckler).

We are aware of some interest in the Senate to include an extra exception to the medical improvement provision contained in S. 476: Where SSA finds that persons can perform their previous work, it will not be required to apply the medical improvement test. While this has a certain simplistic appeal to it, we urge this Committee to resist its inclusion in legislation for the following reasons. First, much like the current "severity" test, discussed in the section immediately following, this test creates a vague standard open to arbitrary application and abuse by SSA. If nothing else, the history of the past three years should have taught all of us that SSA's discretion must be limited in order to assure that the disability program, as it is conceived by the Congress, will be properly administered. If this exception is included, we foresee SSA utilizing it aggressively to avoid the application of the medical improvement test. Second, there is a package of exceptions to the medical improvement standards included in S. 476 and H.R. 4170. The standard will not be applied where (1) the person is now working; (2) medical or rehabilitation techniques are available which allow a person to work despite his/her unchanged medical condition; (3) the original decision was in error, or fraudulently obtained; or (4) new or improved diagnostic techniques reveal that the impairment is less disabling than originally believed. If a beneficiary is truly able to perform his/her previous work, one of these exceptions will apply. The Committee should consider the Ways and Means Committee's approach of including in its report on H.R. 4170 a discussion of ability to engage in prior work as a factor SSA should consider in determining medical improvement.

Should the Committee decide to include a "prior work" exception, we recommend that it specifically state that the Secretary must have "clear and convincing" evidence that the person can perform his/her prior work. This standard would serve to reduce the potential for abuse while leaving the Secretary free to utilize any of the other exceptions described above.

B. and C. SSA should be required to consider vocational factors and the combined effect of all impairments in assessing severity of impairment.

In 1982, SSA denied or terminated 40.2% of the DI disability cases it adjudicated on the basis of "slight" (read "non-severe") impairment.[5] In 1981, the figure was even higher: 45.2%.[6] The figures for SSI are unavailable but are likely to be comparable.

These high rates of denial and termination result from two factors:

(1) SSA fails to consider vocational factors in assessing severity of impairment.

(2) SSA refuses to consider the combined effects of "non-severe" impairments in assessing severity.

Each factor is discussed below.

(1) SSA fails to consider vocational factors in assessing severity of impairment.

Under SSA's sequential evaluation process, the finding of non-severity is wholly medical; no consideration is given to the vocational factors (age, education and work experience). See 20 C.F.R. § 404.1520(c). SSA has taken the position that Congress intended that there must be a solely medical assessment initially. Further, SSA claims that it would be extremely burdensome for it to have to perform vocational assessments where the person only has a very minor impairment, characterized as the "stubbed toe" argument.

42 U.S.C. § 1382c(a)(3)(B) provides that in order to be eligible to receive SSI, a person "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do

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[5] "Background Material and Data on Major Programs Within the Jurisdiction of the Committee on Ways and Means," Committee on Ways and Means, U.S. House of Representatives, WMCP: 98-2, p. 79 (Feb. 8, 1983).

[6] *Id.*

his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." Here, the "severity" standard incorporates both the medical and vocational factors. Identical language is provided in 42 U.S.C. § 423(d)(2)(A). In the last few years, there have been many court decisions upholding SSA's determination that the claimant did not have a severe impairment. However, it does not appear that the plaintiffs challenged the validity of SSA's procedure for applying the "non-severe" step. In Scruggs v. Schweiker, 559 F. Supp. 100, 103 (M. D. Tenn. 1983), the court held that SSA could not separate out the medical from the vocational:

> Thus, it appears that Congress fully intended that the severity of clinically established impairments be considered in relation to the vocational prospects of the individual. A non-severe finding, with nothing more, does not comply with this statutory requirement.

The Scruggs decision addressed both Titles II and XVI (SSI). 559 F. Supp. at 102.

SSA has itself wholly undermined its "stubbed toe" analysis, effectively eliminating it as a basis for concern. In Lofton v. Schweiker, 653 F.2d 215, 217-18 n.1 (5th Cir. 1981), the court refers to SSA's introduction to the 1979 regulations which included the sequential evaluation process:

> The Secretary observed that:
>
> > "In most cases that involve an impairment that is not severe, the vocational evaluation guides can be applied as efficiently as can the nonsevere impairment principle. Most cases of this kind do not require extensive investigation of a person's vocational background in order to evaluate them under the vocational

> guidelines. We can decide many cases of this type on the basis that a person can return to his or her most recent occupation." The Secretary is currently studying the feasibility of revising this regulation.

Of course, the burden is on disabled individuals to prove that they cannot perform their past relevant work. It is not until after that step that the burden shifts to SSA. As a result, the cost of properly including a vocational assessment is low, while assuring that those entitled to receive full vocational assessments receive them. SSA said "most," not all, would be picked up at the past relevant work stage. The others are entitled by statute to a full vocational assessment.

Neither S. 476 nor H.R. 4170 will solve this problem. The Ways and Means Committee "notes that the Secretary has already planned to re-evaluate the current criteria for non-severe impairments, and urges that all due consideration be given to revising those criteria to reflect the real impact of impairments upon the ability to work." ("Report of the Committee on Ways and Means, U.S. House of Representatives on H.R. 4170," No. 98-432, Vol. I, p. 414.) We recommend that the Finance Committee take the Scruggs approach and require SSA to include the vocational factors in evaluating "severity." However, at a minimum, we urge the Committee to take the approach adopted by the Ways and Means Committee, with one addition: SSA has been "re-evaluating" the severity step since 1979, see the Lofton citation, supra. Therefore, we recommend that the Congress mandate that SSA complete its "re-evaluation" within three months of enactment of the legislation and submit a report to the Congress at that time which specifies any changes it has made in the severity step.

(2) SSA refuses to consider the combined effects of "non-severe" impairments in assessing severity.

SSA has taken the position that it will not combine the effects of "non-severe" impairments in assessing severity. In Social Security Ruling # 82-55, SSA stated:

> Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

SSA's own regulation is even worse. 20 C.F.R. § 404.1522 provides that SSA "will consider the combined effects of unrelated impairments only if all are severe and expected to last 12 months."[7]

The result of the application of either the regulation or the ruling is that many severely disabled individuals are being denied benefits or having their benefits terminated because SSA fails to acknowledge the existence of some or all of their impairments and fails to consider the impact of these impairments upon their ability to engage in substantial gainful activity.

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[7] While SSR 82-55 can be read as a liberalization of the regulation, its content has been SSA's policy for some time. This presents an excellent example of a situation where SSA should have utilized the public notice and comment procedures of the Administrative Procedure Act. Had it done so, it might have developed a policy very different from the current policy which excludes consideration of numerous impairments.

Both S. 476 and H.R. 4170 address this problem well. Each simply requires the Secretary to consider the combined effect of <u>all</u> impairments in assessing severity. This does not in any way modify the disability test set forth in the statute but assures that all disabled individuals will receive full and fair consideration of the effects of all of their impairments. We note, however, that the version of S. 476 considered by the full Senate in November 1982 made the effective date for this provision January 1, 1985. There is no excuse for delaying application of such a necessary reform in the disability programs. The delay simply perpetuates the damage suffered by those individuals reviewed this year. We therefore stress the importance of providing the earliest effective date possible for this provision.

D. SSA should be required to consider all evidence of the existence and degree of pain.

Despite its logical relevance to the issue of disability, "pain" is a concept foreign to SSA. While it is discussed in SSA's regulations, it has been stripped of its meaning to the point where it no longer exists as a factor to be considerd in most, if not all, disability evaluations. For example, in Social Security Ruling 82-55, SSA identified a number of impairments which it has determined to be "non-severe." In doing so, SSA stated that it had presumed a level of pain for each condition. "In formulating these examples, the potential for severe and prolonged pain has been considered. These conditions are not expected to produce severe and prolonged pain." In other words, in its designation of "non-severe" conditions, SSA ha categorically eliminated consideration of pain even if the applicant presented proof of severe and prolonged pain.

Further, in Social Security Ruling 82-58, SSA limited the consideration of pain further than that set forth in its own regulations. 20 C.F.R. § 404.1529 provides:

> If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.

Despite the rule that it will consider pain if there is evidencee of "a medical condition that could be reasonably expected to produce those symptoms," SSA added an extra test in SSR 82-58:

> Symptoms will not have a significant effect on a disability determination or decision unless medical signs or findings show that a medical condition is present that could reasonably be expected to produce the symptoms which are alleged or reported. However, once such a medical condition (e.g., disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of symptoms and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss and

> atrophy. There must be an objective basis to support the overall evaluation of impairment severity. It is not sufficient to merely establish a diagnosis or a source for the symptom.

H.R. 4170 (Section 902) requires SSA to have the National Academy of Sciences conduct a study of the issue of pain and report back to the Congress by April 1, 1985. SSA's opposition to this provision is based in its apparent assumption that any objective study would recommend that pain be considered as one aspect of each individual's impairments, as well as suggest evidentiary mechanisms for establishing the existence of pain.

S. 476 takes a very different approach which, on its face, we believe to be an improvement over SSA's current practices. S. 476 requires SSA to focus on proof of the existence of pain, <u>not</u> the underlying symptoms. It is our understanding that this approach was developed after consultation with pain specialists who believe that the existence of pain, not its connection to an underlying condition, is the appropriate approach to take in assessing the effects of pain. We would support this approach. However, we believe that SSA has erroneously interpreted this section of S. 476 to essentially codify its current abusive practices. This conclusion is drawn from the actuary's estimate that the pain provision will have no impact on DI costs. Unless there is explicit legislative history supporting the original intent of S. 476, we fear that the provision will result in greater confusion on the pain issue. Without legislative history, if the provision is enacted and SSA merely continues its current practices, it is reasonable to expect that there will be numerous lawsuits challenging SSA's interpretation.

We therefore recommend the S. 476 definition of pain with a clear statement of the intent of the provision. Failing that, the Committee should adopt the study approach of H.R. 4170, specifying in its report that the several circuit court of appeals decisions regarding pain which are favorable to claimants will remain in force until the Congress acts to put a statutory standard in place.

E. SSA has not properly evaluated the impairments and limitations of mentally disabled individuals.

Our testimony here is based upon MHLP's experience as counsel for the plaintiffs in three class actions in Minnesota, New York and Utah. These cases involve challenges to the Social Security Administration's termination from the disability rolls of mentally disabled recipients. In the case of Mental Health Association of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), aff'd, 720 F.2d 965 (8th Cir. 1983), a federal district court ordered SSA to revise its standards for determining mental disability and re-evaluate all cases of denial or termination of benefits to mentally disabled persons. A similar result was recently ordered for a New York class, City of New York v. Heckler, No. CV-83-0457 (E.D.N.Y. Jan. 11, 1984).

MHLP's research in these cases has consistently demonstrated that the Social Security Administration short-circuits the Social Security Act and its regulations during the conduct of continuing disability investigations. SSA communicated a new standard to its regional offices and state agencies: Mentally impaired claimants under the age of 50 who did not meet SSA's "Listing of

Impairments" were *presumed* capable of at least unskilled work. This presumption almost invariably resulted in denial of disability benefits. In its preliminary ruling in *Mental Health Association of Minnesota v. Schweiker*, the court found that "SSA has no medical, vocational or other empirical or scientific basis for presuming that a mentally impaired person whose condition does not meet or equal the Listing retains the residual functional capacity to work." The court issued a far-reaching injunction, applicable to the six states in the Chicago region, against continued application of this presumption. The court ordered SSA to restore benefits to all mentally disabled persons who were adversely affected by CDIs since March 1981 and to re-evaluate their eligibility.

Documentation of almost identical practices in Utah (*H.J. v. Schweiker*) and New York cases demonstrates that the policy of presumption was not the "aberration" SSA claimed in its defense, only practiced in the Chicago region, but a firm national SSA policy -- one which has been in place for several years. As early as August 1978, the chief consulting psychiatrist in the New York regional office, Dr. Anne Geller, wrote: "It is clear that whether a claimant can withstand the stress of work or not is never a consideration. Unfortunately these are the guidelines we have to follow even though common sense and psychiatric experience dictate otherwise." She went on to say, "I therefore conclude that in younger workers medical-vocational allowances are not considered when the impairment is psychiatric." [Internal memorandum, N.Y. Regional Office, August 24, 1978] The federal district court in *City of New York* found that the "evidence of the fixed clandestine policy against those with mental illness is overwhelming." Slip op. at 17. In Utah, MHLP has completed a review of all initial applications by mentally impaired persons over a two-and-a-half-year period. We found no cases of a disability finding based on a medical-vocational evaluation.

We believe that such neglect of the required sequential evaluation process can be corrected only through legislation. H.R. 2987, sponsored by Congressmen Shannon and Stark, required a realistic evaluation of each claimant's ability to work. For mentally disabled individuals, section 104 required a work evaluation, at an actual or simulated work site. Section 105 prohibited the practice of improperly equating the capacity to do sheltered work with ability to hold a competitive job. We endorsed these requirements.

The Ways and Means Committee, however, considered but deleted these legislative requirements from the provisions of H.R. 4170 in favor of report language. The report reads:

> The committee is also concerned that the evaluation of the person's ability to work be made in a context that accurately reflects the capacity to work in a normal, competitive environment. Such an evaluation does not necessarily require a full "work evaluation" by a vocational expert in each case, although such evaluations are desirable and should be used wherever feasible where the additional information provided by such evaluations would be helpful in deciding close cases. The committee particularly urges that such evaluations should be used if at all possible in cases of mental impairment, where necessary to aid in determining eligibility in "border-line" cases, at the point in the sequential evaluation process where such

> evaluations would normally be done under current policy.
>
> It is also important in such cases to evaluate the person's entire work history, rather than to examine only recent evidence of work activity, in order to determine whether the person can really engage in substantial gainful activity. The committee emphasizes that in any evaluation of work activity, the presence of work in a sheltered setting or workshop cannot in and of itself be used as conclusive evidence of ability to work at the substantial gainful activity level. Such work may be used in conjunction with other evidence that the beneficiary or claimant is not disabled, but benefits should not be denied simply because of sheltered work experience.

We recommend that the Committee adopt the requirements embodied in sections 104 and 105 of H.R. 2987. Failing that, however, we urge the Committee to endorse the report language of H.R. 4170 cited above.

An issue related to the determination of ability to work is addressed in section 3 of S. 476. This section requires SSA to consider the complete medical and vocational history of the applicant, including all evidence in the file from prior evaluations. In situations of long-term illness -- particularly chronic mental illness, which often follows an erratic course -- SSA has mistakenly accepted temporary improvement as representing an end of the disability. We endorse this provision.

II. A NUMBER OF SSA'S PROCEDURES MUST BE IMPROVED, CHANGED OR OTHERWISE REVISED TO ASSURE THAT APPLICANTS' AND RECIPIENTS' CASES ARE HANDLED EXPEDITIOUSLY AND FAIRLY.

There are a number of procedural problems which this Committee should address. These include:

A. SSA's failure (and refusal) to follow the Administrative Procedure Act (APA) in issuing new policy and changes in policy.

B. SSA's refusal to follow circuit courts of appeals decisions, instead "non-acquiescing";

C. SSA's failure to issue regulations for the states to utilize in consultative examination referrals or monitoring the process;

D. SSA's proposed inappropriate implementation of the face-to-face interview for SSI recipients at the reconsideration level of review.

Each of these problems is briefly discussed.

A. Statutory language should make clear that SSA must follow the public notice and comment requirements of the APA.

Despite the fact that SSA, as with all of HHS, has been under the Administrative Procedure Act since 1970 by order of then-Secretary of Health, Education and Welfare Elliot Richardson, SSA persists in ignoring its obligations pursuant to the APA. In particular, SSA issues new policy directives at low levels of the agency without first having published the changes in the Federal Register and obtaining public comment. SSA's own regulations admit to this practice. 20 C.F.R. § 422.406(a)(4) specifically states that the "Social Security Rulings"include "statements of policy and interpretations which have been adopted but have not been published in the Federal Register" (emphasis added).

There is a very definite need for uniformity of decision-making between the various levels of review within SSA. Apparently recognizing that use of the lowliest of SSA documents to issue policy (such as the Program Operations Manual System

(POMs), Informational Digest, and quality asurance "returns"),[8] may not be acceptable to the Congress or the courts, SSA in the past year has moved toward utilizing the "Social Security Rulings" as the source of all policy. As noted earlier, rulings contain policy never published in the Federal Register or the federal regulations. They have also been the vehicle for SSA's formal rulings of non-acquiescence (discussed below).

The rulings are not the answer to SSA's or beneficiaries' problems with the system. The public notice and comment process is well suited to SSA's needs.

Due to the size of the Social Security and SSI programs, there are many individuals and organizations with substantial expertise whose opinions and suggestions should be considered, with the likely result of changes or modifications being made in proposals. For those rare instances when an emergency exists and there is no time for public comment before implementation, the APA permits issuance of final regulations. For the rest, it is generally more useful for SSA or any agency to receive comments before a proposal is implemented, before the agency is locked in administratively to a particular program or approach.

We have no reason to believe that the process for issuing policy changes will be any longer or shorter than the time which SSA currently takes to issue proposed regulations, Social Security Rulings or other memos. In some cases,the time seems to vacillate wildly, depending upon SSA's motivation. For example, in August 1982, SSA issued interim final regulations exempting

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[8] See Mental Health Association of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), aff'd, 720 F.2d 965 (8th Cir. 1983).

burial trusts from resources in SSI, long before a somewhat similar statutory provision had even been enacted, but only shortly after the plight of an elderly woman, Mattie Dudley, became national news. At the opposite end of the spectrum, it appears that some of the rulings issued by SSA in the past year were in the drafting stages for at least a year. Given these fluctuating time frames, there is no excuse for not seeking and obtaining public comment. Proof of SSA's capabilities in quick drafting and issuance of materials was provided to us in somewhat unusual fashion in September 1982. On September 20, 1982, SSA issued a "delayed implementation transmittal" to all SSA staff.[9] In that transmittal, SSA informed local SSA offices that it expected to obtain authority, through either the 1983 appropriations bill or a continuing resolution, to suspend its obligation under § 206 of the Social Security Act, 42 U.S.C. § 406, to withhold 25% of a back award to assure that a private attorney's fees are paid. The 18-page, single-spaced memo detailed how this policy would affect even fees already awarded but not yet paid. SSA had no legislative authority for the transmittal when it was issued nor did it ever receive it. Yet, upon the expectation that it would obtain such authority, SSA staff churned out one of the most detailed, comprehensive documents it has issued in recent years. We can only conclude that, when motivated to do so, SSA can streamline its process and easily obtain the benefit of public comment. We encourage this Committee to require SSA to utilize the APA fully rather than simply acquiescing to its ing policy. Both S. 476 and H.R. 4170 contain provisions which

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[9] SSA Pub. No. 68-0203910 (September 20, 1982).

current sluggish, inverted mechanisms for creating and establish-meet this goal.

B. SSA should be required to follow the decisions of the circuit courts of appeals unless they are overruled by the Supreme Court.

NSCLC has addressed this problems in some detail in previous testimony before this Committee in August 1982. The basic problem is that SSA refuses to follow circuit court precedent even where it fails to appeal. Despite the arrogance and illegality of SSA's policy of non-acquiescing in the decisions of circuit courts of appeals, SSA persists in defending it and continuing its use.

SSA's non-acquiescence policy takes two forms. One, SSA issues "Social Security Rulings" in which it will set forth a circuit court's decision and then state that "SSA holds that" it will not follow the court's order (emphasis in original). This is known as "formal non-acquiescence." Two, SSA simply ignores many decisions of circuit courts with which it disagrees, "informal non-acquiescence." This has happened on subjects such as the consideration of pain, weight to be given a treating physician's report, consideration of the cumulative effect of impairments and evaluation of alcoholism. Regardless of the form, the practice should be eliminated.

At least four courts have now considered the issue and have ruled SSA's practice null and void; SSA is bound to follow the law of the circuit.[10]

In *Lopez*, the court stated, "[F]or the Secretary to make the general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law." As a result of this court's order, approximately 72,000 individuals terminated from the OASDI and SSI disability programs who reside within the Ninth Circuit are now entitled to have their cases redetermined under the standards enunciated in *Finnegan v. Mathews*, 641 F.2d 1340 (9th Cir. 1981), and *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982).

A statutory prohibition against SSA's non-acquiescence policy is critical. Without it, SSA will continue to hold itself "outside the law." Two concerns are sometimes raised when SSA's non-acquiescence policy is addressed. First, doesn't the IRS issue rulings of non-acquiescence? Second, if SSA is to be nationwide program, shouldn't it be administered uniformly?

The Internal Revenue Service does have a non-acquiescence policy. However, it is very different and more sensible than SSA's. For example, if the IRS issues a ruling stating that it non-acquiesces in a circuit court's decision, that ruling is applicable *outside* that circuit. The IRS will follow the circuit court's decision within the circuit. SSA, of course, issues its ruling of non-acquiescence to assure that no one within the

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[10] *Lopez v. Heckler*, No. 83-0697-WPG(T) (C.D. Cal. June 16, 1983), appeal filed in the Ninth Circuit on relief issues only, argued December 1983, stay pending appeal on one portion of the district court's order granted by Justice Rehnquist, September 9, 1983; *Siedlecki v. Schweiker*, No. C82-61R (W.D. Wash. January 28, 1983); *Chee v. Schweiker*, No. CIV-82-693-PCT-VAC (D. Ariz. December 14, 1982); *Hollingsworth v. Schweiker*, No. N81-0035C (E.D. Mo. March 3, 1983).

jurisdiction of the circuit court will follow the court's decision.

On the question of nationwide uniformity, it should be noted that the policy considerations in support of nationwide taxation policies are no less substantial than those favoring nationwide standards in Social Security. In Califano v. Yamasaki, 442 U.S. 682, 669 (1979), SSA informed the Supreme Court that it would follow the decisions of circuit courts of appeals, regardless of whether a class had been certified. "Restricted judicial review will not have a detrimental effect on the administration of the Social Security Act, the Secretary says, because he will appeal adverse decisions or abide [by] them within the jurisdiction of the courts rendering them." Further, in the same case, in an effort to avoid certification of a nationwide class, SSA argued for the need for diversity of circuit court opinions:

> [The Secretary] argues that a nationwide class is unwise in that it forecloses reasoned consideration of the same issues by other federal courts and artificially increases the pressure on the docket of this Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require our immediate attention. 11

We understand that the Secretary is relying heavily upon a recent decision of the Supreme Court, United States v. Mendoza, 52 U.S.L.W. 4019 (U.S. January 10, 1984), as alleged support for her position that she is free to ignore circuit court precedent. Her

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11. 442 U.S. at 701-02. SSA cannot have it both ways. Based upon its own representation, SSA is not really that concerned about the uniformity issue.

reliance upon this decision is highly inappropriate and should be rejected by this Committee.

In Mendoza, the plaintiff, a Philippine national, sought to bind the Immigration and Naturalization Service (INS) to a previous district court opinion in the Northern District of California ruling against the INS on the same issue as Mendoza raised. The first case had been brought on behalf of a class of 68 individuals, which did not include Mendoza. The INS never appealed the district court decision in the first case to the Ninth Circuit. However, when Mendoza's case came up, INS decided it disagreed with the earlier decision and opposed his application for naturalization. When Mendoza challenged this action in federal district court in the Northern District of California, the court found the INS to be collaterally estopped from relitigating the issue because the issue had been decided in the earlier case and INS had never appealed. The Ninth Circuit agreed. However, the Supreme Court reversed, Justice Rehnquist writing the opinion. The Court held that the federal government cannot be bound by the judicially-created doctrine of collateral estoppel. In reaching the decision, the Court stated that "A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." 52 U.S. L.W. at 4021. "We think that our conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums." *Id*, at 4022.

Mendoza does *not* address the federal government's ability to ignore circuit court of appeals precedent. The Supreme Court looked only at the issue of district court decisions. Its decision contemplates the benefits to the Court of numerous circuit courts of appeals decisions on an issue before it decides to take review. In fact, it is our understanding that the INS already follows the practice we urge the Committee to adopt here: The INS follows circuit court of appeals precedent within that circuit, unless and until the Supreme Court holds to the contrary.

Nothing in the non-acquiescence prohibition contained in H.R. 4170 or S. 476 prevents the Secretary from seeking reversal of a circuit court decision even within that circuit. There will always be a subsequent case in which she can raise her challenge for the first time in district court. Meanwhile, she remains bound, within that circuit, to the earlier circuit precedent. For example, the Secretary is now bound by a medical improvement standard in the Ninth Circuit as a result of *Patti*, *supra*; *Finnegan*, *supra*; and *Lopez*, *supra*, which obtained classwide relief based upon *Finnegan* and *Patti*. If the Secretary decided that she wanted to relitigate the medical improvement issue, the next time that an appellant filed a challenge in district court to a decision terminating benefits, the Secretary would not only argue that there was evidence of medical improvement (the *Finnegan/Patti/Lopez* test), she would also argue that, in addition, she disagreed with the standard and seek a decision supporting her position.[12]

H.R. 4170 provides that SSA will be required to acquiesce only in cases <u>decided after</u> the date of enactment of the bill or in which the time to appeal has not expired at the time of enactment. While we do not believe that this language is intended to prevent courts from enforcing earlier circuit court decisions, it would be more helpful if the bill itself simply required SSA to follow all circuit court decisions until such time as it appeals and prevails or a case on the same issue is decided to the contrary by the Supreme Court. This will ensure that SSA follows the many important circuit court decisions which it today ignores on issues such as pain, alcoholism, obesity, the weight to be accorded a treating physician's report, and the ALJ's obligation to assist an unrepresented claimant.

H.R. 4170 also includes language which could be interpreted to provide SSA with an automatic stay of a circuit court's order

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[12] Any arguments by the Secretary that this would be difficult because she cannot initiate this litigation [only the individual whose benefits are terminated or denied would be able to file suit, 42 U.S.C. § 405(g)] should be rejected. First, there are approximately 39,000 cases currently pending in the federal courts involving appeals from the Secretary's decisions. In FY 1983, more than 22,000 new appeals were filed. In earlier years, before the effect of the CDIs was felt at the district court level, the numbers were lower but still substantial: 1980, 5,000; 1981, 7,293; 1983, 7,883. Source: <u>LaBonne v. Heckler</u>, No. 4-83-40 (D. Minn. November 22, 1983). Therefore, there will always be cases in which the Secretary can raise her challenge. Second, to the extent this limits the Secretary, appellants suffer a like disability each time the Secretary decides not to appeal any unfavorable district court decision and instead simply ignores it. This is the Secretary's general practice. Virtually all circuirt court of appeals decisions in Social Security disability cases result from appeals taken by individuals after a district court has upheld the Secretary's original decision denying or terminating benefits.

any time it files an appeal with the Supreme Court, until the Court disposes of the case. We believe that this will unnecessarily increase the number of appeals which SSA files in the Supreme Court and will result in claimants and recipients being denied the benefit of helpful court decisions for many months, in some cases over a year. We recommend that this language be deleted from the bill. If substitute language is required, we recommend a provision that SSA is obligated to implement the court's order unless it seeks and obtains a stay from either that court or the Supreme Court, as provided for in Federal Rules of Appellate Procedures 41(b) and Supreme Court Rule 44.

Subject to the same types of concerns raised above with regard to H.R. 4170, we also endorse the acquiescence requirement of S. 476. However, we disagree strongly with the language contained in the version of S. 476 presented to the full Senate in November 1983. In that version, if the Secretary wished to ignore a circuit court decision, all she would have to do is notify the Congress and publish the fact in the Federal Register. While language was included which indicated that nothing in the provision was intended to preclude courts from requiring the Secretary to follow the circuit precedent, it is absurd that disabled people, often indigent and unrepresented, should be expected to sue the Secretary again and again in federal court in order to require her to follow an earlier decision of the circuit court of appeals for that circuit. This will simply perpetuate the injustices which currently exist for those without the economic, emotional or physical wherewithal or without the knowledge that SSA treated them illegally who do not appeal to federal court. In other words, "justice" at the SSA administrative level will not be the same as that meted out by a district court in the circuit. As the Ways and Means Committee has stated:

> The committee can find no reason grounded in sensible public policy to force beneficiaries to sue in order to obtain what has been declared by the Federal court as justice in a particular area. Such a policy creates a wholly undesirable distinction between those beneficiaries with the resources and fortitude to pursue their claims, and those who accept the government's original denial in good faith or because they lack the means to appeal their case. 13

We therefore recommend that the Committee adopt either the language in H.R. 4170 or in the original version of S. 476, subject to the amendments noted above.

C. SSA should be specifically required by statute to issue regulations governing the use and monitoring of consultative examinations (CE).

Section 304 of PL 96-265, the Social Security Amendments of 1980, provided that the Secretary of HHS "shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program throughout the United States." When SSA issued proposed regulations governing the federal-state agency relationship, it did not mention consultative examiations or set standards for their utilization. This is do despite the substantial administrative costs incurred in pay-

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13. "Report of the Committee on Ways and Means, U.S. House of Representatives on H.R. 4170," Report No. 98-432, Vol. I, p. 431.

ing for CEs, over $137 million in 1981 alone.[14] (As the number of CDI reviews increased ineach of the last two years, it is likely that this figure grew substantially in 1982 and 1983).

The problems with the CE process have been documented at numerous earlier hearings before the Ways and Means Committee, including those focusing solely on the volume provider CE problems. We are aware that SSA has prepared a sheet which describes in general terms administrative actions it has taken in this area. While it is not possible for us to tell from the sheet whether SSA has made significant changes, the calls to our offices regarding the poor quality of CE decisions have not been reduced. Further, there is no mention of the issuance of regulations.

We are aware of lawsuits being filed against HHS, state agencies and CEs by the surviving spouses of disabled workers who died shortly after a CE said they were not disabled and SSA terminated their benefits. It is unfortunate that such suits must be filed, particularly for the disabled worker who cannot regain his life, but if SSA does not regulate this area and improve the quality of CE evaluations it is reasonable to expect that the litigation in this area will increase.

We support the language included in H.R. 4170 requiring SSA to issue regulations on the CE issue.

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[14] Statement of Sandy Crank, Associate Commissioner for Operational Policy and Procedures, Social Security Administration, "Volume Providers of Medical Examinations for Social Security Disbility Programs," Ways and Means Committee, Serial 97-27, p. 22 (September 21, 1981).

D. Face-to-face interviews at the reconsideration level of the review: SSA's actions with regard to SSI.

Currently, when disabled SSI recipients receive a notice of termination, they are entitled to appeal directly to the ALJ level and to receive benefits pending appeal at that level. Unlike DI cases, there is no intermediate "reconsideration level" of review. In PL 97-455, Congress required the Secretary to install face-to-face interviews at the reconsideration level in DI cases. In her proposed rules establishing this process, the Secretary has stated that she intends to create the same process for SSI disability cases. 48 Federal Register 36831 et seq. (August 15, 1983). This might be tolerable, except that the Secretary has also decided to pay benefits only through this new reconsideration level in SSI cases, rather than through the ALJ appeal.

Unfortunately, while benefits pending appeal are constitutionally mandated in welfare programs, see Goldberg v. Kelly, 397 U.S. 254 (1970), this requirement has never been codified for SSI purposes. The requirement currently exists only in the SSA regulations governing SSI. Both S. 476 and H.R. 4170 contain a provision which will require SSA to pay SSI (and DI) benefits through the ALJ level. We strongly endorse this proposal.

Policy reasons dictate against the Secretary's proposal to pay SSI benefits only through reconsideration. The new face-to-face hearing process suffers from numerous deficiencies which render it inadequate to provide the due process prior hearing mandated by Goldberg. For example: (1) SSA will not permit the beneficiary to subpoena witnesses at the reconsideration level.

48 Fed. Reg. 36835. In Goldberg v. Kelly, 397 U.S. at 270 (1970), the Supreme Court specifically held that due process requires that welfare recipients "must . . . be given an opportunity to confront and cross-examine the witnesses relied upon by the defendant." (2) SSA supervisors, not present at the hearing, will be permitted to reverse the hearing officer's decision before it is issued. (3) The hearing officer will be permitted to rely upon hidden witnesses, by consulting with "experts" by telephone but not informing the beneficiary. (4) SSA does not intend to provide reasonable access to the case file prior to the hearing. (5) The summary of the evidence which will be included in the decision will be prepared before the hearing by someone other than the hearing officer, raising the likelihood that the hearing officer will not carefully review the evidence. This possibility is increased by the short time periods permitted for each case by SSA.[15]

After the comment period had expired on the proposed regulations for implementation of face-to-face interviews at the reconsideration level, Commissioner McSteen informed the states that they, not SSA, would conduct these interviews. Despite this radical change, SSA does not intend to issue new proposed rules. Instead, pursuant to an opinion from its Office of General Counsel, SSA plans to issue the final regulations shortly, without the benefit of public comment on the critical state procedural issues. We urge this Committee to investigate this matter and to request the Secretary to delay issuance of final regulations

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[15] Items (2) through (5) are derived from materials obtained from SSA through the Freedom of Information Act. We will be happy to submit documentation upon request.

until she has properly sought and obtained public comment on the state procedural issues.

III. SECRETARY HECKLER'S JUNE 1983 PROPOSALS DID NOT ADDRESS THE PROBLEMS FACED BY MOST DISABILITY BENEFICIARIES SUBJECTED TO CDI REVIEW.

The following is a brief discussion of each of Secretary Heckler's recent proposals along with our concerns about each.

A. SSA has identified new categories of "permanently disabled" individuals who, by virtue of this recategorization, will be exempt from CDI review.

We welcome any effort to identify more disabilities as permanently disabling. However, it is very important that the Congress focus on the types of impairments which SSA began in June 1983, for the very first time, to identify as permanently disabling. The additions to the list include:[16]

- Ischemic heart disease with chest pain of cardiac origin
- Parkinsonian syndrome, with disturbance of movement, gait, or station as required by the applicable listing (at any age, not just over age 59)
- Anterior poliomyelitis, with interference in swallowing, breathing, speech, or motor function as described in the applicable listing (at any age, not just over age 59)
- Chronic brain syndrome (organic brain syndrome) with manifestations as required by the applicable listing

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[16] Source: "Emergency DI/SSI Instructions," OC-83-145 (1027), IT-159-83, June 11, 1983 ("corrected copy").

- Functional psychotic disorders if institutionalized in a licensed mental hospital for past 12 months without releases that would indicate improvement
- Mental retardation, with IQ of 60 to 69 and another physical or mental impairment

It is troubling to imagine that anyone, much less SSA, had difficulty in determining that these impairments were permanently disabling. Yet, from March 1981 through May 1983, SSA reviewed the cases of individuals with exactly these impairments and, we believe, terminated many of their cases. Given this SSA action so late in the review process, SSA should be required to go back and review the cases of recipients whose benefits were terminated who suffer from impairments just added to this list. As noted earlier, this category has the benefit of a medical improvement standard not available to the vast majority of OASDI and SSI beneficiaries. If they had originally been in that category, in all likelihood, their benefits would still be being paid. But, those who did not have the benefit of the medical improvemennt standard were often told instead that their impairments were "not severe." These cases that were terminated should be reviewed immediately and benefits should be reinstated.

B. SSA will propose legislation that benefits be continued through the reconsideraiton level of review and that SSA will be required to review state agency decisions denying benefits as well as allowing benefits.

The problems with providng aid pending only through the reconsideration level are discussed earlier in our testimony. Further, while the terms of PL 97-455 are temporary, this proposal represents a cut from the current payment scheme.

We agree that it would be helpful for SSA to review state agency denials as well as allowances. It is our understanding that SSA is already doing that to some extent. This proposal was first made one year earlier at the Social Security Subcommittee of Ways and Means' hearing on March 16, 1982, by then-Commissioner Svahn.

C. SSA will "study" whether changes should be made with regard to evaluation of severity of impairment and possible use of a medical improvement standard.

These issues are discussed earlier in our statement. The time for "study" of these issues was exhausted long before June 1983. SSA has been involved in litigation on these issues and has lobbied the Congress with regard to various formulations of solutions. In addition, it has ongoing familiarity with the "medical improvement" standards. The Committee should adopt the provisions of H.R. 4170.

D. SSA will no longer rely upon the computer "profile" currently used to identify cases for CDI review and will instead use a random sample.

We believe that in June 1983, eliminating the profile was a hollow gesture. The profile was weighted for younger workers with high earnings before they were disabled. As a result, after over two years of use, it had generally already exhausted its usefulness. While SSA pointed out that the profile weighed factors such as age and previous earnings and therefore would continue to move up the age and down the earnings scales, they were not able to state how many people would benefit from the shift. Over two years into the process, there probably was no difference between the profile and a random sample.

E. SSA will "pause" CDI review of 135,000 people who suffer "functional psychotic disorders" while SSA reviews the standards it has been utilizing in these cases.

A moratorium or pause on the CDI reviews of mentally impaired individuals' cases makes sense if one looks at the 50% appeal rate to the ALJ level in the first year of the CDIs. We assume that his rate was so low not because SSA was accurately deciding cases but because confused people, largely with mental impairments, were not protecting their right to appeal. Recent court decisions requiring SSA to reopen decisions where mentally impaired individuals failed to appeal support this analysis.[17]

The Secretary's proposal raised two concerns. First, it seems inappropriate to distinguish among the mentally impaired. Further, as a practical matter, if SSA's decisions as to who will be entitled to a "pause" are based upon its often poorly developed records, SSA is likely to deny a pause where it should be granted.

Second, we are concerned that any pause or moratorium for the mentally impaired not simply result in more physically impaired people's cases being rushed through the CDI process. It would be helpful if SSA simply reduced the overall number of CDIs which it expects to complete this year.

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[17] See, for example, <u>Penner v. Schweiker</u>, No. 82-5337 (3d Cir. February 28, 1983); <u>Kapp v. Schweiker</u>, 556 F. Supp. 10 (N.D. Cal. 1981); <u>Brittingham v. Schwiker</u>, No. 82-4632 (E.D. Pa. February 7, 1983).

IV. THE COSTS OF H.R. 4170 OR S. 476 ARE WITHIN THE RESERVES AVAILABLE TO THE DI TRUST FUND.

We are well aware of the concern this Committee has expressed about the costs of the disability reform legislation. We are all as citizens concerned with the solvency of the Social Security trust funds. We would make several observations, however, about the cost of disability reform legislation.

1. While we all concede eliminating some of the inequities in the disability determination process and improving the standards for determining disability will cost money, the amount that S. 476 or H.R. 4170 will cost over the next five years varies greatly depending upon the estimator. The Social Security actuaries estimate that Title IX of H.R. 4170, if enacted on January 1, 1984, would cost $4.1 billion over the next five years. The total cost includes $2.6 billion in DI trust fund expenditures and $1.5 billion in added costs to Medicare, SSI and Medicaid. The CBO estimators calculate a total cost of $1.5 billion over the same five-year period, consisting of $1.1 billion in DI trust fund costs and about $400 million for other related programs. The major areas of difference between the two are the estimates of cost for the new medical improvement standard, which CBO estimates will cost $1 billion less than SSA does, and the impact of the legislation on administrative costs, which CBO estimates to be about $300 to $400 million less than the SSA figures. CBO assumes there will be fewer CDI reviews in future years, resulting in less frequent application of the medical improvement standard. CBO also assumes that the face-to-face hearing at the

initial level of CDI review will result in fewer appeals to the ALJs so that administrative costs will not increase as substantially. These are certainly reasonable assumptions. CBO has had a creditable track record over the past eight to nine years, as does SSA, of course. We do not know which of the estimates will turn out to be closer to reality. But, we submit, there is no particular reason this Committee should automatically elect the SSA cost estimates over those of CBO. (Similar differences in estimates exist with respect to S. 476.)

2. In developing its proposals, the Ways and Means Committee exercised extreme care to assure that the total costs of the bill, using the actuaries' estimates, did not result in balances in the DI/OASI trust funds dropping below the 15 percent level. Provisions of major importance to the disabled, including those dealing with severity of impairment, pain and face-to-face interviews, were deleted or significantly modified to keep the bill within available balances. The House bill is fiscally responsible.

3. The savings to the DI trust fund since the beginning of the CDI process in March of 1981 have far exceeded the estimates of savings developed by the Reagan Administration when it first came into office. The famous Stockman bluebook of April 1981, containing revisions to the Carter budget~~s~~, projected savings to the DI trust fund of $750 million from "improved administration" over the period FY 1981 to 1983. In July of 1981 the trustees' report projected the DI trust fund costs incorporating the "improved administration" standard. According to the trustees, "the

(DI) recovery rates were assumed to be 20 percent higher than those of the period (1976 to 1979), thereby allowing for the assumed effect of the disability amendments of 1980." In fact, the "recovery" or termination rate as a result of CDI reviews turned out to be 47 percent in FY 1981, 45 percent in FY 1982 and 43 percent in the first three quarters of FY 1983. The termination rates can be believed only if one is willing to accept an error rate in the DI program approaching 50 percent, meaning that almost one of every two persons on the DI rolls is there improperly. Objective observers reject the conclusion.

In their 1981 report the trustees also made the following reasonable assumption about the initial award rates. They said, "Although disability awards declined by approximately 5 percent during 1980, age-sex specific incidence rates were assumed to <u>increase</u> over the period 1981-2000 to a level about 15 percent higher than the average for 1978-80 and to remain constant thereafter." In fact, in 1981 and 1982, initial awards continued to decline to from 4.1 awards per 1,000 insured workers in 1980 to 3.6 awards per 1,000 insured workers in 1981 and 3.0 in 1982, historic lows in both years.

We now have the actual expenditures for FY 1981, 1982 and 1983, and can compare the Stockman-Trustees estimates with the actuals. Rather than $750 million in savings (after adjusting for the cost effect of legislation not anticipated in the trustees' report), the DI trust fund experienced reduced expenditures totaling $3.4 billion for those three years, more than four times the amount of savings expected.[18] Concomitant savings to Medicare, Medicaid and SSI were also achieved. The difference of $~~[illegible].6~~ 13.4 billion in unanticipated savings in the period 1981 through 1983 more than equals the additional costs of H.R. 3755 over the next five years even using the higher SSA estimates. The point we are making is that disability insurance recipients have been grievously and in many cases permanently damaged by the heavy-handed and illegal application of the CDI reviews. Savings were achieved by violating the DI statute and SSA's own regulations. It is equitable that in a rough way a portion of the money illegally taken from DI beneficiaries be returned over the next five years through a more reasonable administration of the disability statute.

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[18] The details of the estimate of savings are as follows:

Fiscal Year	Trustees' Report 7/2/81 II B Est. of DI Outlays	Actual DI Outlays	Difference
	(Dollars in millions)		
1981	17,547	17,280	- 267
1982	19,235	18,035	-1,200
1983	20,616	18,279	-2,337
Total Difference			-3,804

Note: The Trustees' Report estimates do not include the savings to the DI program resulting from the Omnibus Budget Reconciliation Act of 1981 (PL 97-123, December 29, 1981) and the Social Security Amendments of 1983 (PL 98-21, April 20, 1983). These savings are estimated to be about $400 to 500 million in 1982 and 1983. These are partially offset by the cost of the extension of benefits through ALJ review (about $100 million) in PL 97-455 (January 12, 1983). On a net basis, therefore, the legislative changes reduce the savings resulting from the CDI reviews and the tightened eligibility requirements for initial applicants by about $400 million.

CONCLUSION

The problems in the federal disability programs are serious and extensive. H.R. 4170 or S. 476 with modifications, if enacted, will remedy the most grievous of these problems. We urge this Committee to act quickly to bring one of these bills to the floor for full Senate consideration.

Thank you for providing us with this opportunity to testify.

Mr. MANES. This morning, there was some discussion about the disability insurance program being a runaway program and the costs having escalated beyond all anticipated levels. I think it's maybe more useful, rather than looking at the dollars of the program, to look at the number of people who come on the rolls, and trying to assess whether in those terms the program is a runaway.

If you go back to 1975—and using the staff document put out by the Finance Committee called staff data and materials relating to the social security disability program—in 1975, according to table 4, there were 7.1 awards made for every 1,000 insured persons in insured status. In that year, 7.1 per thousand went on the rolls. That was the high point in the disability insurance program of new awards. In 1976, 1977, 1978, the number of new awards started dropping. And by the time that Congress had enacted legislation to try to deal with problems they thought were existing in the program, the program was fairly well under control. By 1980, the number of new awards had dropped from 7.1 to 4.1 per thousand 5 years earlier.

The legislation the Congress enacted and the way it was implemented had simply accelerated a process which was going on prior to the enactment of the 1980 amendments. By 1982, the number of new awards has dropped to 3.0. I understand that it has crept up in the first half of 1983, but it is still at a historically low level.

Another statement that was made this morning was about in periods of economic difficulty, people search out the disability programs and try to get on the rolls. In 1982, a year in which there was a great deal of economic difficulty, the number of new applications for disability was 160,000 fewer than in 1981, and over 250,000 fewer than in 1980. Slightly over 1 million people applied for disability insurance in 1982, a period when unemployment reached double-digit numbers.

I think it's clear that there is little relationship between the status of the economy and the numbers who apply for disability.

This morning you requested information about how much money has been saved in the disability program as a result of the CDI's. I tried to do my own calculation in advance of your question, and the information appears in the last few pages of my testimony, and I would like to read it.

The savings to the DI trust fund since the beginning of the CDI process in March 1981 have far exceeded the estimates of savings developed by the Reagan administration when it first came into office. The famous Stockman blue book of April 1982 containing revisions to the Carter budget projected savings to the DI trust fund of $750 million from improved administration over the period 1981—fiscal years 1981 through 1983. In July 1981, the trustees' report on the DI trust fund projected the trust fund costs incorporating this improved administration standard. According to the trustees who assumed recovery rates of 20 percent higher than those in the period 1976 to 1979, thereby allowing for the assumed effect of the disability amendments of 1980, and allowing for some increase in new awards, which they felt would turn around and start upward starting in 1980, they projected costs of $17.5 billion, $19.2 billion in 1982, and $20.6 billion in 1983.

In fact, over those 3 years, the cumulative costs, using the actual data from the Treasury statements, turned out to be $3.8 billion less than the trustees assumed in 1981. And that $3.8 billion is after taking out $750 million for their assumed effect of the disability amendments of 1980.

It's clear that this savings was achieved not by adhering to the reasonable assumptions that the trustees made in 1981 of a 20-percent termination or recovery rate, as they call it, and slight increases in initial allowances, but rather through a 47-percent termination rate in 1981, 46 percent in 1982, and 45 percent in 1983.

What those termination rates in those years imply is that the Social Security Administration was in error in almost one out of every two awards it made in prior years. An error rate of almost 50 percent in a program as respected as the Social Security Administration programs have been over the past years is not to be accepted. Respected observers object that that is a natural or reliable figure.

The courts have also, as has been discussed this morning, have found that the social security has violated the law and its own regulations in the way it has applied the CDI's. In the case in which we were involved with in Minnesota—the Mental Health Association of Minnesota versus Heckler—the courts gave us authority to oversee the implementation of the court's order putting back on the rolls the mentally disabled persons who had been terminated from that March 1981 to December 1983.

We have monitored that process. So far of 4,000 re-reviews of mentally disabled persons terminated in that period, 53 percent have been put back on the rolls by DDS by the review process. These are of the 4,000 who had been terminated and had never appealed. Under the court's orders, persons who had completed their appeal process were not part of the Minnesota class. Although of those 4,000 who were terminated, over 50 percent were now found using what the court required and found to be improperly terminated.

We think that probably that number should be higher. We are working with the Social Security Administration on their procedures in reviewing some of these cases.

But it is a startling reversal in the Minnesota case. We don't know exactly how many mentally disabled people will be affected ultimately by the Minnesota decision, upward of 10,000, which means that if current figures hold, 5,000 to 6,000 of those would be put back on the rolls.

A final point I will make about the cost estimates that have been offered for both S. 476 and the House reported legislation, title 9 of H.R. 4170. The SSA numbers bounce around quite vigorously. The last figures that were made public had a total cost of $4.1 billion over the next 5 years, $2.6 billion of that coming out of the DI trust fund and about $1.5 billion out of the collateral programs—medicare, medicaid and SSI.

Today they came in with a figure of $6 billion, and we have not had time to look at it. But the numbers change rapidly, regularly, and they seem only to change in one direction.

The CBO estimates are that the title 9 of H.R. 4170 would cost $1.5 million, and that also includes the collateral costs of medicare, medicaid, and SSI. They assume a $1.1 billion cost to tne DI trust fund.

The differences are primarily in the assumptions that are made on which the cost estimates are based. The CBO assumes that if there is a face-to-face hearing at the initial level there will be fewer appeals than does SSA, and that the administrative costs will be substantially lower.

CBO also assumes that the medical improvement standard will not be applied to as many people because the CDI's will drop off, the number of CDI's will drop off in future years. These are certainly reasonable assumptions if SSA, as they testified this morning, are about two-thirds of the way through the first round of CDI's. It is not likely that they are going to find a large number of additional people in the next round that they need to review. And the application of the medical improvement standard should not have the affect that the social security actuaries anticipate.

But taking either the CBO estimates or the SSA estimates of the future costs, I submit to you that the savings to date in the range of $3 billion from the improper and illegal implementation of the 1980 amendments more than covers the future year costs over the next 5 years, cost of H.R. 4170. And in a rough way, it is equitable to give back, to return to the people who have been grievously and permanently damaged some portion of the money that was taken from them through the improper administration of the program.

Thank you.

Senator HEINZ. Thank you, Mr. Manes.

I have got a few questions. Dr. Flemming, both you and Ms. Garvin spoke quite eloquently on behalf of the House, and to a similar, slightly more modest, extent the Senate bill. Of all the provisions in those two bills, though, what is the most important provision?

Dr. FLEMMING. Well, from our point of view we feel that the provisions dealing with the standard of review are very important. For example, we feel strongly that specific language should be incorporated in the law stating that before a person's disability benefits can be terminated, there must be clear and convincing evidence that there has been significant medical improvement which enables a person to perform substantial, gainful activity or pneumatical evidence and a new assessment of residual functional capacity must show that the person has benefited from advances in medical or vocation therapy or technology which has resulted in an ability to perform substantial, gainful activity. Or the prior decision was clearly erroneous or fraudulently obtained or the person is currently performing substantial, gainful activity.

As a matter of principle, it seems to me that should be incorporated into law and become the directive to the SSA.

Senator HEINZ. What you just quoted is what we, in short, under the tyranny of the 5-minute rule, refer to as the medical improvement standard.

Dr. FLEMMING. That's right.

Senator HEINZ. Ms. Garvin, I gather you agree.

Ms. GARVIN. Yes; we agree with the medical improvement and also the moratorium on the mentally ill.

Dr. FLEMMING. Yes; we agree on that.

Also I might say, Mr. Chairman, we feel very strongly on the multiple impairment issue. In other words, that we feel that an individual that suffers from two, three or four impairments which if reviewed individually would not be disabled; that they nevertheless be extremely disabled by their combined affects. We think that standard ought to be embodied in the law.

We also feel keenly on this issue of payment of benefits during appeal. It seems to me that that is just a part of due process. I just can't understand the argument on that one. If you are going to give persons the right of appeal, certainly while that right is being pursued—right through to the end as far as I am concerned—they should continue to be on the rolls.

And I agree with what I gather was your position.

Senator HEINZ. Unbiased.

Dr. FLEMMING. Well, if they lose the appeal, I just think it is cruel to go back and try to recapture that. I don't think the Congress should permit that.

Incidentally, I was very much interested in your comment on a road show. If you launch one, I will be glad to join it.

Senator HEINZ. Any other volunteers?

[Laughter.]

Senator HEINZ. I think we just got a crop.

Dr. Meyerson, both you and Ms. Garvin have indicated that a moratorium on the mentally impaired and disabled is vital. You've been working as part of a work group convened by SSA. The idea first came out of Secretary Heckler's initiative on June 7, as I recollect, of last year. Could you comment on the progress of the group, and the adequacy of the initiatives taken back in June 1983 by Secretary Heckler?

Dr. MEYERSON. Yes, I would like to.

Senator HEINZ. Perhaps you might start with the last part of that question.

Dr. MEYERSON. It's perfectly clear that it is only because of pressure brought about by public exposure of the excesses of SSA's administration of this program and the light thrown on that by the hearings you held, by the hearings that Congressman Pickle held. It is only under that kind of pressure that the Secretary took any action at all. The consortium of which I am part, and the American Psychiatric Association is a part—it includes the American Nursing Association, the National Association of Social Workers, Council of State Commissioners of Mental Health and so forth—approached the Secretary and medical staff of SSA within several months of the onset of the CDI process—a full year before those hearings were held—to bring home to them that we as caretakers, if you will, of this population's medical needs were seeing terrible excesses and human tragedies. There was no response whatever. It was only because of legislative pressure and then the court decisions, the public display of SSA's failure to provide an adequate standard of fair play, that caused the Secretary, I believe, to initiate her moratorium and to start these work groups.

Now the work group of which I am a part has been devoted to rewriting the standards—and I want to be as precise as I can—within the 1200 section of the medical impairment part of the regulations. That's the mentally impaired section.

The goals of that should not be confused. All we are doing is attempting to update, in the light of current psychiatric knowledge and understanding of the illnesses involved, the standards that the Social Security Administration has embodied in their regulations. As we have seen from past performance, standards, whatever they are, can be effectively modified by a judicial climate which interprets them, no matter how well written and how current or scientific they may be, more or less strictly. That is true of any system; not just the medical system, and that is what happened. There was a misstatement of fact this morning. Our work group has finished writing those standards. And APA has already stated its support for them within the Social Security Administration. They are not waiting for APA or AMA to approve of those standards. It's going through their own—and I think appropriately—bureaucratic review.

Whether the standards are adopted or not, without legislative action, without the action of this committee in reporting out a bill, we have grave reservations about the utility of any medical standard which can be as subverted as the current standards have been. There's no guarantee that that won't happen again unless there is a change in legislation including medical efforts and provisions that Dr. Flemming commented on in response to your last question.

The medical improvement standard, in particular this morning, was argued against by the acting commissioner on the following basis: She said, well, if you adopt a medical improvement standard, then people you are reviewing who are already on the rolls will be subject to that medical improvement standard, while people who are coming up for a new assessment will not, and that represents unfairness.

I'm not sure if that is true or not. It may be true, but clearly the unfairness represented by such a problem is nowhere near the magnitude of the unfairness that has already been incurred within their administration of this program.

Secondly, if it does represent some kind of unfairness, it's not that difficult to deal with administratively. One could, after all, view these new psychiatric medical listings, as subject—as all the medical listings ought to be—to continual review by scientific and medical advisory bodies. That they stay the same for 10 or 15 years is ludicrous. Heart disease, psychiatric changes, the diagnosis and treatment of rheumatoid arthritis all change over time and so the listings should be regularly updated. The standards, while they may only occasionally require change, should be reviewed regularly. That's not nearly as difficult or costly as the kind of cost that has been visited upon the human beings subject to the current administration of this program.

Senator HEINZ. Are you optimistic that your work group is going to produce something that is helpful?

Dr. MEYERSON. We have.

Senator HEINZ. We haven't seen it.

Dr. MEYERSON. The work of the group was finished about 5 or 6 weeks ago. The document was distributed in a final draft form to the membership approximately a month ago. As of about 3 weeks ago, I spoke to the chairman of the group, John Hamilton, working for SSA on this project, and he said that there were few substantive changes, and that the document is now going through the Social Security's own administrative procedures. Their attorneys were looking at it and so forth.

Senator HEINZ. OMB is looking at it?

Dr. MEYERSON. Right. But it's out of our hands at this point. We feel it's reasonably medically sophisticated, and is improved in language, and criteria over the past, both as an instrument for——

Senator HEINZ. Maybe I missed something, but why isn't it that the good news ever leaks?

Dr. MEYERSON. I'm not sure how good a news it is. As I say, without legislative action to make sure that they maintain a kind of uniform application of those standards they could be perverted again.

Senator HEINZ. Dr. Meyerson, thank you.

Dr. MEYERSON. Thank you.

Senator HEINZ. Mr. Manes, you provided us with some eloquent and fascinating testimony here. But I do have one question for you regarding your interesting argument that the 47-percent termination rate suggests that one out of every two decisions are in error, which seems impossible for any Government agency. Yet the figures provided from the blue book do not entirely contradict a one-in-two error rate. The 7.1 awards per 1,000 in 1975, versus the 3 awards per 1,000 in 1982, which you quoted.

Why can't someone say that those award incidence numbers indeed prove the point that you say is wrong? That there cannot possibly be a 1-in-2 error rate.

Mr. MANES. The proof has been in the court actions that have almost uniformly found SSA not properly applying its own rules, its own regulations, in assessing the people who they are now reviewing.

Senator HEINZ. But why should there be a drop from 7.1 awards per 1,000 to 4.1 awards per 1,000 in 1980, and 3 awards per 1,000 in 1982? Four point one was during the last year of the Carter administration. Three point zero was 2 years into the Reagan administration. Either way its a very significant—nearly a 50-percent cut since 1975. Were there some unusual circumstances in and around 1975 or were the unusual circumstances that people were being willy-nilly put on the rolls? There has got to be an objective answer here to a statistical question.

Mr. MANES. I can't tell you what the—there is a general sense that there was a loosening in the mid-1970's for a short time and it tightened up in the late 1970's and early 1980's. And that may have resulted in the increase in the——

Senator HEINZ. Is there anybody else that would like to answer that question?

Ms. SWEENEY. As a practical matter, Mr. Heinz, I think——

Senator HEINZ. Would you identify yourself?

Ms. SWEENEY. I'm sorry. My name is Eileen Sweeney. I'm an attorney at the National Senior Citizens Law Center. And I think as a practical matter there has been a concern for a long time about what has been happening at the initial denial level in social security. In fact, since the late 1970's—1975, 1976 and on—there has been a concern that people who were entitled to benefits were being cut off the rolls. The figures now, I think—the 3 are probably the incorrect figures. The 7-percent figure may be high. But, in fact, it's probably a more accurate one.

There has been testimony before this committee and before the Ways and Means Committee since the middle of the 1970's about the problem of people being denied benefits. I think that all the problems that you see for termination cases are, with the exception of medical improvement, identical for the people who are being denied at the initial level.

Senator HEINZ. I know Dr. Flemming is about to say something, but I want to just pursue something here.

Do you happen to know what the award levels were pre-1975?

Ms. SWEENEY. I can provide that to you.

Senator HEINZ. My recollection is that they were a lot lower than 7.0. My further recollection is that when I was a Member of the House of Representatives I remember being up in Pittsburgh and finding much to my astonishment an advertisement on television, informing people of the availability of disability benefits. I think the advertisements were initiated in either 1972 or 1973 by virtue of some kind of a decision—I think a judicial one—that found not enough people knew about the social security disability insurance program. And as a result, there had to be an affirmative action on the part of government to let people know about it. Now I'm not sure if my recollection is correct, but statistically it looks like I'm not far off because for many years the awards for 1,000 were fluctuated around about 5.0. And then they started climbing very dramatically in 1972, which is about when I remember seeing that ad. That was when Elliot Richardson was at HHS.

Dr. FLEMMING. I can tell you about that.

Senator HEINZ. You are surely the expert. I should have turned to you long ago.

Dr. FLEMMING. I was the commissioner on aging at that time and we did have a nationwide program which we identified as SSI alert. We were out trying to find the older person and the disabled, the blind, who were isolated cut off from life, who knew nothing about these programs. And we were trying to find them and tell them about it.

Senator HEINZ. I thought we would get to the right answer to the question eventually.

Dr. FLEMMING. Well, my reaction to this drop is that we shouldn't take any pride in that drop. First of all, the evidence is overwhelming here that a great many people have been cut off these rolls who should have never been cut off the rolls. They should still be on the rolls.

The second thing is that we have still got millions of people out in the country who are entitled to disability benefits, but who are isolated and cut off and who know nothing about it. In the last social security legislation there was inserted by the initiative of this committee a provision directing the Secretary of Health and Human Services to do more about alerting people to SSI, for example. And the disability part of SSI is a very, very important part of it. And SOS is going to come in back of that, and we are working with the Red Cross and other organizations. We are going to launch another SSI alert to try to find these people and get them on the rolls. That figure ought to be built up. We ought not to take any pride in it at all.

Senator HEINZ. Arthur, I think it's important to state for the record that these figures are people who are in an insured, employed status. In both the 1977 and 1983 social security amendments have increased the number of covered quarters to achieve eligibility, and I suspect part of the drop since 1975 is attributable to the more restrictive eligibility requirements for social security. I would suspect that with respect to the SSI program it is not so tied that you might see a somewhat different trend. I just wanted to make clear that these numbers have built into them those tighter eligibility restrictions. With respect to the SSI program, I make no claims whatsoever.

Senator Pryor.

Senator PRYOR. I have one question, John. Thank you.

Senator HEINZ. By the way, your Governor is here.

Senator PRYOR. Our Governor is here and I wanted to be here when he came. And I have got to go make a little talk downstairs, but I will be back in a few minutes.

Senator HEINZ. I was ready to turn the gavel over to you.

Senator PRYOR. Oh, I would be scared to death to have the gavel of this committee.

Senator HEINZ. On second thought, so would I.

Senator PRYOR. Dr. Flemming, one question. You are a great authority, I think, on the whole social security system and the trust fund, et cetera. What if we had a proposal similar to the Levin-Cohen bill we have talked about today or something of that nature, what would this do in your opinion to the social security trust fund?

Dr. FLEMMING. Well, I have been listening to the debates that have been taking place on the cost figures.

Senator PRYOR. Yes, sir.

Dr. FLEMMING. Now I don't have available any independent means of developing the cost figures. But my impression is that the cost figures submitted by the administration are high. I don't know whether the cost figures submitted by the Congressional Budget Office would be regarded as low, but probably we could say that the cost figures may be somewhere in between there.

I don't think it would have any serious impact on the trust fund situation.

Senator PRYOR. I see.

Dr. FLEMMING. My feeling is that whatever the legitimate cost figure is, we should confront it in the interest of operating a system in a fair manner and a manner that accords with our concepts of due process because that's a legitimate expense. And we should incur it in the interest of getting across to our people the fact that we have the capability as a nation of taking a social insurance program and administering it in a fair, equitable manner.

Senator PRYOR. Thank you very much.

Senator HEINZ. I've got one last quick question. I hope it will be quick. If it can't be answered quickly, we are going to have to put it in the record. The question is for Mr. Manes. There is an assertion on the part of the administration, that when people are stricken from the disability rolls there is a terrific savings to society, the largest part of which is a budget savings to the disability insurance trust fund. My question is whether it is true the taxpayers really save any money? Not just the Federal taxpayers. We have a lot of taxpayers. They pay State taxes; they pay local taxes. And a subsidiary question is when you go into any major metropolitan area—sometimes not too major—you will see some sadly deranged people who we now describe today as "street people" who are absolutely tragic cases. They have no place to go. They are clearly out of their minds. And I've only seen these people since this continuing disability investigation started. Is there a connection?

Mr. **Manes**. Undoubtedly, there is. In terms of your question about is there a savings, in dollars terms? Unfortunately, I think we must say there are savings. There are many of these people who fall through the system, who fall out of the system, who do not end up on local or State welfare programs. They are somewhere out there fending for themselves as best they can. And for them society is expending in terms of dollars no money. But in human costs, there is a great deal that we are losing.

Senator **Heinz**. Let me ask Dr. Meyerson. Particularly with respect to the mentally impaired, of the nearly 30 percent of the people who have been cut off, how many of them end up in State mental institutions? Also, what's the difference in cost between the $3,000 or $4,000 in Federal Government payments per year and to a disability recipient and how much it costs the taxpayer to pay for someone's stay in a State mental institution.

Dr. **Meyerson**. By the way, if you look at a State mental institution, you are looking at a somewhat lower cost than is probably the case among most of these folks. A great many of them are being hospitalized at a much higher frequency than otherwise because of the lack of stability, and the difficulty in making the transition between being on SSDI and its supports and attempting to get on welfare and other forms of medical insurance and so forth.

A State hospital, in New York costs about $80 to $90 a day. However, as you know, State hospitals ain't what they used to be, and they are not taking the volume of patients that they used to take. They are not keeping patients for a long time. So most of these patients are hospitalized at a rate somewhere between $400 and $700 per day in general psychiatric hospital units for a week to 10 days for evaluation before they go to the State hospital. Just the evaluation period is going to cost as much as a year on one of these programs. The human cost, as has been said, is horrendous. I'm not sure that Mr. Manes is correct, that there is an actual saving. I don't think anybody has done that kind of computation.

If there is, it's at tremendous human cost. The reason I'm not sure is because certainly among the mentally ill, the programs for the homeless are costing the taxpayer money. The general hospital's hospitalization are costing the taxpayer money. The need for transitional living arrangements which have more protection and more support in them cost the taxpayers money. As you suggested, State hospitalization for a year or two costs the taxpayer a hell of a lot more money than maintaining somebody in the community on one of these programs.

So all and all while the final answer, I don't believe, is in—maybe it is, but I haven't heard it—clearly the Government has not demonstrated an overall saving to the individual taxpayer. I don't think many of us have noticed it if that has been the case.

Senator HEINZ. If you drive into the Capital from almost any point of the compass at 6 a.m. in the morning, you will see people asleep on grates. Are any of those people people who have been cut off?

Dr. MEYERSON. Yes.

Senator HEINZ. Mentally impaired people who have been cut off.

Dr. MEYERSON. The estimates in New York are that the homeless are 80,000. The estimate of the mentally ill among the homeless has varied between 30 and 60 percent, depending on the surveys. Let's take a conservative figure, 30 percent. At least one-third of those from two surveys that have been done—small surveys done by the commissioner of mental health in New York, the one that Jack Weinstein cited in his decision in New York—is that a significant percentage of those people are those who have been thrown off the rolls, and simply can't cope with either the appeals process or finding some other means of public support. They don't even wind up on welfare. They wind up sleeping on grates or in the subway or in somebody's parking lot or whatever.

Ms. SWEENEY. I just wanted to add that one of the costs that I don't think anybody is thinking about yet is that there are now starting to be a number of tort actions, constitutional tort actions and Federal Tort Claim Act suits, filed against the Social Security Administration and the Federal Government because people have died because there have been negligent actions in people having electroshock treatment again when they didn't need it, because examiners have ignored treating physicians' reports. And the cost to the Federal Government of those types of law suits should be factored in in terms of whether the Government wants to continue with these types of practices. The costs are going to continue to get higher if they continue to do it.

Dr. MEYERSON. I think the mental health law project has said there are as many as 18,000 individuals ready to sue or are in the act of suing the Social Security Administration. That's a big cost.

Senator HEINZ. It is.

Arthur, we have a few other witnesses. Do you have a point you need to make?

Dr. FLEMMING. I just wanted to say that I appreciate your line of questioning because the whole social security concept was accepted by this country in the interest of making it possible for people to deal with the hazards and vicissitudes of life. And when we arbitrarily cut people out of this social insurance, we pay a penalty. Not only from a dollars and cents point of view, but from many other points of view. And we cease to move toward the objective of the whole social insurance program; namely, to help people deal with these hazards and vicissitudes. And when we do it in an arbitrary and capricious manner, it does something to the morale of our Nation.

Senator HEINZ. I thank you all. You have been a very helpful panel.

Senator Dole wants to hear the next panel. Senator Pryor will be back in 5 minutes. He wanted to introduce Governor Clinton. I have a 2 p.m. meeting I have got to get to so we will recess for approximately 5 minutes or less, if either Senator Dole or Senator Pryor get here sooner than that.

Thank you.

[Whereupon, at 2:15 p.m., the hearing was recessed.]

AFTER RECESS

Senator LONG. Let me call this meeting to order. Senator Pryor wants to be here to hear the next scheduled witness so I'm going to call Mr. Gerald S. Parker. Mr. Parker came in from out of town. We would be pleased to hear your statement, Mr. Parker.

STATEMENT OF GERALD S. PARKER, CLU, RHU, CONSULTANT ON DISABILITY AND HEALTH INSURANCE, OLD GREENWICH, CONN.

Mr. PARKER. Thank you, Senator Long. My name is Gerald Parker. You have that. I will skip the introduction except to say that I have been in the disability and health insurance business for some 38 years.

Senator LONG. Thirty-eight years?

Mr. PARKER. I am not representing any insurance companies here today. I'm here purely on my own initiative.

I recall very clearly the problems of the claim administration that led the Congress in the 1980 amendments to require the Secretary to take steps to tighten up claim administration. Some of those problems were a complete lack of uniformity in the disability determination criteria, virtually complete loss of control of State agency disability determination standards; and lack of any consistency in any of the decisions by administrative law judges on appeals and unwillingness of ALJ's to follow SSA guidelines.

Senator LONG. Don't read so fast.

Mr. PARKER. Sorry, sir. I was trying to get through in a hurry. And also a very low rate of quality review of State agency decisions by the SSA.

These problems and some others had resulted in an explosive rate of new disability claimants and large numbers of people on the rolls who weren't truly disabled. In fact, some of them were working full time.

Things are very different today, as we have heard. The Social Security Administration has responded to the mandate of Congress in the 1980 amendments, and while there are still some problems, many past abusers have been largely corrected.

Senator LONG. If I might suggest, because I have read most of your statement, why don't you skip down to page 3 where it starts with section 901?

Mr. PARKER. Very well, sir.

This section provides standards and deals with the requirement that an individual must now be able to work because of a medical improvement or with two or three technical exceptions. What's the problem? The main problem is that in many cases, perhaps most cases, impaired people who become able to work do so in spite of their impairments because they learn to compensate for them. Such learning is often motivated by the lure of a financial reward that is more attractive than the disability benefits available. But even with respect to the exceptions to the medical improvement requirement, the Ways and Means Committee report indicates that the committee intended those criteria to be applied with what amounts to a presumption of disability. I think this is something that needs to be considered very carefully before it is adopted in its present form.

Senator LONG. Let me just take this illustration and ask you about this. Now on this item in the bill, as I understand it, if someone is on the rolls you couldn't take them off unless you can show that they have improved. Isn't that what it amounts to?

Mr. PARKER. That's correct. Medically improved.

Senator LONG. Now let's take the situation in which the person is not disabled. The person is doing a fulltime job the way it is now. Why should you have to prove that the person has improved? Presumably the person never was qualified to be on the rolls from the beginning. Now why should you have to prove that the person is improved? In other words, if I understand the logic of that, if you assume that a person got on improperly, they are entitled to stay on forever because they never were disabled in the first place. Based on that provision, they would be entitled to stay there forever. That's the logic of it, I assume.

Now I think they have got some little provision, a little proviso, in there that would give you some hope that you might get them out if they never were qualified.

Mr. PARKER. Yes, sir, you are quite right. There is a provision for taking someone off who is actually engaged in work. But prior to the 1980 amendments, that very situation happened often. That people were at work and were being paid because there was no followup.

But I think that this requirement will primarily make it more difficult to apply standards where a person would be able to work, is now doing things that are not remunerative that indicate that he could work. That's where it's going to help the most, if we are able to continue not to have this.

Senator LONG. Yes, sir.

Mr. PARKER. The section 902 that calls for a study on the subjective evidence of pain—that's a hard provision to oppose. But I have a feeling it will probably result in the expenditure of some pretty substantial sums without any useful result. Insurance companies and rehabilitation experts and many physicians have been trying to find out how to tell whether pain is severe or mild and whether it's real pain for years and years without any demonstrable success.

Pain is so subjective that no physician can say a claimant doesn't have back pain or chest pain if the claimant says he has it. I really doubt that the problem is ever going to be solved no matter what we do with it.

I think I'll skip the section 903. Something you can handle with the written testimony.

But I would like to talk about section 911, which deals with the moratorium on mental impairment reviews. Of course, this one is active now on a temporary basis, but there's a problem in my mind with the concept of establishing criteria for finding a person disabled under the listings so that the revised criteria alone and in combination with assessments of residual functional capacities shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantially gainful activity in a competitive work place environment.

The main problem resides in the nature of emotional disability. There is subjectivity; there is variety. And the fact that something like 75 percent of the redeterminations—I may be off on this figure, but I found it in the newspaper somewhere—in findings of nondisability have been mental impairments.

Mental and emotional impairments are horrendously difficult and expensive causes of disability the insurance companies have had to deal with since the business began. And the incidence of these disabilities skyrockets during depressed economic times. Distinguishing between unemployment and unemployability due to mental problems is extraordinarily difficult.

Psychiatrists and psychologists are of very limited help. Many therapists tend to be conditioned to believe the patient. And if the patient says he can't stand the stress of the work environment, the therapist tends to direct his efforts to find a way to help the patient cope with this stress. He doesn't so much tend to try to determine whether the stress in the work involves a real emotional disability, but whether it's nothing more than an allergy to effort. When you are dealing with serious psychos it's quite a different problem from dealing with what used to be called nervous breakdowns. And disability benefits can have a very strong affect on the outcome. People with disability benefits that expire on a short-term basis, after a year or two, often find that they really can work when the benefits have run out. But of course some of them can't.

I was interested in Dr. Meyerson's testimony—and I hope that this will be very helpful—but I really doubt that the Secretary and the advisory council together can write regulations that can objectively determine the existence or nonexistence of an emotional disability on a consistent and uniform basis. I'm afraid it's pretty much wishful thinking.

I do suspect that any regulations that do come down will simply have the effect of making it easier for such a person to qualify for benefits based on mental impairment, and virtually impossible to prove a recovery from a mental disability of anyone who doesn't want to work or fears he can't find a job.

The report of the Committee on Ways and Means is cognizant of the fact that revisions and listings on mental impairment could potentially result in an increase in cost. I would hope the Congress would be prepared to find the extra costs in advance for the social security taxes that may have to be raised if it's liberalized to the extent that is proposed in this bill.

I'm not suggesting nothing be done, Senator, but I think it should be very carefully considered.

Senator LONG. Well, if I might just ask a question of you. As a lawyer, I'm familiar with what it means to have the burden of proof. If you have got the burden of proving that a person is capable of earning a living and that person doesn't want to cooperate—I'm not sure if you have tried to look at that from a legal point of view—but can you imagine the burden you have if you must prove that somebody is capable of earning a living when that person doesn't want you to prove that?

Mr. **Parker**. I never heard of a case so far on one of these things that didn't have a medical expert on each side and each medical expert would maintain stoutly that he was right, and his side was right. It's impossible to prove.

Senator **Long**. You have the burden of trying to prove the person is capable of earning a living. And that person is determined that you aren't going to prove that. That's kind of hard to do isn't it?

Mr. **Parker**. Yes, it is.

Senator **Long**. Now I've had the burden of trying to prove that the person was disabled. When I started out as a lawyer, I had the burden of trying to prove that the person was disabled. And that's kind of hard to prove too.

But I think it's much tougher to try to prove it the other way around unless you have had detectives out following the person around day by day. And that would cost cost you a huge amount of money, wouldn't it?

Mr. **Parker**. Well, sir, I remember a case that I'm familiar with of a gentleman who was a quadraplegic and was carted in an ambulance to a rehabilitation center in Denver, Colo. You would think that's about as hopeless and definitely a disabled person as you could imagine. Yet some months later that gentleman drove himself back to Los Angeles in his own automobile where he is practicing law.

So disability can be both objective and subjective. And sometimes the difference is hard to tell.

Senator **Long**. Well, we just had a case where the junior chamber of commerce—they call them the JC's now—they just recommended one of the 10 outstanding men of America, a person from my State, a quadraplegic, who made a living practicing law. He's working for the Government—practicing law. And he is apparently doing an excellent job at it.

So just because you have lost all arms and all legs, that doesn't mean that you have to be disabled. You might be able to do something even then. That's the same type thing you are talking about.

Mr. **Parker**. Yes, sir, it is.

Senator **Long**. Now if that person didn't want you to find him able to work for a living, he could make himself look awfully pitiful. And I guarantee you you would never prove it, would you?

Mr. **Parker**. The whole thing is motivation, Senator.

Senator **Long**. Yes, sir.

Mr. **Parker**. And motivation can sometimes be influenced by financial circumstances.

Senator **Long**. Yes. Go right ahead.

Mr. **Parker**. The matter of face to face hearings, I think, is an important thing and I would favor this part of the legislation. If people doing the hearing are going to receive training in the conduct of interviews with claimants, fine. Untrained people can be very adversely influenced by good acting. And the training in this area can make them much better able to judge these things.

I would suggest that some consideration be given to using some surveillance techniques in some cases to confirm or disprove allegations of disability.

I think we've had enough discussion of the section on reimbursement and continuation of benefits during the appeals process. I think that has been pretty well covered.

The section 921 requires that qualified psychiatrists or psychologists to endorse the finding of no disability in mental cases. I think this may be better in getting better initial decision, but I would caution the committee not to expect too much because of the ability of claimants. Most any claimant can get a psychiatrist or a psychologist to testify on his behalf. Unless you can also get one on the Government side to testify for the Government, that may be somewhat prejudicial.

I'm not going to discuss the matter of the Administrative Procedures Act. There are some ideas in my testimony but I think I might skip it unless you have questions on it.

And I think I won't comment on the matter of abiding by the appeals court decisions unless you have questions on that. Those are in my testimony.

Senator LONG. Well, thank you very much.

As I understand it, during most of your working life you have worked for insurance companies. Is that correct?

Mr. PARKER. That's correct. I started Guardian Life Insurance Co.'s individual disability insurance program in 1952. And I ran it for 30 years. And then I retired from that, and I have been consulting with companies, including the Guardian, and several others on the disability business since then.

Senator LONG. Now an insurance company testified on one occasion that—if we are going to pay the amount that we pay under social security for a person to be disabled—that from that point of view that is not an insurable risk. Are you familiar with that?

Mr. PARKER. I haven't seen that testimony, Senator.

Senator LONG. Well, basically, the idea was that if you are going to pay a person for being disabled about 50 percent to two-thirds of what they could make working then that is not an insurable risk. You are going to have so many people retire on you and claim the benefit who would otherwise be working that it's just not an insurable risk.

At least that's the testimony that I've heard in other situations. Are you familiar with that logic?

Mr. PARKER. I think that percentage—if you are talking about gross earnings, it might be fairly close. We usually try to shoot for no more than about three-quarters of net take-home pay, if you will, as a maximum that is safe to insure. Prior to the 1980 amendments we had a situation where the maximum family benefit was getting sometimes more than 100 percent of take-home pay.

Senator LONG. Oh, yes.

Mr. PARKER. And when we reduced that to 150 percent of the primary amount for most people in the 1980 amendments, I think that's a big reason why the number of new claims is off from what it was prior to that. That was a tremendously effective step in helping with the cost of the program.

Senator LONG. Yes, you have to look at the tax differential. For example, if a person is working for a living, they have to pay social security taxes on what they are earning, not to mention the income taxes, State taxes, Federal taxes. You have to take all that into account in order to see where you come out.

And when it gets to where the income for just sitting there and doing nothing approaches what one would make in the take-home income from a job, there is a great temptation for people at that point just to retire on you and live on those benefits rather than work for a living. Now are you familiar with that problem from working with the insurance industry?

Mr. PARKER. I'm very familiar with it, Senator. We have fought that on many occasions in the past in my experience. It's very difficult. And, of course, the longer a person has been on benefits, the harder it is to get him back to work. But the tax situation that you mentioned is the reason why. Insurance companies, for instance, when they are insuring people who have modest incomes—let's say $20,000 or less—they may insure as much as three-quarters of it. But when an insured surge is making up in the six figures, it gets down to about 30 percent that they are willing to insure.

Senator LONG. Let me thank you very much for your testimony here today, Mr. Parker. I appreciate your coming.

Mr. PARKER. Thank you.

[The prepared statement of Mr. Parker follows:]

TESTIMONY OF GERALD S. PARKER, CLU, RHU
before
Senate Finance Committee
25 Jan 1983

My name is Gerald S. Parker. I live and have my office in Old Greenwich, Connecticut. Since January, 1982, I have been a consultant to insurance organizations, mostly insurance companies, on disability and health care insurance. Before that, I was a vice president of The Guardian Life Insurance Company of America in New York. I organized and created that company's disability and health insurance business and ran it for thirty years. I have a broad knowledge of the nature of disability insurance and its beneficiaries, and of its history over nearly one hundred years.

I was extensively involved with industry committees of both the American Council of Life Insurance and the Health Insurance Association of America in the studies and recommendations that led to both the 1977 and 1980 amendments. I testified on those matters on several occasions before the Social Security Subcommittees of both Houses. I recall very clearly the problems of claim administration that led ~~in~~ the Congress, in the 1980 amendments*, to require the Secretary to take steps to tighten up claim administration. Some of those problems were: A complete lack of uniformity in the disability determination criteria being followed from state to state;

Virtually complete loss of control of state agency disability determination standards by the Social Security Administration;

Lack of any consistency in decisions by Administrative Law Judges on appeals and unwillingness of ALJs to follow SSA guidelines; and

A very low rate of quality review of state agency decisions by SSA.

It was broadly recognized by everyone concerned - in the SSA, the Congress, and the insurance industry - that these problems and some others had resulted in an explosive growth rate for new disability claimants and large numbers of people on the rolls who were not truly disabled. In fact, because there was so little SSA follow-up of existing claimants, some were receiving disability benefits while working full time. Equally important, recovery rates had declined dramatically.

Things are indeed very different today. SSA has responded to the mandate of the Congress in the 1980 amendments, and while there are still some problems, many of the past abuses have been largely corrected.

As the report of the Committee on Ways and Means on HR4170 states, "The disability insurance program has attracted substantial Congressional attention......, primarily because of the numbers of beneficiaries whose benefits have been terminated." I recognize that the Congress must take this seriously, but there is a real danger of over-reacting. In considering this legislation, I hope this Committee will keep in mind the characteristics of human nature and the subjective nature of many disabilities. Except perhaps for the most flagrant fraud, ~~[illegible]~~ virtually anyone who has been receiving benefits will howl in anguidh if they are terminated. And you will hear the howls, no matter how fairly it is done.

The Committee on Ways and Means believed it crucial to public support of the program that the public understand it to be administered according to law and not arbitrarily. I suggest that it may be even more crucial to public support that the program not be administered so generously that the taxes needed to pay for it must be substantially increased over their already high level.

The Congress face an incredibly difficult task in trying to legislate better administration of the disability program. A surprisingly large proportion of disabilities are largely subjective in nature. Some people work full time and effectively under incredible handicaps; others become disabled under little more than a disinclination to effort. In considering this legislation, I hope you will keep in mind that it is never going to be possible to perfectly administer anything as subjective as disability under rules and regulations. Yet, as Government has no choice but to operate by them, we must settle for the best we can get. I don't think HR4170 meets that test..

<u>Section 901</u> provides standards that must be met before an individual can be considered <u>not</u> disabled. Briefly;

> The individual must now be able to work because of a <u>medical</u> improvement; <u>or</u>
>
> <u>Advances in medical or vocational technology</u> now make the individual able to work without medical improvement; <u>or</u>
>
> <u>Because of new or improved diagnostic techniques or evaluations</u>, the impairment is not as disabling as previously determined.

What's the problem? First it doesn't really recognize the erroneous decision in the first place. In fact, it just about rules out the possibility of terminating benefits awarded because of a wrong affirmative decision at the outset, because no review is ever going to admit that the original decision was wrong. Second, in many cases, perhaps most cases, impaired people who become able to work do so in spite of their impairments, because they learn to compensate for their problems. Such learning is often motivated by the lure of financial rewards more attractive than the disability benefits available. Yet even with respect to the exceptions to the medical improvement requirement, the Ways and Means Committee report indicates that the Commttee ~~that~~ Intended those criteria be applied with what amounts to a "presumption of disability." See the second and third paragraphs near the top of Page 419 of the Committee Report.

Section 902 calls for a study on the use of subjective evidence of pain. This provision is hard to oppose. Yet it will probably result in the expenditure of substantial sums without any useful result. Insurance companies, rehabilitation experts, and many physicians have been trying to find out how to tell whether pain is severe or mild, whether it is real or feigned, for years and years without success. Pain is so subjective that noone can evaluate its severity in another. No physician can say a claimant doesn't have back pain or chest pain if the claimant says he has. I doubt that that problem will ever be solved -- other than by obtaining moving pictures of the severely disabled claimant playing vigorous tennis or shoveling snow, which we have occasionally been able to do in the private insurance business.

Section 903 would permit a determination that an individual is disabled from multiple impairments, even if no one of them is sufficiently severe to be disabling if considered separately. On its face, this amendment is hard to criticize. Certainly, there are people with a variety of painful impairments that work together. Certainly some such people are probably sufficiently handicapped to be incapable of effective work activity. The number who would be found so disabled by the state agencies and the ultimate financial implications of this amendment are, however, impossible to predict.

(At this point, the section number references in the House Committee report depart from those in the copy of HR 4170 I was furnished. Sections 904-908 described in the report seem to be Sections 911-915 in the bill, etc. I shall follow the numbering in the bill.)

Section 911 provides a moratorium on mental impairment reviews. Such a moratorium has already been established by the Secretary, and it is likely to be very expensive as it stands. Meanwhile, Section 911 directs the Secretary to extensively revise the criteria for finding a person disabled under the listings so that the revised criteria alone and in combination with assessments of residual functional capacities ..."shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in SGA in a competitive workplace environment." She is given nine months to do this and is required to do so in consultation with the Advisory Council to be appointed under Section 924.

Note that the Advisory Council must include at least one psychiatrist, one rehabilitation psychologist, and one medical social worker. Who would the seven others be? If they are members of benefit increase-seeking pressure groups, the results are predictable and will be expensive!

But that isn't the main problem. The main problem resides in the nature of mental and emotional disabilities, their subjectivity, their variety, and the fact that something like 75% of the redeterminations resulting in findings of non-disability have been on mental impairments.

Mental and emotional impairments are horrendously difficult to deal with. One might say that all psychotics could be deemed totally disabled from working. But manic-depressives are considered psychotic, yet many of them can function in a work environment under medical treatment - and many do.

When it comes to those with neuroses, emotional problems, anxiety states, the problem is far worse. These have been the most difficult and expensive causes of disability the insurance companies have had to deal with since the business began. The incidence of these disabilities skyrockets during depressed economic times. Distinguishing between unemployment and unemployability due to mental problems is extraordinarily difficult.

Psychiatrists and psychologists are of very limited help. The therapist tends to be automatically conditioned to believe the patient. If the patient says he can't stand the stress of the work environment, the therapist tends to accept that. He directs his efforts to trying to find a way to help the patient cope with the reported stress. He doesn't tend to determine whether that stress in the work involves a real emotional disability or whether it is nothing more than an allergy to effort.

And disability benefits can have s strong effect on the outcome. People with disability benefits that expire after a year or two often find that they reall- can work after the benefits have run out. But some of them can't.

I believe that the hope that the Secretary and the Advisory Council can together write regulations that can objectively determine the existence or non-existence of mental disability on a consistent and uniform basis is purely wishful thinking. I suspect that any regulations that do come down will simply have the effect of making it much easier for a person to qualify for benefits based on mental impairment and virtually impossible to prove a recovery from mental disability of anyone who doesn't want to work or fears he can't find a job. Yet many people who don't function well under a tough boss do well in their own enterprises; and others who are no good at self-discipline do very well under good supervision. If a self-employed artisan becomes depressed because his business is failing and won't support him any more due to his inability to manage his time and customers, he may well qualify for disability benefits under the proposed regulations. Yet he might, being highly skilled, be perfectly able to work effectively in a shop owned by someone else who would handle the business side. But what pressure would there be on such a person to try?

The Report of the Committee on Ways and Means states (page 422) that "The Committee is cognizant of the fact that revision of the listings in the mental impairment area could potentially result in an increase in the cost of the disability program. For that reason, the Committee intends to monitor closely the cost effects of these revisions......" The cost effects are not predictable, but it would be my suggestion that the Congress be prepared to find a billion dollars or two of extra Social Security taxes if thas amendment is adopted.

Section 912 of the bill provides a right of face-to-face hearing at the redetermination stage and makes other administrative changes. I would support the desirability of early face to face hearings if the hearing personnel will receive training in the conduct of interviews with claimants. Untrained people can be very adversely influenced by good acting!

Consideration should be given to using surveillance techniques in some cases to confirm or disprove allegations of disability. There are such things as fraudulent claimants!

Section 913 of the bill would provide on a permanent basis for persons found to be no longer disabled to elect to have their benefits continued during the appeal process through the ALJ stage, with provision for repayment in the event of adverse findings on appeal. And it also provides for waiver of repayment on judgement of the Secretary that the appeal was made in good faith. Further, the report of the House Committee states (last paragraph of the discussion of Section 906, page 424) that "The Committee intends that at, the time beneficiaries are given the opportunity to make this election, they be informed that, in the event of an unfavorable determination, they might be eligible for a waiver or for a long term repayment plan." Such action would virtually guarantee that all ~~would~~ who appeal ~~and~~ would request continuation of benefits during the appeal. And I suspect the Government would recover next to none of the payments continued in the cases it won on appeal. The claimants would have spent it, wouldn't have it, and waivers would be granted routinely.

Section 914 requires that a qualified psychiatrist or psychologist effectively endorse the finding of no disability in mental cases. This may be helpful in getting better initial decisions. However, I would caution the Committee not to expect too much. In the private insurance world, every case that goes to trial features a medical expert on each side, and each "expert" is invariably willing to go out on a limb in support of his side of the issue.

Section 921 of the bill requiring notice and comment provisions of Section 553 (a)(2) of The Administrative Procedures Act be applied to these benefit programs seems simple enough. However, it may raise questions not immediately apparent. The rationale for it in the House Committee report centers on State agency disability examiner reaction to criticsm of allowance decisions coming back from SSA's Federal quality assurance reviewers and the ' hit [illegible] ALJs have of reversing disallowances . It is suggested that the latter phenomenon may result from the fact that the ALJs are bound by statute and regulations, while the State agencies are supposedly bound by the Social Security Rulings and disability claims manuals.

Possibly, this is the case, but I suspect otherwise. I no longer had access to the Report of the hearings preceding the adoption of the 1977 and 1980 amendments, but I vividly recall testimony by Representative Elliott Levitas of Georgia and by an ALJ who testified , I believe at Representative Levitas's request, on the subject. As I recall, the sense of that testimony was that the high reversal rate by ALJs at that time arose from their failure to follow the then existing SSA policies, the lack of any coherent body of guidance material that they would follow, and their tendency to redecide the facts. If my memory is accurate, and similar conditions continue, one wonders if this amendment will have the desired effect or will merely complicate and slow down SSA's efforts to improve the administration of disability claims.

<u>Section 922</u> would require SSA to either abide by any Federal appeals court decision and carry it out nationally or appeal it to the Supreme Court. This would put an end to SSA's practice of not appealing and not acquiescing in decisions with which it disagrees, beyond the actual case at bar. To this practice, the House Committee takes exception. But does not the IRS take a similar position on tax matters?

Is the issue whether the courts or the Social Security Administration interpreting the intent of Congress should determine the criteria for judging whether disability exists? Since Federal judges are not always experts in evaluating disability risks, there may be danger in the former resolution of that issue that costs may again rise more than expected.

<u>Section 923</u> would remove the restriction, added by P.L. 97-35, that vocational rehabilitation services could be reimbursed if rendered to participants in the medical recovery program only when the beneficiary had performed SGA for nine months and would allow reimbursement when the individual refuses to cooperate

without good cause. Well administerd vocational rehabilitation programs for carefully selected claimants can be very cost effective. My recollection is that the restrictions in P.L. 97-35 were put there because of a sense at that time that the program was not being very effective and that the so-called returns to work often involved people who would have recovered and returned to work at about the same time anyway.I have no way of judging the accuracy of that perception. I doubt that this amendment will have a serious financial impact on the system.

I have already commented on Section 924, I have no comments on other features of the proposal. If any of you has questions, I'll answer to the best of my ability.

Senator LONG. Now I was the one that asked that the panel from the Department of HHS remain here, the social security people. Are they still here? I'd like to call them back and ask a question or two.

Now I particularly want to ask this question of the young lady—what is your name?

Ms. OWENS. Pat Owens.

Senator LONG. Owens?

Ms. OWENS. Yes.

Senator LONG. Now your superior, your boss, wanted to yield to you because you were the one whom she regarded as the expert on your program. Senator Heinz was reluctant to let her do that. And I believe you could make a contribution because of your close familiarity with the program.

Do you recall what the question was?

Ms. OWENS. It had to do with the mental impairment criteria.

Senator LONG. Yes. I think the question had something to do with this—since the administration has put a moratorium on reviewing cases where a person's disability is due to a functional psychosis, why don't you reinstate on the rolls all similar persons who were taken off the rolls before you declared a moratorium? I think that was the question. Is that how you recall it?

Ms. OWENS. Yes.

Senator LONG. Would you give us your reaction to that question?

Ms. OWENS. Well, the first thing I was going to say was to reiterate what Mrs. McSteen did say. That we are in the process of reviewing the criteria on mental impairment cases. Until we do review the criteria and have a revised criteria, we have no reason to go back and review the cases at that point. We would be reviewing them against the current criteria that are in place right now. That was basically how I was going to answer the question.

Senator LONG. Let me say to you that I don't think it's fair to blame the Department or anyone of you who appear for the Department today for what developed in this program. This was a program that was not recommended by the Department. This was a Senate floor amendment to a House-passed bill. The administration at that time was opposing the amendment. And those of us who thought it ought to be added to the bill took advantage of such help as we could muster at that point. Much of it came from Mr. Nelson Cruikshank, and people who had been associated with the American Federation of Labor in years gone by, and people who were dedicated on the side of those disabled people. And so, to a large degree, we let those people write their own ticket when we passed that bill for them. And I was one of the sponsors of that amendment. I know that.

This program that we passed into law, so far as I can recall—and I was a sponsor of the amendment—was not an Administration bill. This was not a bill prepared by the Administration and sent up here. This was something prepared by the special pleaders. So this was their program to begin with. And they gave us the estimates. I'm sure they did it honestly—from their point of view. Those estimates supported what they thought it was going to cost.

Now what concerns me about this is that down the road a ways we found that this thing was getting ready to cost eight times the original estimate. Here we were in 1977 with a prediction that this disability was going to cost some 40 percent of what the entire social security program had been predicted to cost at the time the disability program was adopted.

And, frankly, as one of those who was a cosponsor on the amendment to establish the disability program, I have to recogmize that this has become a run-away spending program.

Now I hope you people in the department have the courage to go ahead and recognize the fact that the majority of people who are paying your salaries are not people who claim to be disabled but are not. The majority of people who are paying your salaries are honorable, decent people out there who are paying taxes to support this program. And they don't deserve to be taken to the cleaners. They deserve to get their money's worth for what they are paying.

Now can you people tell me what is likely to happen if we permit this program just to go on ahead and get out of control again?

Mr. ENOFF. Well, I think the results, Mr. Long, of what we have done would show that 20 percent of the people do end up being terminated from the rolls so that those projections in the 1980 amendments were apparently close to accurate because the net result even after all the appeals process is about 20 percent of those that we review end up not being disabled. And I think that the other thing that we need to point out in relation to those people who are going through that process is they are retaining their payments while they go through the appeal process, all the way up.

So I think that does bring that kind of humanity to the process so that while the appeal is going on, they can appeal all the way up the line with it.

But I think you are right. The reviews are necessary in order to assure that the people on the rolls are, indeed disabled.

Senator LONG. I recall one time when I was sitting up in the White House with President Lyndon Johnson and he was feeling sorry for himself that the press was giving him the worst of it about some of the spending programs. And he said, "How can anybody be angry with you because you give food to some little hungry children and some hungry, starving people out there?" "Mr. President, are you talking about the food stamp program?" He said "Yes." I said, "Well, do you think that those people are using that money to buy food with it?" He said, "Why, of course. What else?" I said, "Well, they might be buying some food with it, but down my way they also use it to buy whiskey, cigarettes, drugs, just any blessed thing that a man can conceive of."

He said, "Oh, that can't be true; that's against the law." I said, "Well, all I know is the way it works in Baton Rouge, La., where I happen to live. It just goes on all the time. Here is a little store that has got a barroom in the back and a little grocery store in the front, and a fellow comes in there the first time and buys a steak for $5, and he said 'How much is that bottle of whiskey?' 'Four fifty.' 'Well, I will trade you this steak for the bottle of whiskey.' And he walks out with a bottle of whiskey. The second time he doesn't even bother going through all that. He just gives him the food stamps for the $5 and takes the bottle of whiskey out."

The President said, "Oh, I can't believe that." Later on I heard some anguished cries from my hometown. I hear a bunch of my constituents are being prosecuted because they are doing just exactly that. Well, that's the way it was all over the whole State and the whole United States as far as I know.

The program was not what the President intended. He didn't intend that program to sustain a drug habit or an alcohol habit or to provide cigarettes or marihuana or goodness knows what. He thought those food stamps were to be used to feed hungry people.

These programs have a way of getting out of hand unless people in Congress have the courage to at least ride herd on them. And when they see something is in error or something is going wrong, to straighten that matter out.

Now I feel like I owe you people an apology. I was one of those people that supported the 1956 law that said that we would let the States go ahead and hire the people who would examine the applicants and we would pay 100 percent of the cost. Now we see that a great number of States refused to abide by the regulations when you are trying to make the program be what it was supposed to be.

Now I'm not here to defend any mistakes that were made by the administration. I just wasn't responsible for that. But I did support the program that made all this possible. And I would hope that each one of you here in your position of responsibility would tell your secretary she had no business letting the first Governor get away with telling you that he wasn't going to abide by the law. He should have been told immediately when he did that, well, if that's the way you are going to do business, sorry, but we are not going to use your people any more.

The President had the courage to fire that bunch of comptrollers when they went out on strike against the U.S. Government. Why shouldn't you just tell the Governor "You are no longer hiring people to work for us." How would any of you justify continuing to do business with a Governor when he refused to abide by your regulations and the Federal law? How do you defend letting him get away with that?

Mr. ENOFF. Well, sir, we have now, as I think the Secretary told you yesterday and as acting Commissioner McSteen said today, we have now sent letters to each of the Governors and asked them to resume processing in a normal mode and in court cases with court orders. And we will be working with those States to bring them back into line in terms of processing. And we will be using whatever tools we have available. And I think you know that some of those tools are well spelled out in the statute even.

Senator LONG. How many States do we have to contend with on that? We are paying 100 percent of the cost, and they are declining to abide by the law.

Now how many Governors and States do we have to contend with on that basis?

Mr. ENOFF. Well, sir, it varies depending on the court situation. And that is why there was some confusion earlier. But if you take States where there is no court order pending, we are talking about eight States that have done some action on their own where there is no overriding court order pending.

Senator LONG. When we in the Congress try to get that mischief back under control, and we try to get the geni back inside the bottle, we might have eight Governors calling on their Senators.

That's 16 Senators out there to fight on that Senate floor. If I had had my way, you would have never had more than two Senators to contend with because the first Governor that did that, he would have been told that your crowd are fired; they are off the payroll. We are going to now proceed to name our own examiners. And they will examine these cases. And we are not going to ask the neighboring State to do that. If I were the Governor of Mississippi and you asked me to go there and run Louisiana's program, I would think I was asking for trouble.

The Federal Government is paying for this program. I think we ought to run it. But why on Earth should the Department wait until we have got eight of these governors to contend with. Why shouldn't they start out with No. 1 and just stop that mischief right off.

Does the President of the United States know this? That the Secretary is sitting there letting that mischief go on day by day?

Mr. ENOFF. I can't tell you for certain exactly how much he knows about that.

Senator LONG. Well, I'm sure going to find out. The President, if I judge that man, he's a pretty tough kind of cookie. When he is paying for it and you are not doing your part, my guess is that he is the kind of person that would do what he did to those controllers. Tell them they are fired.

I know you have a big heart, and every one of you wants to help the less fortunate people and people in distress—but I hope that every one of you has also got a head on you as well as a heart, enough to say that you are not going to let the taxpayers of this country who are paying your salaries and mine just be completely cleaned out by loading those rolls down with millions of people that don't belong on there. Just as one Senator, can I count on you doing business that way down there?

Mr. ENOFF. I think you've heard what we have begun to do and you can count on us.

Senator LONG. How about the rest of you? How do you feel about it?

Mr. GONYA. We have certainly continued to defend the position on medical improvement. We are deep into court actions, maintaining that the statute does not require medical improvement.

Senator LONG. How about you?

Ms. OWENS. Yes, sir.

Senator LONG. Well, I am just one person, but as far as I am concerned, the law is on my side. They can put me in all the gold coffins they want to. I've had this crowd march up and down the hall threatening to kill me and all that foolishness. I don't know of anything more likely to reelect a Senator than to find out that a whole bunch of people who were not entitled to be drawing Federal money were making threats to a Senator because he was trying to do his duty to protect the taxpayers.

Now the people of this country are generous and they are kind and they are big hearted, and they are willing to pay for all those who are less fortunate. But, when they feel like they have been victimized and cheated, when they look at people right next door drawing disability payments and there is not a thing in the world wrong with them, then they lose faith in all of us. And from my point of view if I have got to run for office and I can take the pressure, I think that you people ought to be able to take the pressure and just administer a law.

Do any of you have any doubt where the President is going to come down if it gets down to a question of whether he is going to permit us to have eight times as many people on the rolls or three times as many people on those rolls as have any right to be there? Do any of you have any doubt where the President is going to come down if it gets to his desk on those terms? I don't have any doubt about it.

Thank you very much.

STATEMENT OF THE HONORABLE BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS

Senator **Long**. Welcome, Governor Clinton. We are pleased to hear from you.

Senator **Pryor**. I'd like to say a word, Mr. Chairman. I've been real excited about introducing Governor Clinton here this afternoon, and I don't know whether I am as excited now as I was 30 minutes ago. [Laughter.]

But we are very, very glad that you are here, Governor. And I would just like to say, Senator Long, Governor Clinton, who is the Governor of Arkansas, has been chosen by his colleagues, the National Governors Association, to come and present the Governors' side of this picture. And you have raised, I think, some very interesting points, Senator Long. And I'm sure that Governor Clinton can address those points and also any other matters that he would like. But our State is very honored to have you chosen, Governor, to come today and present the position of the Governors with regard to social security disability.

Governor **Clinton**. Thank you very much, Senator Pryor, Senator Long. I was hoping you would be here today and we would have a chance to discuss this issue. And I appreciate the opportunity to appear.

I would like to have my remarks read into the record, but I would only like to take a couple minutes of your time before we can get into a dialog.

As you have pointed out today, the States do administer this program which is paid for entirely, not only in benefits but also State employees' salaries of the program, by the Federal Government. The Governors have not been opposed to the idea that the program ought to be tightened up, and certainly do not oppose the 1980 amendments, which call for a review of all those who had been previously put on disability.

The grave concern that we have had over changes in the program growing out of the 1980 legislation essentially grew out of the fact that it seemed to us that not only people who were needing to be kicked off disability were being kicked off, but there were those being terminated who there was no reasonable possibility they would ever return to work because, in fact, they were disabled or because they had been on disability so long and were so old or so unskilled there was no reasonable opportunity they could go back.

You and I, if you want, can get into a little back and forth. You can cite me one example and I can cite you another. But suffice it to say our State's program, which is run by the gentleman to my left, Julius Kearney, a distinguished young Arkansan, has been recognized over and over again by the people who just left this table as being one of the most efficient programs in the country with a very, very low error rate both in putting people on and in taking people off.

In August at the Governors' conference in Maine I offered a resolution which was unanimously adopted by every Republican and Democratic Governor there which called for changes in the way the program was being administered. It called for face-to-face interviews before determination because many people, including me—and I practiced in the disability law field—believe that the quality of the judgment is better if there is a face-to-face interview. It called for the continuation of benefits through the ALJ level as the administration just testified they are presently doing. It called for three other things that I think there is some difference of opinion on.

One, a medical improvement standard for kicking people off if they were legally put on in the first place, having nothing to do with what should be done prospectively in the definition of disability.

Two, adherence to the circuit court of appeals' decisions by the SSA unless they are going to appeal those decisions to the Supreme Court so that everybody is following the same law. If it is, as you suggest, Mr. Chairman, a program that there ought to be Federal uniformity in then the Federal Government ought to be uniform in what they say the law is and what they permit us to administer without regard to what State we are in.

And, third, some uniformity of the standard of disability. That is, after all, what we are hired to do at the State level—determine whether a person is disabled or not.

Since the 1980 amendments and particularly since 1981, we've been asked to—many of us felt like we were lost in a fun house, frankly, in trying to define what disability is. There has been kind of a crazy quilt pattern of the statute, regulations, internal policy statements, official directives, telephone conversations back and forth between the State office and the feds saying what we should or shouldn't be doing. We don't know what the rules are. And whatever they are, we want to know what they are; we want to do the same for everybody in every State. And that's been very frustrating for us.

Now 25 States have taken some independent action. Fifteen have declared moratoriums on any more terminations. Eight of them are defiant enough to have done it without the benefit of a court order, and I'm one of the eight so I'm standing here guilty. I would like to tell you that what we did in Arkansas was last June I issued an executive order which didn't stop terminations but which attempted to clarify and rationalize the process by which we were making the decisions. And which met with no substantial opposition from the Social Security Administration, as far as I know.

I did not issue the moratorium on cessations until December when the Congress went home without taking further action and when we didn't know what the position of the Congress was going to be on this issue. And I certainly look forward to getting back into a position where I can work in tandem with and cooperation with this administration.

My message today is this: I think we need congressional action. I think we need a bill which embodies the Governors' resolution. We are not against the 1980 amendments which call for review of people that are on disability. We are not against kicking people off who shouldn't be on and who ought to be required to go back to work. We are against what we have seen in the abuses of the program. We simply think the pendulum swung too much the other way, and that is the sole basis of our resolution, apart from the fact that we think we need to have a uniform set of standards that are fair and clear and unambiguous for all the States administering the program without regard to where they are, unless there is an unavoidable difference caused by a court decision, instead of the administration trying to maneuver which court decisions they recognize and which they don't and where they recognize them.

And let me just say this in closing. This thing got so hot in 1982 when I was running for Governor again that the incumbent Republican had his name taken off the stationery in my State. And I never once used it against him as we walked around all the State. Every county I went into I found somebody else who had been kicked off of disability and I listened to the stories and some struck me as valid and some didn't. I think you would have the same reaction if you went around in Louisiana.

I don't think the Governors should run this program, if we are going to be asked to run it according to standards, rules, regulations, and procedures that we think are intolerable, indefensible, irrational, and in some cases cruel. Now we are going to make mistakes. We are going to make mistakes no matter what kind of program we have.

But one thing I came here to say—now I am speaking for myself now; not the Governors' Association. I believe, and I don't want to lose Mr. Kearney's job because he's a fine man—but I agree that if we can't live with a program you want to run then you ought to take it over and fire us. But I'm not going to go home and walk around and go into any town in my State and look at any citizen of my State and tell them why I'm doing something if I can't defend it. If I can't look them straight in the eye and say this is why we are doing this, and we think we are doing something that needs to be done, and I feel good about it, I'm not going to do it. And I think all of us should have the programs taken away from us if we are going to continue the present posture. The administration has reaffirmed that it is against a medical improvement standard. It has, to me, reaffirmed implicitly that it doesn't care whether there is any uniformity among the States.

I will say that I am pleased that apparently the administration wants to continue the receipt of benefits through the administrative law judge level, and some other things that we feel need to be done.

But I like the Governors' Conference resolution. We are all for it. It's not a partisan issue. It's not an issue of the States against the Federal Government. It's not something that indicates we don't want to see the deficit reduced. And we are not trying to pump you for money that we know you don't have. We just think that if we are going to run this program we have got to run it according to rules and regulations that we can have respect for and explain to our people which holds up the best motives of the Federal and the State Governments.

Thank you very much.

[The prepared statement of Governor Clinton follows:]

PREPARED STATEMENT OF GOV. BILL CLINTON

The National Governors' Association supports a number of major reforms in the disability insurance program. We believe that the present process results in the erroneous termination of benefits to a significant number of eligible persons, that the current administrative standards are more restrictive than authorized by regulation or statute and that the failure to consider medical improvement denies benefits to persons who are, in fact, unable to return to work.

While we do not question the need for a continuing review process in the disability insurance system, nor the need to periodically reassess the eligibility standards themselves, we are concerned when that review process is unreasonably accelerated or when the standards appear to bear little relevance to the actual ability to find and engage in work.

As a result of these concerns the Governors, in August, unanimously approved a policy statement calling for six major reforms in the disability process. We urged changes that would:

- make permanent the temporary policy that continues Social Security disability benefits through the Administrative Law Judge (ALJ) level in all continuing disability investigation cases;
- adhere to a medical improvement standard before terminating benefits once eligibility is initially established;
- require the public promulgation of policies and regulations affecting the determination of disability;

- require SSA to apply decisions of the Circuit Court of Appeal or to appeal those decisions with which it disagrees;
- provide for face-to-face evidentiary interviews at the initial decision level; and
- provide for a temporary moratorium on mental impairment reviews until such a time as the listings for mental impairment have been revised.

While the Administration has acted, at least in part, on a number of these recommendations, it has been unwilling to adequately address the fundamental issues of continuation of benefits, medical improvement or the uniform application of Circuit Court of Appeal decisions. The result is that serious problems remain and that immediate legislative solutions are required.

An examination of the current disarray in the disability system makes the need for such changes very clear. The accelerated review process was initiated in March 1981 and approximately 1,134,000 cases had been reviewed by June 1983, of which 421,000 had been terminated. About 30 percent of the cases which were denied after state reconsideration have requested a federal review. Requests for ALJ hearings have increased from 281,700 in FY 1981 to an estimated 415,700 in FY 1983. An estimated 173,000 cases were pending decision at the end of that year. ALJ's for the months of February 1982 through July 1983 heard 126,000 appeals and reversed 77,000, or 61 percent of them. At a minimum it would appear that almost 20 percent of all state decisions are overturned by ALJ's and that the number of possibly incorrect decisions may be much higher as many persons do not pursue the full range of appeals available to them. The situation is made even more complex

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by SSA's decision to request Appeals Council review of ALJ's decisions which restore benefits and recent court cases concerning the impact of that review on the ALJ's.

For many persons their disability insurance payment is the sole source of income. For others it may be the difference between a minimally adequate income and poverty. Clearly such persons should continue to receive assistance until an adequate review process has been completed. Congress has recognized the importance of continuing benefits during the appeal process. Unfortunately the temporary extension expired on December 7, 1983 and has not yet been extended.

Other steps should be taken to improve the quality of the review process itself. First, it is critical that the review standards themselves be consistent with federal regulations and the disability statute. At the present time the state agencies are required to use guidelines which appear to be much more stringent than the law or regulations. Until such guidelines are incorporated into regulations or are changed to conform to current regulations a high reversal rate during the appeal process will continue. We believe that all of the major guidelines affecting eligibility should be publically promulgated to allow for public review and comment and to allow a careful scrutiny to determine their conformity to the law.

Second, the newly authorized face-to-face evidentiary interview should be conducted prior to a final determination and before the actual termination of benefits. Disability determination is often a complex process for both the recipient and the examiner. The lack of face-to-face contact during this process increases the possibility of needless error.

Third, the scheduling of reviews must be reasonably related to the staffing levels provided to state agencies. The number of scheduled continuing disability reviews rose from 257,000 in FY 1981 to 676,000 in FY 1983, an increase of over 160 percent. While total disability related workload rose much less quickly and may now have been offset by staffing increases, it appears that, at least in some states, the necessary additional staff was not available and fully trained at the beginning of the accelerated review.

The inequities and confusion engendered as a result of the differences between administrative guidelines and the law and regulations are compounded by the failure of the Social Security Administration to either appeal or implement federal circuit court decisions on a national level. We believe that SSDI is a national program and should remain one. Current SSA policy concerning Circuit Courts of Appeal decisions threatens the uniformity of the system and places states in an untenable legal situation. If the Social Security Administration disagrees with a decision it should appeal that decision, not merely ignore its application elsewhere in the system.

In addition to these procedural issues we believe that the disability process suffers from two major substantive defects. First, we do not believe that current medical standards are adequate for determining disability due to mental disability. There is considerable evidence that the current guidelines served to deny benefits to individuals that were clearly unable to function in a work situation. The Social Security Administration has suspended reviews relative to mental impairment and is re-examining the medical standards involved. We commend Secretary Heckler for this decision and we suggest that it be incorporated into legislation.

Second, it is critical to recognize that individuals who have been on the disability rolls for sometime have lost their attachment to the work force and may no longer have skills that are readily marketable. The Governors recognize that some individuals may have been classified as disabled mistakenly. They also recognize that newly available treatment may mitigate or eliminate a disabling condition so that an individual is able to work. However, there is little reason to expect that an individual long out of the job market will be able to return just because of a change in a medical impairment standard or a review guideline. Unless this problem is recognized and addressed these individuals are likely to become dependent upon other governmental programs or to substantially impoverish their own families. If prior standards were not properly targeted they should be changed. New applicants, those recently in the job market, are appropriately reviewed by these new standards but we should not expect either state government or the individual to be able to respond overnight to the change. The failure to require medical improvement is particularly troublesome in relation to Supplemental Security Income (SSI) cases and to those disabled persons who are nearing normal retirement age. In the first case the denial of federal benefits merely shifts a federal cost to state welfare programs. With thousands of able bodied welfare recipients unable to find work it is unlikely that the needed jobs are to be found to return the disabled person to the work force. In the second case the older recipient faces the dual barrier of no recent work history and a future work life that may not justify the investment needed in retraining by a potential employer. Congress must make clear that medical improvement should play an important role in the review process.

If the Congress and the Administration wish to assist those currently classified as disabled to return to work, additional attention could be given to the vocational rehabilitation program. Unfortunately the funds specifically allocated for vocational rehabilitation for the Title II and SSI disabled have been reduced substantially. In FY 1981, $124 million was allocated, but this dropped to $10 million in FY 1983 as a result of the Omnibus Budget Reconciliation Act of 1981 (OBRA). While OBRA required that the Social Security Administration reimburse states for all Title II and SSI disabled persons successfully rehabilitated, it is unlikely that this reimbursement will even approach the FY 1981 levels.

As you know, The Social Security Act provides that the states may administer the eligibility determination process for the disability insurance program. While states are not required to carry out these responsibilities all states currently do so. States are expected to conduct disability determination in accordance with federal rules and regulations and the federal government reimburses the states for the full cost of these services.

In accordance with their normal operating procedures the states initially attempted to comply with federal directives to implement the accelerated disability review process. Serious problems developed quickly as the number of scheduled reviews exceeded staff capacity to conduct them properly. More important, it became clear that there were deficiencies in the review standards themselves, particularly in relation to mental impairment and that the review process was not providing adequate information on which to make an accurate decision.

Additional problems surfaced as court decisions concerning the review process increasingly came into conflict with Social Security directives and as it became clear that many persons being terminated from the rolls were, in fact, unable to resume work. The lack of any medical improvement standard to temper the more recent disability standards was forcing the termination of benefits to individuals with no recent work experience and with no reasonable expectation of finding employment.

Faced with a rapidly growing problem of both a humanitarian and administrative nature states first sought solutions in the Administration and the Congress. When approaches to both the Administration and the Congress failed to produce comprehensive action, some states were forced to act unilaterlly to prevent severe harm to disadvantaged individuals and to respond to a variety of court orders not fully recognized by the Social Security Administration. While many states were able to delay such action the problem became more difficult when the temporary authority to extend benefits pending final resolution of appeal expired on December 7. By the time that Secretary Heckler placed a temporary moritorium on terminations, some 25 states had acted on their own. In 10 states, state action was covered by a variety of direct court orders while 15 others have temproarily suspended terminations or are operating under modified review standards.

The states which have acted to delay the issuance of final determinations recognize the seriousness of that action. However, so long as the federal government continues to rely on states for the disability eligibility function, those states are not prepared to ignore what they see as legitimate court orders or a major humanitarian concern.

Let me make clear that the Governors are not opposed to responsible efforts to reduce the federal deficit. We recognize the danger of continuing high deficits and the need to restrain the rapid growth in national entitlement programs. We actively supported the enactment of the social security reform recommendations of the bi-partisan commission and we are urging a similar approach to resolving problems in the unemployment insurance system. In addition we are taking new steps at the state level to help control rapidly escalating health costs and we support a continued effort to restrain the growth in non-needs tested entitlement programs.

States are prepared to work with SSA and the Congress to develop both interim and more permanent solutions, but they should not be forced to act irresponsibly. If the federal government is not prepared to correct the problem it must be prepared to assume responsibility for direct administration of the program and it must act to protect those employees who are affected.

I am convinced, however, that the issues will be resolved and that Congress will act to restore reasonableness and uniformity to the disability insurance system.

Senator PRYOR. I feel our State might be similar to a lot of States that have gone through this whole process since 1981. What effort does the State disability determination services make to channel the disabled into vocational rehabilitation programs? Do we have a program there in our State and do other States have such a program?

Governor CLINTON. Well, Senator, we do. A couple of years ago the program was funded at I think a 90-percent higher funding rate than it is now. And one of the things that I think that perhaps we could all agree on is that even some people who are being removed from disability who need to be removed have maybe been on it so long and are of such background and lack of work experience that they need to have some sort of rehabilitation or vocational training. And as I understand it—my figures may be wrong—I think the funding of the program has been cut back from about $110 million to much, much less than that.

Our State share was about $37,000 or something like that last year. There's no funding for a vocational rehabilitation component of this program anymore for any practical purposes. And I think there should be.

Mr. Baxter of our State has participated in the drafting of the testimony which has been presented or will be presented by the people who work in the rehabilitation field. And I think they have taken the strong position that no matter what we do on all these procedural changes, Senator, we need to beef up the vocational rehabilitation component because I think—and you all have figures on this—but I think it's proved pretty cost effective for you.

Senator PRYOR. I'd like to ask a question of Mr. Kearney, if I could. And first, Senator Long, Mr. Kearney is from a very fine southeast Arkansas family. And if I'm not mistaken you have five or six brothers and sisters all lawyers. Is that right?

Mr. KEARNEY. That's correct.

Senator PRYOR. Now I know that your brother John worked for me when I was Governor. We worked together. And how many brothers do you have that are lawyers, and sisters?

Mr. KEARNEY. There are five who are lawyers. There are 19 brothers and sisters altogether.

Senator PRYOR. Right. Nineteen brothers and sisters.

Mr. KEARNEY. We all decided we were too tired—so we decided to go to law school.

Senator PRYOR. Do you have any idea about how much it takes, how much it might take financially, to conduct a disability review? Do you have that broken down?

Mr. KEARNEY. We do not have figures. I was looking for some figures that I believe the SSA did saying that the cost just to notify people would take over $400 per case. Just for notification for people that they did have the right to have the case reviewed. We have not had it broken down in our office.

Senator PRYOR. Now, Mr. Kearney, right now the State of Arkansas, I guess, would be somewhat similar to the other moratorium States. Are you continuing your review process? Is that correct? But not sending the results into Washington? Is that how our particular moratorium is being done at the moment?

Mr. KEARNEY. Right. At this time we are continuing the review process under what we understand to be SSA's guidelines. If we would determine that a case would be one that would be a cessation case, then we are just holding that.

We have recently received a phone call, however, from the regional office telling us that we should lean toward continuing as many cases as possible. So our problem there is the rules as they are written might say cessation, but they are saying lean toward continuing them so that we won't have the cases sitting there. So, again, that is part of what Governor Clinton is saying. That we are having a real problem getting one word on what we ought to be doing.

Senator PRYOR. Senator Long, maybe you have some questions.

Senator LONG. Yes, I do.

Governor, have you been in the room during the course of the hearing to hear the previous witnesses?

Governor CLINTON. Yes, I heard most of it. Enjoyed it very much.

Senator LONG. Let me just tell you, Governor Clinton, that when I came to the Senate I must have been about your age. How old are you?

Governor CLINTON. Thirty-seven.

Senator LONG. Well, I was younger than you. I was 30. In fact, I was 29 when I was elected. So I came here committed to this type of program. And I guess I still am committed to it provided that it is administered the way it ought to be administered and provided it's the program that it ought to be.

Those who persuaded Senator George to be the sponsor of the amendment that made this program part of the law came to me first. They thought I was the logical person to sponsor the amendment when it became law. I would have been very proud to have had my name on that, but I thought it would have a better chance if we could persuade Walter George, who had been the former chairman of the committee, to offer it. That was his last year. He had enormous respect and prestige in the Senate. And, frankly, that was good judgment because if I had offered that amendment it wouldn't have carried. He did and it carried. It only carried by one vote.

And he made an eloquent speech out there and he explained the amendment and did a magnificent job. That was one of the high points of my Senate service to hear him make his closing speech for this amendment.

Now we go down the road a ways to 1977, and the social security program is going broke. As chairman of the committee, it seemed to me the logical thing to do was to raise the taxes to pay for it. And I led the charge to try to do that, and we did. And when I ran for reelection that was one of the principal points my opponent raised against me. You might have seen some of his television ads over there in Arkansas. You are a next door neighbor.

Governor CLINTON. I saw your ad defending your vote.

Senator LONG. Pardon me?

Governor CLINTON. I saw your ad defending your vote. I liked it.

Senator LONG. But here was this fellow telling the people that I had advocated the biggest tax—he gave me full credit. I put the biggest tax increase in history on the backs of the people. In fact, he gave me credit for the windfall tax, too. [Laughter.]

He said I had put the two biggest taxes in history on the backs 'of the people. And I didn't deny that, but it seemed to me as though we had no choice if we didn't want the program to go broke. This disability program was responsible for a large part of that problem. The trustees report in 1977 projected that the disability program was going to cost 2.26 percent of payroll. And that means that this program which is costing about $18 billion now would be costing us over $30 billion a year if nothing were done to control its costs.

Now I've seen these people that come up here in wheelchairs. And I have met with them. And I would be willing to stipulate that all those people are probably disabled.

But let me just tell you this, Governor. There are also people I have met either because they are working for me or have worked for me or because they know me personally who are on the disability rolls even though they were never intended to be on those rolls.

Let me just give you the best example I know on the rolls. Here's a fine, honorable, decent, god-fearing woman working for me and my wife right here in our apartment in Washington. She came down with cancer. And it occurred to me that maybe she would be entitled to go on those rolls. I suggested she go down and talk to the people at the social security office.

She was somewhat dismayed that the benefits were not more than they were and that they had a waiting period. But when she decided to claim the benefits, she intended to continue to work for people, including us, and receive whatever pay that we felt like paying, and do what work she felt like she could do, so as to supplement the social security income with her earnings.

I told her that I couldn't do that. In the first place, it would be against the law. And if anybody was going to break the law, it shouldn't be me. I was the one that helped to pass that law.

That dear sweet woman offered to work for us for nothing because she felt that we had been good to her. And my reaction was that we couldn't do business that way. So we had to terminate our relationship. I could not employ that person.

I assume she continued to work for the other people. And you and I know that's against that law. Is that right, or not?

You are nodding. You agree that's correct.

Governor CLINTON. That's correct.

Senator LONG. Now that's against the law. That dear woman died of cancer that year, and she didn't last very long, bless her heart. But the point is she was on the rolls prematurely—while she was still working.

Now I can understand how an examiner can be compassionate and try to be kind and good to people in such circumstances. Now that's the best case I have seen. There are other cases where the people are working fulltime in a home even though they are drawing disability. It's not at all unusual in my hometown for people to be employing people with no records kept who are on those rolls as being disabled. Now what do you think we ought to do about that?

Governor CLINTON. Senator, I think that's a good argument for what the Congress did in 1980. Pass legislation requiring all the cases to be reviewed. I don't have any problem with that. That's what our people do all day every day. They review these cases. They try to evaluate whether the people ought to be terminated or not. And if they are double-dipping or if they have got a bad medical evaluation and they get another one, that's the kind of people we can terminate under the law. Under any conceivable set of rules and regulations that are properly and firmly administered under the 1980 legislation, those people would be caught up in it. But that doesn't have anything to do with the fact that, as you have already acknowledged, there are 40-11 horror stories for every dozen you can tell about people that shouldn't be drawing it. And that the.procedures are a living nightmare for us to administer.

The issue, I guess, is whether or not—there is no question that there are more people being kicked off under what has been done in the last couple years than there would have been if the previous administration, the way they contemplated running the program, had continued, even under the 1980 amendments.

But I'm telling you that I come from a State where the taxpayers think just like they do in your State and where it is popular to remove people from any kind of welfare roll as it is to put them on. I'm very proud of what we did in our State going back from when I was Governor before, to tighten eligibility standards for all kinds of public assistance programs. But I don't believe you can justify, No. 1, the results that I have seen with my own eyes in my State; and No. 2, the procedures by which they are followed. It's hard to know from one week to the next what the dad-gum standards are, and what the signals are. And we certainly know that there has been no uniformity throughout the country in how we define who is disabled and what the new rules are.

So I don't disagree with anything you are saying, but I don't think it undermines the Governors' position, which is that there ought to be the changes that are outlined in our resolution. I don't. And believe me, I'm not comfortable standing in the school house door with my moratorium here. But we've got to do something to change this thing.

Senator LONG. Governor, please understand my position. I have great respect for Governors, and you in particular. My father was a Governor. My Uncle Earl was a Governor three different times. I love Governors. Have the highest regard for Governors. [Laughter.]

And I have the highest regard for you, Governor. But I'm not particularly pleased with the way this matter has been handled by the Department. And I'm not particularly pleased that the Secretary of HEW did not arrive here today. Yesterday she was here and I insisted on interrogating her about this matter. She didn't want to be here for this hearing. And my reaction is that if you want that job—it's like Harry Truman said—if you can't stand the heat, then get out of the kitchen. When you take a job like that you are just getting in for a real tough situation. Some of this stuff is not going to be fun.

But I think that you and I have really no difference on the basic situation. Let me ask you this on the issue about compliance. You are the Governor. Suppose you put a program into effect and you are paying for 100 percent of it, and you call on the county officials to administer it, and they are breaking the bank. They are putting all kinds of people on those rolls that don't belong there at all. They are going to bankrupt your whole administration. What would you do about that?

Governor CLINTON. If they were breaking the bank and they were administering the program improperly, I would either make them change the way they were running it or I would take it over. But let me state again that our State has been recognized—Mr. Kearney got a call yesterday from Baltimore saying we are mad at you boys down there for defying our orders but we have to admit you are running one of the best programs in the country.

You can't get me to admit that I want this program liberalized so much that we're letting people draw what they shouldn't. I think anybody that is capable of going to work and is not really disabled under a reasonable and firm definition should not be drawing this. But I don't think that's an argument against the specific things that are in the Governors' resolution, many of them embodied in the bill offered by Senators Cohen and Levin and many of them embodied in the similar House bill.

Senator LONG. Well, Governor, let me just pose another question to you. Under the law of our State, if a person loses a hand, if he's a carpenter and he loses a hand or if he is a railroad worker working on the train and he loses a hand, he would be construed as being totally and completely disabled because even though he might be an enormous success in something else, he has been disabled from doing that particular job for the future.

Now I think we can agree that this particular law that we have here does not allow that. It doesn't provide for that, does it? If you lose a hand, you are not regarded as totally disabled under this program. Can we agree on that?

Governor CLINTON. Yes, we do agree on that.

Senator LONG. In other words, under Louisiana law if you lose a hand or foot and you are just an ordinary working man—a carpenter, bricklayer, plumber—you can be regarded as totally and permanently disabled.

Governor CLINTON. Under the workmans compensation law.

Senator LONG. Under workmans compensation. We put a provision in this law where even though our workmans compensation law might call you totally and permanently disabled, you wouldn't qualify under Federal law. We meant this to be a very tight program—it was supposed to cost one-third, the employer plus the employee, both of them put together, was supposed to add up to one-third of 1 percent of payroll for the cost of it. And we explained out there on that floor why it wouldn't cost any more than that because it was so tightly drawn.

Now knowing what we had in mind, can you agree with me that at any time you find somebody doing a full-time job that person does not belong on those rolls?

Governor CLINTON. I agree with that.

Senator LONG. Now if that's the case, why should we have to prove that that person's health has improved? What difference would it make whether their health had improved or hadn't improved? Shouldn't that be totally irrelevant?

Governor CLINTON. As I understand, Senator, you don't have to prove their health has improved because if they are working, they are not eligible anyway under the present rules. I think that's right.

Let me give you a counter example because I have got one. In Yell County, a county that Senator Pryor always carries. There is a State representative there who thinks he is going to succeed Senator Pryor when he dies and he was telling me the other day, this same State representative was telling me, that he's got a constituent with a ninth grade education who is a truck driver, and a truck fell over on the guy and it broke his back. And miraculously he acquired the ability to walk again even though people thought he wouldn't. And he was a very proud man. And they tried for a long time to get him to apply for disability and he wouldn't do it. And finally he did and he drew it.

But when he walks, he walks like this. You know, his back is very stiff. But anyway he acquired the ability to walk again. Then under this review process in 1982 he was terminated. And the reason he was terminated is that the judgment was made that he was capable of going back to work at a desk job. So there's a case in the middle where the fellow is not working; they say he is capable of going back to work in a desk job, but he's got a ninth grade education in a State with 10 percent unemployment.

Now that's a tough question. Should he be terminated? There are two real questions. Should you tighten up the standards so that a person like that can't be put on in the future because probably when the program was originally drafted you didn't mean for those people to draw under this program? But it's a different question if the person has been drawing for 3 or 4 years and hadn't worked in all that time that is in that situation. Should you take them off without any evidence of medical improvement?

Now my judgment there, even though it would cost more money, is that if a person is like that and legitimately, honest to goodness, having a tough review can't go back, you ought to leave him on and not kick him off, if there is not medical improvement.

That's where I would come down on it even if it costs more money.

Senator LONG. Well, if we ran the program the way we ought to run it, assuming that we are going to maintain tight controls on the cost of the program, we would try to get every employer to do what Exxon Corp. does right in my hometown. Perhaps they have got a worker and he is disabled from doing his job where he has to stand up all the time?

He lost a leg or for whatever reason, he can't stand up anymore to do that job. They will see if they can't put him into a job where he can work sitting down. They try to slot him into a job and give him a job preference. They will take the guy that has that desk job, and put him over there standing up so that the fellow that can't stand can hold a job sitting down.

It seems to me that if you ran the program the way you ought to run it that we would try to get all employers, and, hopefully, society in general, to slot these handicapped people into jobs that they can do. That ought to be your starting point.

Governor CLINTON. I agree with that. And believe me this guy would go back to work in a bird dog minute if he had a chance to do it. But he was an independent log hauler, a contractor. The woods in Arkansas are just like north Louisiana. They are full of these guys that run these logging trucks. They work for other people on contracts. They don't necessarily have anybody that can give them another job sitting down somewhere. And I believe that's right. If you could construct a program for those that don't belong to a company like Exxon, you could retrain them and find something else for them to do, then, boy, I would be strong for not letting them draw disability and making them be productive.

The CHAIRMAN. Governor, I appreciate very much your testimony. I have been absent, and will have to leave again to see Senator Baker. But I'm glad you addressed the State administrative side of this, because I think we are going to have a problem. If we adopt some new standard that you do not like, are you just going to ignore it?

Governor CLINTON. No, I wouldn't.

The CHAIRMAN. I think that's the problem. If the States are just going to ignore whatever we do, I do not know why we ought to continue to pay the States to administer the program.

Governor CLINTON. Well, Senator, let me say first of all that I don't think any Governor really has enjoyed this standoff. Most of us very much hope that the Congress will act, even if you do something different from exactly what we want, and give us some clear signal. Let us go back to the drawing boards, figure out what we are doing, and then go forward working with you.

The truth is it wouldn't cost you much more money just to take over the whole program. The only person I can name is this person right here. Everybody else is a Federal employee and, in effect, paid for by Federal dollars. And maybe you ought to do that anyway.

I believe that we've had a good State-Federal relationship on the whole.

The CHAIRMAN. That's what the administration indicated this morning.

Governor CLINTON. I think it has been good. And the Governors that I know that have been responsible for these moratoriums are really very, very anxious to drop them because we supported the 1980 legislation in the first place to review all this so we want to go back to the business of reviewing.

The CHAIRMAN. Plus, the Governors keep telling us we have to reduce the Federal deficit.

Governor CLINTON. Well, I agree with that, too. But let me just say that a member of your party, Governor Snelling of Vermont, has been working with us and he has been our leader on this for 6 years now trying to be responsible. We supported your social security reform and lots of other things. We don't get to vote on taxing and spending issues, defense or otherwise, so we are not entirely responsible.

The CHAIRMAN. I don't have any quarrel with the Governors, but I think you understand our problem.

Governor CLINTON. Sure.

The CHAIRMAN. Senator Long was in on the takeoff of this program and he doesn't want to see a crash landing. I think he's trying to smooth it out a little bit.

Governor CLINTON. Obviously, I can't make a commitment for what any other Governor would do after you act, but I think you can be reasonably assured that even if you don't do every little thing we want you to do, if you will take our concerns seriously about the terrible administrative problems that have been created, and give us a chance to work with you in a way that gives you the confidence you need that we are trying to hold down the cost of this program—prospectively you may even want to redefine who should be drawing it.

The CHAIRMAN. Right.

Governor CLINTON. And we are going to try to kick off people who shouldn't be drawing it and put everybody we can back to work, I think you will find that things will return to a good balance. And I will certainly do everything I can in that regard.

But we can't live with the present conditions. I'm just speaking for myself now because this issue has never been brought up. But I would just as soon you take it back if you are not going to pass legislation and change it.

Senator PRYOR. Senator Dole, while you were out of the room Governor Clinton testified that one reason they felt the moratorium was justified in our State was the ambiguity and that the rules were changing every day and some were being telegraphed in, some telephoned in, and it finally got to a point where no one knew what rules they were playing under.

Now I would just make a suggestion to the social security people and the administration that when we do come forward with something, whether it's legislation, administrative change or whatever, that these people right out there on that firing line be a part of that because they are the ones that are having to deal with this program everyday. And I think that during the implementation process there was probably very little input from people that are running the program.

I just want to also say, Governor—and I know Senator Long wants to say something else—but you have heard him say he doesn't want anybody drawing benefits that don't deserve them. And that's what you have said and that's what I have said. We all agree with that.

But you know he has a welfare program that I've heard him talk about at lunch that is a pretty good program. He doesn't believe that anybody ought to get benefits unless they are just blind or totally disabled—they ought not to get a check without giving something back in return. And so the other day I heard him explaining his program, and he said we ought to have a program where these able-bodied folks get out there and pick up paper and pick up trash.

And one of our colleagues said what if there isn't any paper, what if there is not any trash. He said, well, we will hire somebody to throw some out. [Laughter.]

So that's Senator Long. That's the way he thinks about this. And I think that a lot of people agree with that whole philosophy. And I just hope this hearing is going to be constructive and beneficial.

Senator LONG. Governor, I would rather pay somebody to do something than pay them to do nothing even if what they are doing is not really necessary. In other words, it seems to me that we are doing a grave injustice to make drones out of people who are potentially useful citizens. I think you agree with that, don't you?

Governor CLINTON. A hundred percent.

Senator LONG. If I had my way, we wouldn't have to argue about the regulations. We would just give you the money and say, here, you are required to look after these people.

Governor CLINTON. Make them do something for the money.

Senator LONG. Now I'm not sure you would get reelected if we did that. By the time a lot of people are disappointed because they can't get on the rolls, they might vote for the other guy. But it would be all right with me to say, look, Governor Clinton, there's the dough and anybody that is disabled down there, you look after them. If you ~~have~~ got anything left over, you can put it into whatever seems like the most fruitful use for the people. But in the meantime you are expected to look after these people down here with this money. Do you think you could handle that? Would you like that or not if we did that? You could write your own regulations.

Governor CLINTON. Well, I might. If you gave me the money I would put a work for it component in there. Strong. And I would enforce it.

Senator LONG. Incidentally, I might get a vote for my welfare program. [Laughter.]

My position is that we ought to let every State government, working with the counties—I don't care at what level you do it—deal with the problem in this way. We would say, "Here is your share of the money. Now we urge you to put these people to work. Put them to work doing something. Give them something to do. Pay somebody to hire them. But we would urge you to try to put everybody to work doing anything they can that is useful for society.

And then if you have got somebody that just can't do anything, well go ahead and pay them something for doing nothing. Pay them for being disabled, if the case may be. But we have just ruined a lot of good people in this country by handing out to people who can work foodstamps and welfare checks and all sorts of benefits, running into more than $50 billion a year. This tends to be a work disincentive. If they go to work to earn some money, at some point they become disqualified to get these hand-outs. And they would be better citizens if we paid them for doing something. Do you kind of like that philosophy?

Governor CLINTON. I do. I agree with that.

Senator LONG. I don't know what you and I are arguing about, Governor. It seems to be maybe we ought to be on the same side. Thank you very much, Governor. If you have something else you want to say, go right ahead.

Governor CLINTON. The only thing I wanted to say is to make this one point in closing. Our State may be the only State in the country that has this agency totally independent. It's a free standing agency and not under any other government department. We've tried to do that so they could work closely with the Federal Government. And I said and I will say it again one more time, we have been recognized for the efficiency of our operation and the accuracy of the judgments which have been made by our people. And we are proud of that. We don't like the idea of people drawing who shouldn't. But again I would request respectfully that you and the other committee members review very carefully what is in our resolution, the Governors' resolution. We want to work with the Senate, with the Congress to help reduce the deficit; not to increase spending and programs that can't be justified. I think what's in this program is good for the country, and I do not believe it will lead to abuses of the program. And I hope you all can support it.

Thank you very much.

Senator LONG. Thank you for your statement, Governor.

Apparently Mr. Malleris is not available at the moment so I will call the next panel. Next we have a panel consisting of Mr. Reyes Gonzales, president of the National Association of Disability Examiners, from Elgin, Tex.; and the Honorable Judge Ainsworth H. Brown, vice president, Association of Administrative Law Judges of Wilkes-Barre, Pa. I'm told that Mr. Perales is not able to be with us. Oh, he is present.

Well, we are pleased to hear from you gentlemen.

STATEMENT OF REYES GONZALES, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS, ELGIN, TEX.

Mr. GONZALES. I'd like to introduce Ms. Marty Marshall who is not listed on the list of witnesses who is going to be accompanying me. She is the NADE legislative chairperson, sitting to my right, from Lansing, Mich.

I would ask that the entire testimony be made a part of the record. I would like to highlight a couple of the key points of our testimony.

I am the current president of the National Association of Disability Examiners, which has a membership of approximately 2,000 individuals engaged in a wide variety of functions within the disability program. NADE is a professional association open to all persons involved in the evaluation of claims for disability benefits. The majority of our membership is in the State disability determination services who are adjudicating the disability claims for the Social Security Administration.

Other members includes attorneys, physicians, psychologists, and others involved in all aspects of disability.

Since the inception of Public Law 96-265, also known as the 1980 disability amendments, there has been considerable outcry from the public due to the accelerated process by which the claims were being reviewed and by the high percentage of terminations that were being processed. After the accelerated continuing disability reviews were instituted in 1980, State agency termination rates ranged from 40 percent to 65 percent, some higher in some months. This was an alarming rate since the GAO study prior to 1980 gave an indication that approximately 20 percent, or one out of every five individuals who were on disability, did not belong on the disability rolls. After 1980, State agencies however were terminating benefits approximately at the rate of one out of every two.

I was proud to see that legislative action in the form of investigations, hearings, and congressional actions brought about some relief to the beneficiaries who were unduly suffering from a bureaucratic nightmare as a result of the administration of the 1980 amendments. One important relief came when Congress passed Public Law 97-455 in January 1983. The law gave relief in the form of the following to the disability program:

Temporarily provided for the continuation of benefits through the ALJ hearing for those terminated and appealing their cases; and also provided that individuals should be granted the opportunity for a face-to-face evidentiary hearing during reconsideration of any decision that disability has ceased.

Although this congressional action did provide some relief to the beneficiaries then, it is still quite obvious that SSA and Congress need to take further action to insure that the disability program being administered to the public is consistent in reference to policy interpretation and is being applied in the most humane manner possible.

We are aware that the Secretary of HHS, Margaret Heckler, issued some major directives in the summer of 1983 in reference to the disability program. It was the administration's intent that some of those directives would improve some of the problems that currently existed within disability program. We feel, however, that further congressional action is necessary.

NADE sent some position statements to the Senate Finance Committee and to the full Senate in November 1983. At that time, we stated that because of the adjudicative climate, outlined earlier in this testimony, we supported the need for a legislative definition of medical improvement. We also support the SSA directive that returns the face-to-face evidentiary hearings to the State disability examiners. We also urge that the provision calling for equal numbers of reviews of both favorable and unfavorable decisions be reinstated in this legislation.

NADE believes that medical improvement needs to take into consideration improvement in the medical or vocational technologies made available to the beneficiary; error on the face of the evidence of the originally allowed determination, return to work, and evidence indicating the impairment is less severe than originally proposed.

In addition, we would like to offer two other proposals that would benefit approximately 15 percent of those on the rolls. And those are beneficiaries who are 55 years or older and who have been on disability for 5 years or longer, we feel should be continued unless there is specific evidence of medical improvement. And the second and last one is beneficiaries who are 50 years and older and who have been on disability for 10 years or more and who have not demonstrated the ability to perform past work should be continued.

Essentially these proposals consider the reliance that many disabled persons have come to place on the disability benefits they receive as well as the adverse effect longevity on the roll plays in a person's successful return to the work force.

All of the aforementioned would provide equity in evaluation and less harshness than the present system, but still maintains the integrity and purpose of the disability insurance program.

At the present time, some States are recommending cessations only if medical improvement is shown while other States are not considering medical improvement. A single definition for medical improvement for all States would increase uniformity in the disability program.

Public Law 97-455 passed in Congress in December 1982 included a provision to allow beneficiaries whose benefits have been ceased because of a medical review of their eligibility, to elect to continue to receive benefits until an ALJ has rendered a decision in the case. If the case was denied, then the benefits, except for medicare, were subject to the hardship waiver standards already in law.

This provision was adopted on a temporary basis until further consideration could be given to the CDI issue in the 98th Congress. Thus, under the present law, no extended payment could be made after June 1984 and the provision applied only to cessations occurring before October 1983.

Subsequently, benefit continuation was rescheduled to end on December 7, as we have heard also today, 1983. And since this date, no legislative action to continue benefits under this provision was passed by Congress in 1983, so Social Security has made an administrative decision to continue benefits for individuals until congressional action relieved this situation. We believe it is now time that Congress acts on this provision and continues benefits as originally indicated in Public Law 97-455, originally passed in Congress January 1983. But we feel that this should not be on a temporary but rather ongoing basis.

NADE does not support the position that the Social Security Administration either apply the decisions of circuit courts of appeals to all beneficiaries residing within the States or the circuits or appeal the decision to the Supreme Court. The Social Security Administration's current policy of nonacquiescence in district and appeals court decisions would appear to be the only plausible stance under current operating procedures. Court decisions can vary from district to district, and it would not be reasonable for a national disability program to be governed by such regional decisions.

As we noted in our June 8, 1983, testimony to the Senate Government Oversight Committee, to require the Secretary to acquiesce or appeal individual court decisions would not promote uniformity in a decisionmaking process.

NADE supports the creation of an advisory council consisting of medical, psychological, and vocational experts to provide the necessary advice and recommendations to the Secretary on disability standards and policies and procedures. We also believe that a representative from NADE should be included in this advisory council.

I will just finish with a summary and then be available to answer any questions.

In summary, NADE recognizes the need for legislative action to improve the administration of the current social security disability program. I mention in our written statement at least six major items that I would like to recommend, but I would only like to comment on three since the rest of them will be made a part of the record.

That is, No. 1, to allow for continuance of benefits through the ALJ level for those who have been terminated. No. 2, provide a legislative definition for medical improvement. And provide for legislation to show medical improvement prior to termination of benefits. And, No. 3, continue to afford an individual the opportunity for a face-to-face hearing prior to termination of benefitis, and continue with the goal of demonstration projects to demonstrate the success of face-to-face hearings at the initial level for new disability applications. We feel that at least those three issues need legislative attention this year.

Thank you, Mr. Chairman, and committee members, for the opportunity of providing NADE the opportunity to present this testimony.

[The prepared statement of Mr. Gonzales follows:]

STATEMENT OF REYES GONZALES, PRESIDENT NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

nade

On behalf of the National Association of Disability Examiners (NADE), I welcome the opportunity to express our association's views on the Social Security Disability Program. I am the current President of NADE which has a membership of approximately 2,000 individuals engaged in a wide variety of functions within the Disability Program. NADE is a professional association open to all persons involved in the evaluation of claims for disability benefits, in the public and private sector. The majority of our membership is in the State Disability Determination Services who are adjudicating the disability claims for the Social Security Administration. Other members include attorneys, physicians, psychologists and others involved in all aspects of disability evaluation. Our membership shares the public awareness to the problems existing in the implementation of the Social Security Administration Disability Insurance and Supplemental Income Programs.

Since the inception of PL 96-265 also known as the 1980 Disability Amendments, there has been considerable outcry from the public due to the accelerated process by which the claims were being reviewed and by the high percentage of terminations that were being processed. After the accelerated Continuing Disability Reviews (ACDR) were instituted in 1980, State Agency termination rates ranged from 40% to 65%, some higher in some months. This was an alarming rate since the GAO study prior to 1980 gave an indication that approximately 20% or 1 out of every 5 individuals who were on disability did not belong on the disability rolls. After 1980, State Agencies however were terminating benefits approximately at the rate of 1 out of every 2 (or about 50%).

After 1980 we found that Administrative Law Judges were reversing these State Agency terminations almost to the tune of 50%. 1981 and 1982 were very hard years on the staff of the Disability Determination units since they were receiving a majority of the adverse publicity for the high termination rates produced by the accelerated and periodic reviews and for the high reversal rates produced by the Administrative Law Judges of these terminations.

I was proud to see that legislative action in the form of investigations, hearings and Congressional action brought about some relief to the beneficiaries who were

National Association of Disability Examiners unduly suffering from a bureaucratic nightmare as a result of administration of the 1980 Amendments. One important relief came when Congress passed Public Law 97-455 in January, 1983. This law gave relief in the form of the following to the Disability Program:

1. Temporarily provided for continuation of benefits through the Administrative Law Judge (ALJ) Hearing for those individuals terminated and appealing their cases.
2. Provided that an individual should be granted the opportunity for a Face-to-Face evidentiary hearing, during reconsideration of any decision that disability has ceased. Initially, these hearing officer positions were to be Federal positions but in October, 1983 the Secretary of Health and Human Resources (HHS) Margaret Heckler gave the States the option to hire state personnel to conduct the hearings beginning in January, 1984. It is my understanding that all but three (3) of the States have opted to perform this function. In those states that have opted not to perform this function, Federal Hearing Officers will perform the duty.

Although this Congressional action did provide some immediate relief to the beneficiaries then, it is still quite obvious that SSA and Congress need to take further action to insure that the disability program being administered to the public is consistent in reference to policy interpretation and is being applied in the most humane manner possible.

In December, 1982, a Federal Court in the State of Minnesota ruled against SSA because the Administration was not applying the sequential evaluation process, instituted for the determination of disability claims, in cases dealing with the mentally impaired. Prior to this action, disability examiners throughout the country were disturbed by the policy issued by SSA that permitted individuals to be denied disability benefits if they did not meet or equal the Social Security disability guidelines for disability without addressing residual work ability. Attached is a letter dated February 25, 1983 from John A. Svahn, then the Commissioner of Social Security, responding to a letter dated January 26, 1983 from the NADE Great Lakes Region. NADE supported the alteration of SSA's adjudication process for claims in which mental impairments existed then and does so still. NADE believes in the application of medical and vocational factors in the evaluation of mental cases as it does in the evaluation of all impairments.

In light of the actions that have taken place nationally, NADE supports even further refinement of the disability program as proposed in current House Bill HR 4170, the Disability Amendments introduced by Congressman Jake Pickle.

We are aware that Secretary of HHS Margaret Heckler issued some major directives in the summer of 1983 in reference to the disability program. It was the Administration's intent that some of those directives would improve some of the problems that currently existed with the Disability Program. We feel, however, that further Congressional action is necessary.

At our Annual Conference in October, 1983, NADE again took additional positions on the disability program.

As a result of this meeting, NADE was prompted to send some position statements to the Senate Finance Committee and to the full Senate by November, 1983 (copy attached). Since a copy is attached, I will only comment on the highlights of that position letter to the Senators.

NADE stated at that time, that because of the adjudicative climate (outlined earlier in this testimony), it supported the need for a legislative definition of medical improvement. We also support the SSA directive that returns the Face-to-Face evidentiary hearings to the State Disability Examiners. Finally, we also urge that the provision calling for equal numbers reviews of <u>both</u> favorable and unfavorable decisions be reinstated in the legislation.

NADE believes that a clear "medical improvement" standard needs to be established. One that creates a category of beneficiaries who because of their medical conditions have not improved, are presumed to be unable to work, and therefore must continue to receive benefits.

NADE believes that medical improvement needs to take into consideration improvement in medical or vocational technologies made available to the beneficiary; error on the face of the evidence of the originally allowed determination; return to work (SGA);

and evidence indicating the impairment is less severe than originally proposed. In addition, NADE has two proposals which would benefit approximately 15% of those on the disability rolls. These are:

1. Beneficiaries, aged 55 years and older, who have been on the disability rolls for five years or longer, should be continued, unless there is specific evidence of medical improvement.
2. Beneficiaries, aged 50 years and older, who have been on the disability rolls for 10 years or more and who have not demonstrated the ability to perform past work, should be continued.

These proposals consider the reliance many disabled persons have come to place on the disability benefits they receive, as well as the adverse effect longevity on the rolls plays in a person's successful return to the work force. All of the aforementioned would provide equity in evaluation and less harshness than the present system, but maintain the integrity and purpose of the Disability Insurance Program.

At the present time, some states are recommending cessations only if medical improvement is shown, while other states are not considering medical improvement. A single definition for medical improvement for all states would increase uniformity in the disability program.

Currently SSA, upon the direction of Secretary Heckler in the summer of 1983, is reviewing policies and procedures under which we are adjudicating disability claims. A review of the mental disorders and the listing of impairments is also being undertaken and input is being sought from the American Psychiatric Association and other professionals in the medical field on this subject. NADE supports a moratorium of all CDRs (not just mental cases as some have proposed), until SSA completes its review of all its policies and procedures, issues national implementation dates for these current procedures with training and until the issue of medical improvement is clarified. We support that such a moratorium be effectuated immediately and continued until such time as SSA or Congress provides a single definition of medical improvement to be used, uniformly so that all disabled people will be treated equally, regardless of state of residence. This would also come at the time that the program needs it the most, in that we would be receiving the top to bottom policy clarification hopefully, sometime in 1984 from SSA. NADE has gone on record with this position and has issued a letter dated 11/23/83 (copy attached) to Ms. Patricia Owens, Acting Associate Commissioner for Disability for SSA.

PL 97-455 legislated that by 1/1/84 individuals whose benefits are terminated due to a medical review (CDR) must be given the opportunity to have a Face-to-Face evidentiary hearing at the reconsideration level conducted either by the Secretaty or the State Agency. We support the decision of the Secretary of HHS to encourage that these particular Face-to-Face evidentiary hearings of CDR claims be conducted by State Agency personnel. NADE feels that the disability examiner in the states have the expertise and knowledge of the disability adjudication process to conduct Face-to-Face evidentiary hearings that will be needed. If the evidentiary Face-to-Face hearings prove successful, NADE supports consideration of Face-to-Face interviews of all initial level denials of all claims. Perhaps, a demonstration project would be the most economical choice to take so that the project could be evaluated prior to a decision to do Face-to-Face hearings of all claims.

PL 97-455 passed in Congress in December, 1982 included a provision to allow beneficiaries, whose benefits have been ceased because of a medical review of their eligibility, to elect to continue to receive benefits until an ALJ has rendered a decision in the case. If the case was denied then the benefits, except for medicare, were subject to the hardship waiver standards already in law. This provision was adopted on a temporary basis until further consideration could be given to the CDI issue in the 98th Congress. Thus, under the present law, no extended payment could be made after 6/84 and the provision applied only to cessations occurring before October, 1983. Subsequently, benefit continuation was rescheduled to end on 12/7/83. Subsequent to this date, since no legislative action to continue benefits under this provision was passed by Congress in 1983, SSA made an administrative decision to continue benefits for individuals until Congressional action relieved this situation. It is now time that Congress acts on this provision and continues benefits as originally indicated in PL 97-455 and originally passed in Congress in 1/83. This should not be on a temporary, but rather, ongoing basis.

The aforementioned position will go a long way in establishing more humane treatment in the disability program, establish uniformity in the application of the disability process and provide quick and immediate relief to the nation's disability applicants and to the public in general, that is long overdue. I would like to point out that if the House of Representatives takes no further action we urge you to take action on the aforementioned sections of this Bill.

NADE believes that the Secretary be required to regulate and supervise use of Consultative exams and provide more direction in the use of consultative exams and to encourage SSA to redouble its efforts to secure reasonable fee structures for consultative exams. We do not necessarily agree that the answer is a reduction of volume providers per se, but we support the concept that a regulatory standard be institutled in SSA to regulate consultative exam purchases, fee structures, and the most important concept that has not even been mentioned yet, that of the quality of the consultative exam. We should not hesitate to pay even if we have to use volume providers as long as we are monitoring the quality of the consultative exam and can defend it in court. We also believe that this could be done through administrative directives without much of an added fiscal cost.

NADE wishes to testify that notice and comment provisions concerning issuance of regulation of section 553 (c) (2) of the Administrative Procedure Act be applied to benefit programs in Title II. However, we again want to strongly emphasize careful administration of it by SSA and the ALJs. One of our major concerns has always been as we have previously testified before Congress, the fact that policies and procedures for adjudicating disability claims have not been issued with the same consistency to the ALJs and to Disability Examiners. Continued enforcement of SSA and the ALJs application of this provision must be continued in order to insure more uniformity in the Disability Program.

NADE does not support the position that the Social Security Administration either apply the decisions of Circuit Courts of Appeals to all beneficiaries residing within States within the Circuit or appeal the decision to the Supreme Court. The Social Security Administration's current policy of non-acquiescence in District and Appeals Court decisions would appear to be the only plausible stance under current operating procedures. Court decision can vary from District to District and it would not be reasonable for a national disability program to be governed by such regional decisions. As we noted in our June 8, 1983 testimony to the Senate Government Oversight Committee, to require the Secretary to acquiesce or appeal individual court decisions would not promote uniformity in the decision-making process. If acquiescence is followed then even more appeals will result with the actual day-to-day functioning of the Program being quagmired as case processing proceeded on an erratic basis awating the settlement of injunctions, stays, and decisions. NADE has long supported the establishment of a Social Security Disability Court. This would solve the problem of acquiescence and would lessen the congestion in appeals in the federal courts. More importantly, it would create a single policy body for decisions, binding at all levels, and enforcing uniformity. If a legislative solution is sought to this complex problem, the establishment of a Social Security Court offers a more effective alternative. Acquiescence should not be a major problem where there would be only one Social Security Court--with a mechanism to insure internal consistency as is provided in the IRS Tax Court--and there would be appeal to only one Circuit Court and the Supreme Court.

NADE supports the creation of an advisory council consisting of medical, psychological, and vocational experts to provide the necessary advice and recommendations to the Secretary on disability standards, policies, and procedures. We also believe that a representative from NADE be included in this advisory council.

NADE wishes to testify to its support of ongoing medical and vocational training to all adjudicators involved in the disability process, D E., ALJ, Hearing Officer, etc. We would like to emphasize that training such as that the Disability Examiners receive, be mandated for potential ALJs. Currently a new disability examiner hired by the State Agencies undergoes 3 to 6 weeks of formalized medical training in disability evaluations using the SSA Listing of Impairments. We believe that this type of intensive medical training should be mandated for all potential ALJs. Further, ongoing continuation of training in the form of medical training in reference to adjudication of Social Security disability claims and the application of the Listing of Impairments should be conducted for both the examiners and ALJs. This training could also be provided at a central point throughout the regions of the country, where both the ALJs and the Disability Examiners, for a given period of time, could receive the same formalized training for the adjudication of claims.

Senator Robert A. Dole, Chairman of the Committee on Finance in announcing a hearing set by the Finance Committee on Social Security Disability Insurance Program points out that the periodic eligibility reviews mandated by Congress in 1980 have generated concern about the adequacy of the disability determination process. There is no doubt we express this same concern and we have tried to outline our feeling on the needed Congressional action. NADE is concerned, as Senator Dole is, about the beneficiaries who are no longer assured of equal treatment in various states. Clearly we must take steps at whatever cost to insure that we have a uniform national administration of this program. There is some probable impact upon the financing of the Disability Insurance in reference to some of the above-mentioned program changes and it is my understanding that those would be addressed in this hearing. I would like to make a plea to those individuals involved in those major decisions that we really have to consider national application of the program foremost and we do understand that some very difficult decisions in reference to financing must be made. It is my understanding that there is some concern that additional spending measures were not anticipated when the Social Security financial bill was enacted last spring. These changes would not have such a significant impact on that Social Security spending bill when the lives of individuals are at stake. We feel that with some administrative reform and legislative assistance the goals of a National Program and savings could be accomplished.

Recently some Senators hoped to address some major portions of the disability problems in a Senate Bill introduced in 1983 in the Senate. The Bill addressed the need for medical improvement, the need for a right for a personal appearance, the need for continued payment of disability benefits during an appeal, the need for uniform standards for disability determinations, the need of more consistency when evaluating pain, and mandatory appeal by the Secretary on certain court decisions. This tells me that it is very clear that Congressional members have done a very detailed study into the problems affecting the disability program. Certainly it is time that we answer and address the needs that the constituents throughout the country are asking for. This has been verified by the fact that at some time or another approximately 28 states during the last 12 to 18 months have issued moratoriums on ceasing benefits or ceasing the review of claims until medical improvement is shown or until SSA revamps its policies and procedures. It also speaks very highly for the Congressmen in the House and in the Senate during 1983 who took the initiative to hold hearings and investigate the problems within the disability program and who have presented them before Congress in a formal manner to aleviate some problems that are now occurring in the disability program. I applaud those Senators and House Members who have so graciously testified during 1983 in reference to the much needed reforms of the Disability Program. Certainly we must support this significant movement on this subject.

Although many problems exist, the Disability Examiner remains dedicated to the profession and to improve upon it. This can be seen in participation in training programs beyond those the State and Federal Governments provide and in interest in furthering change in the laws under which decisions are made. Disability Examiners although frustrated with the program from time to time, have not given up on it or the desire for an equitable decision for every disability applicant and beneficiary. We support whatever efforts are necessary to make the disability insurance program a sound and equitable program for the disabled. Professional Disability Examiners accept these challenges and the changes they bring to the program. NADE has made its recommendations to assist the examiners by underlying the need for uniformity and consistency, throughout the process. We hope consideration will be given to our proposals for changing some of the problem areas. Much has been stated lately for the humane nature of the reforms. We applaud this attitude on the part of the Administration. NADE believes that both the new applicant and the current beneficiary deserve humane treatment. They also deserve an explanation of the disability process and how it affects them. Without this knowledge and an awareness that the Program can be modified, there will be little public acceptance. We support whatever efforts are necessary to make the Disability Insurance Program a sound and equitable program for the disabled.

This concludes our statement for the record.

SUMMARY

In summary, NADE recognizes a need for legislative action to improve the administration of the current Social Security Disability Program. At the least we must issue legislation to:

1. Allow for the continuance of benefits through the ALJ level for those who have been terminated.
2. Provide a Legislative definition for medical improvement and provide for legislation to show medical improvement prior to termination of benefits.
3. Continue to afford an individual the opportunity for a Face-to-Face hearing prior to termination of benefits and continue with the goal of demonstration project to demonstrate the success of Face-to-Face hearings at the initial level for new disability applications.
4. Provide for uniform standards of Disability determinations and more careful issuances of clarification with consistency across the regions so as to avoid further "policy changes" which resulted in the court case of the Mental Health Association of Minnesota vs. Schweiker, (No. 4-82-Civ 83).
5. We also support the concept that the Secretary appeal certain court decisions to the Supreme Court. This would increase the uniformity of our national program. We do not recommend application of circuit court decisions to only those states in that circuit because that would not accomplish national uniformity. We support the use of a Social Security Disability Court as an alternative.
6. We support current SSA Policy that mandated a "top to bottom" review of all policies and procedures issued by SSA and we support the use of work groups especially from front line examiners and professional in the medical or vocational fields as well as from the public and private sectors to help review the current SSA policies for disability.

Thank you, Mr. Chairman and Committee Members for the opportunity you have provided NADE to present this testimony.

THE COMMISSIONER OF SOCIAL SECURITY
BALTIMORE MARYLAND 21235

February 25, 1983

Mr. Mark C. Hudson
Great Lakes Regional Director
National Association of Disability Examiners
P.O. Box 44237
Indianapolis, Indiana 46244

Dear Mr. Hudson:

This is in response to your January 26, 1983 letter to Secretary-designate Heckler supporting the alteration of the Social Security Administration's adjudication process for claims in which a mental impairment exists.

We appreciate your offer of support and advice as we address ourselves to the decision in the Minnesota case. While I am not free to discuss a case in litigation, I do want you to know that I support fully the policy set forth in the regulations. The policy requires full consideration of vocational factors in a case where a person with a severe impairment does not meet or equal the listings. My memoranda of January 3, 1983 make clear my commitment to this policy. Copies are enclosed for your convenience.

The endorsement of this commitment by your membership would serve to reinforce the importance of full and complete adjudication in every case.

Sincerely,

John A. Svahn

Enclosures

ATTACHMENT 1

Dear Senator:

On behalf of the National Association of Disability Examiners we would like to bring your attention to those provisions of HR4170 (legislation affecting the Social Security disability program] which we feel warrant your careful consideration.

The Social Security disability program is a national program and, as such, must be administered uniformly between States and Regions and at all levels in the decision making process. Yet the Sections requiring compliance with certain court orders will produce just the opposite effect. If this Section is passed as written the disability program will become a Regional program whose policies are established by the Courts. Court decisions vary from Circuit to Circuit. Whether or not a person receives disability benefits will depend on which circuit he or she lives in.

We believe this is grossly unjust and administratively unworkable.

Likewise, the Administrative procedure and uniform standards Section would continue - and increase - the disparity between the decisions made by State disability examiners and those made by Administrative Law Judges. The Administrative Law Judges will be bound only by the Regulations while State disability examiners will continue to follow the "interpretive rulings" of SSA. This creates a merry-go-around effect - where a person is granted disability benefits at one level and those benefits are then terminated at another level following a more strict interpretation of the Regulations. We believe all levels should be bound by the same guides. This section will not promote uniformity.

We support the need for a legislated definition of medical improvement as set forth in the legislation. We also support the provision which would return the face-to-face Hearing to the State disability examiner.

Finally we urge that the provision calling for equal reviews of both favorable and unfavorable decisions be re-instated in the legislation.

We would welcome the opportunity to discuss this bill - or other legislation which would directly impact on disability examiners with you.

Sincerely,

Reyes Gonzales

Reyes Gonzales, President
P.O. Box 627
Elgin, Texas 78621
(512) 445-8507

Martha Marshall

Martha Marshall, Legislative Chair
2704 Frant Street
Lansing, Michigan 48910
(517) 882-8073

ATTACHMENT 2

P.O. Box 627
Elgin, Texas 78621
512-445-8507

November 23, 1983

Ms. Patricia Owens, Associate Commissioner
Social Security Administration
Office of Disability
100 Altmeyer Building, 6401 Security Blvd.
Baltimore, Maryland 21235

Dear Ms. Owens:

The following resolution was recently passed at the business meeting of the National Association of Disability Examiners (NADE) at the National Conference in Baltimore on October 14, 1983. It is my responsibility to provide you with the following resolution that was passed by the delegate assembly.

That the National Association of Disability Examiners support the idea of a moratorium by SSA on all CDRs until the issue of medical improvement is clarified and that in such support, go on record in writing to the Social Security Administration and the Congress of the United States that such a moratorium be effectuated immediately and continue until such time as either the SSA or Congress provide a single definition of medical improvement to be used unilaterally so all disabled people be treated equally, regardless of state of residence.

You can respond to me in reference to the above-mentioned position from NADE and I will,of course,communicate to the NADE membership.

Sincerely,

Reyes Gonzales
NADE President

cc: Jeannette L. Fanning, President-elect, NADE
Congressman J. J. Pickle

Attachment 3

National Association of Disability Examiners

STATEMENT OF HON. CESAR A. PERALES, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICE, ALBANY, N.Y.

Mr. PERALES. Senator, I understand the hour draws late. I will be 1 minute or so. I will just indicate I am the commissioner for the New York State Department of Social Services. I represent one of those eight States that has imposed a moratorium.

I merely wanted to point out that in New York State the disability review program has been particularly difficult to administer. We have been particularly hard hit by the program. The mentally ill who have been illegally removed from the rolls—and I say illegally—are increasingly becoming a part of New York's homeless problem. And I've heard some of your remarks earlier, and I think it's important that you understand that some of us who are trying to administer this program at the State level are faced with competing legal demands, it seems.

We are told on the one hand by our lawyers that what is going on, what we were being required to do, is illegal. We are told by the Federal Government to do it. Some of us have chosen to go into court, as New York did. And in a recent decision, which I think has been cited in earlier testimony, the courts have told us that our administering of the program under the rules set by the Federal Government was, indeed, illegal. So there are many of us who have chosen to impose a moratorium. We are pleased that SSA itself has presently proposed a moratorium. We are hoping desperately that we will get legislation clarifying the situation. I can only echo in support the articulate statement made by Governor Clinton that it's an extremely difficult program to administer at this point. We have the courts telling us one thing; we have our lawyers telling us some things; and we have got conflicting statements from SSA. So I hope that you would consider that, because I know you feel very strongly about the obligation of States following the Federal Government. But the fact is that the courts have intervened. That none of the States imposed the moratoriums until after there were a number of court decisions. In fact, not until after nine States were, in essence, told to impose moratoriums. So the question was whether or not we would protect the rights of our own citizens, as the courts had told us they ought to be protected.

[The prepared statement of Mr. Perales follows:]

TESTIMONY OF CESAR PERALES

(Commissioner of NYS Department of Social Services)
Before the Senate Finance Committee

January 25, 1984

I am Cesar A. Perales, Commissioner of the New York State Department of Social Services. I am very pleased that you asked me to appear before your committee to speak about the disability program. Governor Cuomo and I have been very concerned with the harsh and restrictive nature of the program. I welcome the opportunity to be able to share with you our concerns regarding the problems associated with the program and our proposals for changes needed to ensure a fair and effective program.

Although major changes are needed in all areas of the disability program, the most immediate need is for elimination of the harsh and restrictive Continuing Disability Review (CDR) standards being applied and for immediate action to end the confusion and disarray surrounding the continuing disability review program.

The review program, initiated without proper planning in 1980, has had major negative impacts on the disabled, the states, and the Federal government. Tens of thousands of truly disabled individuals have lost their benefits and have suffered unnecessary physical, emotional and financial hardships. Many of these individuals, because of their disabilitites, have little prospect for engaging in substantial gainful activity. At the present time, no national CDR program exists. Individual District and Circuit Court decisions have imposed different standards than SSA's, many states have been forced to take their own actions and Congress has not acted to set new standards.

Since the initiation of the CDR program, New York State has expressed its grave concerns regarding the lack of planning and appreciation for the hardships the CDR program would produce. In 1980, Congress anticipated a maximum of 20% potential cessations, yet during its first years, the CDR program produced cessations of over 45%. Recipients of disability benefits, who had been disabled for many years, were unjustly made to assume the burden of proving their continued disability.

The harshness and lack of appropriate CDR standards was clearly shown by reversal rates of 65-75% being made by ALJ's and by the massive public outcry. Enormous numbers of disabled people were being unneccessarily removed from disability under SSA rules, and then returned to the rolls after appeal. Clearly, the most disadvantaged were the mentally disabled who, in many cases, were unable to understand or respond to what was happening.

In the two years following implementation of the CDR program, the problems identified at the outset were compounded and exacerbated by frequent and inconsistent changes in SSA's policies and procedures. We in New York have consistently taken a leadership role to insure that our disabled citizens would be appropriately protected from the harshness and inequities of the CDR process. We have implemented a number of reforms including:

- Intensive additional quality control procedures designed to insure that medical evidence gathering has been thorough and that it has been examined appropriately in decision making.

- Procedures to insure that SSA has followed all necessary steps to contact individuals whose cases are being reviewed so that individuals are not simply removed for failure to cooperate; an action of great concern particularly for the mentally ill.
- Extensive outreach programs with provider and advocacy groups to assist clients in negotiating this cumbersome and difficult CDR process; a process which has been extremely difficult to negotiate even for the most well informed recipient.
- Maximization of the use of information from the recipients treating source in decision making rather than reliance on information provided by physicians under contract to the disability program.
- A set of case decision criteria which appropriately insure that the benefit of the doubt is given to recipients in borderline cases.

All these actions have resulted in a 25 percent increase in the number of clients retained on the rolls who otherwise would have been illegally removed.

Despite these efforts, however, some 25,000 New Yorkers have been removed from the disability rolls and it is estimated that at completion of the review program, if the same trends persist, as many as 100-150,000 New Yorkers could ultimately lose their benefits.

As has been the experience in the rest of the nation, the numbers of people removed has far exceeded the expectations of Congress, when it passed CDR legislation in 1980.

There is clearly a very fundamental problem in SSA's implementation and operations of this program that goes well beyond procedural and administrative matters. The problem centers on the unreasonable and illegal burden of proof required of recipients in order to continue on the disability rolls; a burden which has resulted in removal from the rolls of tens of thousands of our most vulnerable citizens.

For that reason, and in addition to the procedural and operating improvements that we have implemented, we have continually sought from both Congress and SSA basic changes in the definition of disability. These changes in definition would require SSA to establish that there has been medical improvement in a recipient's condition before that recipient could be removed from the disability rolls.

This position was supported by a court decision in the state of Washington which required proof of medical improvement before an individual could be removed from the disability rolls. At the time of that decision, it was clear that the nine states within that particular court circuit would eventually be following a more liberal standard than the one that would be applied to the disabled citizens of my state. This, coupled with SSA's improper implementation and operation of the program, made the program intolerable. Therefore, on July 22, 1983, I imposed a temporary suspension on the removal of disabled individuals from the Social Security rolls until such time as the Federal government established equitable and uniform medical standards for evaluating the continued disability of Social Security recipients.

We were followed in this action by eleven other states and by the Social Security Administration itself, which has imposed a national moritorium on cessations pending resolution of various CDR issues.

In addition to the administrative actions that were taken , New York State has brought several lawsuits against SSA's rules and regulations. On January 11, 1984, the New York Federal District Court ruled that SSA's policies regarding the mentally ill were illegal and order reinstatement of benefits and re-review of all NYS denials and cessations since 1980. This decision reinforced the correctness of the actions I took and is evidence that the courts are holding the Federal government to the same standards we have advocated all along. This decision, which could affect as many as 60,000 cases in New York, is only one of many Federal Court decisions that have held the CDR rules and standards are harsh and incorrect.

It has become increasingly clear that there is no uniform national CDR standard and that there is a critical need for Congress to act immediately to correct the inequities in the program and re-establish a national program. It is also critical that Congress liberalize the present unfair and harsh process which places an unfair and illegal burden of proof on the disabled to prove their continued disability.

Clearly, SSA is unwilling or unable to react to these major issues. I know Congress has devoted much time and very serious attention to the disability program. There has been much study and discussion of the problems and proposed solutions. Congress must act now to reform this program.

In order to correct the inequities of the program and to eliminate the present state of disarray and confusion, New York State has, and continues to, support passage of legislation similar to the Pickle and Cohen/Levin bills. We strongly urge this committee to support and move on such legislation immediately.

The most critical parts of these bills are the establishment of a medical improvement standard and the continuation of benefits during appeal. We believe that requiring medical improvement before cessation, giving appropriate consideration to previous error is fair to all parties. Our reviews have indicated that applying such a standard would, while providing more equitable decisions, remove from the disability rolls those recipients clearly not disabled. A Medical Improvement standard would overcome the burden of proof issue.

The application of a Medical Improvement standard should achieve fiscal savings approximately equal to those anticipated by Congress in 1979. However, we would anticipate a significant reduction in the 65-75% CDR cessation reversal rate. Further, the significant administrative cost of appeals and unnecessary negative impacts on the disabled would be diminished.

In August 1983, we presented SSA a proposed outline of a medical improvement standard which we believe meets the mandate of the six Federal Court decisions which have imposed a medical improvement standard. I have recently written Secretary Heckler on this issue and have provided her with a detailing of the concept and operation of this standard.

While we urge rapid action on the proposed legislation, we would also urge SSA and Congress to give consideration to other prooposals that we have made.

These include:

- change in the basic definition of disability

- consideration of time on rolls in CDR evaluation
- extension of adjustment benefits to six months
- allow states more control over their decisions
- provide uniform adjudication standards at all levels of the process
- emphasize correctness of individual case decision as opposed to statistical compliance and productivity
- expand emphasis on treating sources and on innovative approaches to determining disability
- give equal attention to their reviews to both allowances and denials
- obtain more input from medical community
- assure uniformity between regions

New York is seriously concerned that unless needed changes are made that the CDR program will continue to unnecessarily impact and penalize the truly disabled. The need for Congressional action to eliminate the unfairness and harshness of the CDR process and end the present confusion and turmoil is clear. Congress must act expeditiously if we are to avoid further disarray to the program and hardships to our disabled citizens.

Thank you for the opportunity to speak to you today on this critical issue.

Senator LONG. Well, one thing that did not help matters at all in the beginning was when we first wrote the SSI bill, Mr. Perales. We said in that bill that we would just blanket under our program all the people on those rolls that the States had found to be disabled. Now unfortunately when we so stipulated we had an effective date that left some time for the States to act before the bill went into effect.

And the way I recall it, New York State—and I don't think you were the commissioner at that point—but New York State at that time proceeded to take all those cases, all those family cases, families with dependent children, all those AFDC mothers they could find who by any stretch of the imagination could be considered to be disabled, and they just wrote all those people on the roll: disabled so they were all blanketed under this program as though they were disabled.

So New York was unloading a huge portion of its State welfare program onto the Federal Government as though those were disabled, which was an enormous windfall for New York State that we never intended up here. Now do you defend that type of situation?

Mr. PERALES. No. I would just deny it. I would simply say that that is not what occurred. I think what we have found is that, true, many of the people that have been terminated under the present review have gone back on home relief. But quite frankly very few of them had any prior history of having been on public assistance. If that happened several years ago, I don't know where those people have gone.

We find that the people that we are terminating, a great many of them, have not had prior history of public assistance. But the fact remains that it's not just New York and social welfare ideas that we are dealing with. We've got courts all over the country, Senator, who have said that what is going on is wrong. We have heard people cite the decision of a Federal judge in New York, not a welfare official, that said the way the policy is being administered is illegal. I would ask what you would do if you were a State official having read those court opinions, having been told by your own administrators that there are conflicting opinions, and having been told that other States, because courts had acted in the same sense, were applying different standards.

And I think that is the problem that New York State faces.

Senator LONG. I'm not in a position to answer that question. I've got enough problems the way it is now. But my reaction is that when I sponsored this program I didn't vote for a program to bankrupt the Social Security Act, and to bankrupt the whole program of social security. I voted for something that would cost less than 1 percent of payroll.

And as I told a previous witness—I'm sure you heard that. You were in the room at the time—my experience as a citizen out there among the people is that the people that I run into who are on these rolls are not qualified to be there.

Mr. PERALES. Let me just say something because I have heard you say that.

Senator LONG. As far as I'm concerned, I told you the best case, the lady who died of cancer. Now I'm sure that in the last stage of the cancer she belonged on the rolls, but she didn't belong on the rolls while she could still go out and make a living.

Mr. PERALES. I agree. But the law makes reference to substantial gainful employment. I mean if there are people who have gone on fraudulently, they should be cut off. And even though we have imposed the moratorium, in our review when we find fraud we are still removing people from the rolls. So there is absolutely no question that when somebody can work, they don't belong on this program.

But, again, I would hope that you would understand that the issue is not that simple and not that clear cut. I think the issue is much closer to the example given by Governor Clinton of that gentlemen with the broken back who gained the ability to walk who now faces a question of whether or not he should be on the rolls. Those are the tougher questions. And those are the ones that I think we need some clarification on. And I think the Federal Government has failed to give us any clarification. And at least in the definition of mental disability, has been clearly wrong. And court after court has found that.

Senator LONG. Let me just ask you about the general subject, the general issue, and the other witnesses are free to comment, if they want to.

I wonder if you agree with me in this philosophy. That it is better to pay somebody who is capable of doing something, to pay him to do what he is capable of doing, and try to slot that person into some job that that person can do, even if you have to subsidize it very heavily than just to let the person sit there and vegetate.

Mr. PERALES. I agree completely. Absolutely no question. I would support any legislation of that kind. And I'm sure that the Governor of New York State, Governor Cuomo, would be most enthusiastic about such legislation.

Senator LONG. Senator Levin and I appear to be on opposite sides on this particular bill. But we are not on opposite sides on all of it. There is a lot that we agree on. He told me—and I don't think he would mind me saying this in public—he told me that he agrees with me that you ought to pay people to do something constructive—that you should try to put them into whatever job you can find a place for them in society rather than just make vegetables out of people.

Mr. PERALES. I agree, Senator. But I think what we are saying is that we have a law that says if you can be employed, you don't belong in this program. You might belong on a welfare program, on a home relief program, but what we are talking about here is disability.

Senator LONG. Right.

Mr. PERALES. People who cannot work. And I think that there are many people who cannot work who have been terminated under the present law.

Senator LONG. Now let's just talk about a desirable program. Something that maybe we can get to some day. Let's just take my example of the woman with cancer. Bless her heart, she was a fine, God-fearing person doing the best that she could. She spurned the whole idea of public welfare up until the time she came down with cancer. And at that point she was in distress and had to seek help wherever she could find it.

But that fine woman wanted to earn her way wherever she could. Now wouldn't it have been a much better program if we had the people for whom she had loyally worked keep her on and pay her as long as she could do anything, as long as she felt like working. And at some point it might be appropriate for the Government to subsidize her earnings so she could reduce her hours and so we wouldn't be demanding too much of the people who kept her on when she couldn't do but maybe half of what she had done before. And in due course when she just felt that she couldn't work anymore, let her draw the disability payments.

And generally speaking, looking at our whole program, the whole welfare program, wouldn't we be better off taking these people who are only capable of marginal employment and trying to assign them to the marginal jobs and subsidizing it rather than having the people just sitting there drawing a welfare check and feeling useless to themselves and society in general?

Mr. PERALES. That sounds like public service employment. And I think that has been tried, and I think it's a good program.

Senator LONG. But it need not be done entirely in the public service. It seems to me that when we have tried that kind of thing we have overlooked the biggest potential. The biggest potential is out there in private employment. If people that are going to have to have help can be subsidized in employment, we can find jobs for them. You've got a lot of good companies that would be willing to help. I mentioned Exxon as one example. That's a mature company. They had a bad reputation in the early stages of American capitalism. But I think they are a very responsible company today.

We ought to just find some place where they can put the person. I see you are nodding. You agree with that.

Mr. PERALES. Sure.

Senator LONG. You try to find a place where you put that person and try to use those people and make the best use of what they have to offer. As long as they can do something. When they can't, of course, then I think we ought to take care of them.

Now it's not too difficult to see what an appropriate program ought to be. I just hope that we will start changing these laws to do that.

Mr. PERALES. I agree with you. The only caution I would insert is that you have got to be careful that you don't use a program like that to subsidize people in private industry, and then allow industry not to pay people a living wage and then undermine other hardworking people who deserve a full salary. That is the only thing that I would be concerned about. That those people who you represent who want to work for a living would not be undermined by a program in which the Government is subsidizing other people.

Senator LONG. Mr. Perales, and I would say this to you too, Mr. Gonzales, if we run this country the way we ought to run it, everybody who wants to work for a living will have an opportunity to do something. And it doesn't make any sense to run it any other way.

You can discuss this matter with any audience you can. find anywhere in America. If it has a substantial number of business people or civic minded people in that audience and you mention the old

WPA program where they put people to work, you will find that the people in the audience applaud that. The old WPA or the CCC and things like that paid people to do something. And they did what they could, marginal though it may be, to earn their keep. But that's superior to paying people just to be idle. Do you kind of agree with that philosophy?

Mr. PERALES. I believe that it is better for the Government to create jobs for the people than to support them, yes.

Senator LONG. How about you? Do you agree with that, sir?

Mr. GONZALES. Certainly. I certainly agree with that. It's just that we keep discussing that same issue. We have a problem here today that we need to deal with. And that is, of course, why we are here. And I think that is why a lot of the witnesses are here. I believe if that issue was made part of any disability legislation—to help some of these people get back—not only terminated—but help them get back out in the work force, certainly we would agree with that legislation. But when we go back home after today, we still have to deal with this medical improvement situation and the court problems. That's why we are here today at least to impress this upon this committee, the importance of dealing with those particular issues now, this year.

But certainly if that was made part of a legislative action, I see where no one would disagree with that concept.

Senator LONG. Thank you very much for your testimony here.

Mr. PERALES. Thank you, Senator.

[Whereupon, at 4:07 p.m. the hearing was concluded.]

[By direction of the chairman the following communications were made a part of the hearing record:]

SECTION 1619 MUST BE RE-AUTHORIZED

STATEMENT BY

SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman, I would like to thank you for giving me the opportunity to present this statement on the re-authorization of Section 1619 to the Senate Finance Committee.

When considering the Social Security Disability Amendments of 1980, Congress found that many disabled persons were capable of performing some form of gainful activity but, with a $300 per month income limit on eligibility for Supplemental Security Income and Medicaid, were unable to afford to accept work. The public policies of this country should provide incentives to our citizens to engage in productive activity whenever possible. But, prior to passage of the 1980 legislation, our policies were encouraging otherwise productive citizens in the opposite direction.

Mr. Chairman, the disabled people of this country owe you a great debt for realizing this fact and offering an amendment to the 1980 Disability Amendments designed to eliminate this dis-incentive. The chairman's amendment set up a three year pilot program under which a disabled individual performing substaintial gainful activity could continue to receive both SSI and Medicaid if his or her income from that employment exceeded the normal SSI disability cap of $300 per month, but did not exceed the income cap for aged and blind recipients of SSI. That cap is currently $693 per month.

In addition, the recipient would be able to continue receiving Medicaid benefits, though not SSI, if his or her income falls between $693 per month, and a state imposed limit, which in Delaware is $947 per month. That state imposed limit is determined by adding the average Medicaid cost of treating a disabled person in a particular state to the aged and blind limit.

Obviously we are not talking about benefits for people making a king's ransom, nor is this a new middle class entitlement. We are talking about people having the ability to make a decent living contributing their talents to society, while retaining access to the medical care their disabilities require. We are talking about an incentive for work.

As you know, Mr. Chairman, the Senate voted 80-0 to extend Section 1619 of the Social Security Act just prior to the recent recess. The House, however, failed to act on the measure. Thankfully, the administration, which now supports an extension of Section 1619, has kept the program alive on an interim basis. We must, however, act to bring certainty to the program and extend this important incentive for at least three years, as the Senate tried to do on Novermber 18.

Extension of this program, however, will not mean a great deal unless the Social Security Administration does more to inform the disabled community, and its own field workers for that matter, of the opportunities offered under Section 1619. The House Ways and Means Committee, during hearings last year, heard a number of witnesses attest to the fact that SSA has done little to publicize the program, and that SSA field workers, in many instances are not even aware of Section 1619.

Mr. Chairman, I hope the Senate Finance Committee, during its deliberations on much needed disability reform legislation, or as free standing legislation, will enact the longest possible extension of Section 1619; and will follow that action by using its oversight function to ensure that beneficiaries and SSA field workers will be aware of the benefits of this important program.

STATEMENT

OF

SENATOR PAUL SARBANES

Disability Review Testimony for the Senate Finance Committee

MR. CHAIRMAN. Since I have been in the Senate, I have worked to alleviate the plight of our citizens who are severely disabled and no longer able to work. Therefore, I have been particularly concerned that, since the Social Security Administration began implementation of the periodic review provisions of the Social Security Disability Amendments of 1980, my office has been deluged with requests for assistance from Marylanders who have received disability benefits for years and are now told that they are not disabled, or who obviously qualify for benefits but are rejected. Many feel that the accelerated review process is being conducted much too hastily and with little thought to fairness or to the consequences of removing people from the disability rolls who are, in fact, unable to work.

I would like to tell you about a few of the people who have contacted my Maryland offices and have been victims of the accelerated review process.

One 54 year old male Maryland resident had been receiving disability benefits since 1974 and was terminated from the Social Security disability program in the summer of 1982. He has multiple disabilities: heart condition, degenerative joint disease, high blood pressure, emphysema, and arthritis. He had seven heart attacks in one two-year period and has had two multiple-bypass operations. After his termination, he kept trying to return to work against his physician's advice, but could only work for one hour before chest pains began. He was finally reinstated by an Administrative Law Judge this past fall. In response to the SSA contention that "the evidence shows you are still able to move about and to use your arms and legs in a satisfactory manner," he wrote: "Just what does moving your arms and legs in a satisfactory manner mean? Satsifactory to whom? Satisfactory for what? I cannot walk any distance, I cannot walk upstairs or bend over. If I move my arms, I get chest pain. I have pain in my arms and chest constantly every day. I have to spend the majority of my time laying down in bed to get any measure of relief."

A 32 year old female with acute lymphatic cancer with metasteses in her liver and bone marrow, as diagnosed by NIH in early 1982, was denied an initial claim for disability benefits. She filed for reconsideration and was backed up by NIH reports saying her condition was very grave and that she had had seven cycles of intensive chemotherapy with multiple complications and had never been in remission. SSA denied reconsideration in October, 1982, saying she had stomach cancer but was responding well to treatment and was able to return to her job as a credit clerk; she died in early November.

A male over 50 on disability since 1974 because of heart problems was informed that his benefits had been terminated on September 18, 1981, and had a heart attack the next day. SSA's own consulting physician said the man was unable to work. Throughout the appeals process, he continued to have severe medical problems: several heart attacks, hospitalizations, and post-operative complications requiring additional hospitalizations. He was eventually approved at the Administrative Law Judge level in February 1983 -- 18 months later.

A 30 year old Maryland resident with severe diabetes, arthritis, and asthma has had repeated prolonged hospitalizations in the past several years due to pneumonia and poor blood sugar control. Her doctors report that she is a meticulous patient who, despite rigid adherence to all medical instructions and strict monitoring of her condition, is unable to control her diabetes. SSA granted her disability benefits in the fall of 1983 to begin in

1984. After reviewing her case, SSA then denied her benefits a month before they were to start. She was in the hospital again when she received the denial and has appealed the decision.

A 52 year old female and former teacher has been on disability since 1978, when at age 46 her car was hit from behind and she sustained multiple injuries to her neck and spine, causing loss of the use of her hands and other nerve damage. She has had one cervical fusion and two spinal fusions. She is unable to sit for more than five minutes each hour, can stand only when encased in a molded plastic body jacket, and must lie flat most of the time. She was terminated in 1982 because SSA determined that her condition did "not preclude engaging in some form of work." She was reinstated by an ALJ this past summer. She has rebelled often against the circumstances which have forced her to apply for disability benefits and noted, "If the people who want to throw me off the rolls would like to have a neck fusion and two spinal fusions, to wear my body jacket, and live with the constant pain and depression that comes from living a life that is totally restricted, they are most welcome to both my body and my benefits."

These stories are not, unfortunately, isolated instances. Rather, they reflect a general pattern in the way disability reviews have been conducted. There has been a bias built into the system that favors denial of benefits, at least initially, almost regardless of the common sense facts of the case. Of course, all of us agree with the need to prevent fraud and abuse in our Social Security Disability Insurance Program; however, a review system that excludes such obviously-eligible people as the ones I have mentioned is gravely flawed and must be changed.

In Maryland and in many other states across the nation, state officials have imposed a moratorium on decisions leading to the cessation of benefits for disabled citizens in response to the heated controversy generated by the present Social Security disability review process. On October 3, 1983, David W. Hornbeck, State Superintendent of Schools, instructed officials of the Maryland Disability Determination Unit, a branch of the Maryland State Department of Education's Division of Vocational Rehabilitation, to impose such a moratorium. In his statement, Dr. Hornbeck noted that the confusion that developed when SSA abandoned the termination review standard of "medical improvement" in favor of a concept of "ability to engage in substantial gainful activity" has been "compounded by the SSA apparently flouting several Federal circuit orders directing that Administration to determine that medical improvement has occured before cutting off benefits."

In Maryland, such a court decision was handed down on December 13th in the U.S. District Court for the District of Maryland. The decision found that "in this circuit the Secretary [of the U.S. Department of Health and Human Services] must . . . come forward at all termination hearings in which medical factors are considered with evidence to rebut the presumption of disability. In essence, the Secretary must establish that the claimant's medical condition has improved [in order for that claimant to be removed from the disability rolls]."

In light of this court decision, and because of the great personal injustice of the present disability review process, we must work diligently to improve this process and make sure that all those eligible for benefits receive them. I am sure many Marylanders would agree with me that those of us in the Senate must act promptly to restore fairness to the Social Security disability program.

Statement of Senator Jeff Bingaman
Before the Committee of Finance
U.S. Senate
January 25, 1984
Social Security Disability Reform

Mr. Chairman: Thank you for the opportunity to offer my comments on the pressing Social Security disability problem which now faces us. I am pleased that the Committee has provided the opportunity to air the concerns many of us have.

I believe the Social Security Disability System is badly flawed and immediate corrections must be made. Several states, including New Mexico, have taken independent action calling for moratoriums of further reviews. Some regulatory changes have been advanced but the review program is in turmoil. Unfortunately, an amendment, which I cosponsored and which I feel would have made needed changes in the disability program, was narrowly defeated late last year as the Senate tabled the Levin/Cohen amendment to the 1984 Supplemental Appropriations Act. Meanwhile, the pain and suffering of needy beneficiaries continues at this time.

I am personally aware of the tragedies which have been caused as a result of this flawed program. The volume of Social Security disability casework by my field offices is greater than any other issue. Disability cases are also the most heart-rendering. On October 8, 1983, I was pleased to be able to hold a field hearing of the U.S. Senate Committee on Governmental Affairs in Santa Fe on the subject of Social Security disability reviews. First hand testimony was heard from a cross section of New Mexicans who told of their painful experiences caused by an insensitive, inefficient and dehumanizing process. Testimony was also received from doctors who treat claiments, attorneys who represent claiments, the State of New Mexico Disability Determination Unit Director, an Administrative Law Judge who hears appeals, and a representative of the Governor's office. Many others submitted testimony that will be included in the printed hearing record.

Like those cases in New Mexico I am familar with, other Members of Congress and the American people have read and heard, on an almost daily basis, depressing stories about termination of disability benefits for individuals who are clearly still disabled. These are people who could not face the prospect of battling a hostile review process or of losing their only source of income.

Other individuals, shortly after having their benefits terminated, have died of the same illness which examiners had found no longer disabling. Nearly all of the terminations have resulted in needless pain, suffering, and loss of income for thousands of disabled individuals and their families. Ironically, many who have been found recovered and have had their benefits terminated were later, upon closer examination, eventually restored to the disability rolls. But often it was only after months of anguish at the hands of a wasteful and inefficient system.

This flood of terminations stems largely from two factors. One was the Act of Congress, the so-called Bellmon amendment, which mandated in 1980 that disability recipients be reviewed every three years to determine if they were still eligible for benefits. These reviews, called continuing disability investigations, or CDI's, were scheduled by Congress to begin in January 1982. The second factor behind the great number of terminations was an Administration bent on reducing government spending regardless of human costs. Wielding the Bellmon amendment, the Reagan Administration decided to accelerate the implementation date to March 1981, and began ordering disability reviews at an alarming rate.

In fiscal 1982, some 497,000 disability recipients, or almost 18 percent of the total, found their cases under review. Some 340,000 individuals have been cut off the rolls since March 1981 when the Reagan Administration began its review program.

No one can argue with the need for review to insure that only those who are actually disabled be permitted to continue to receive disability benefits. But the manner in which the review is conducted should be sensitive to the hardships which it can cause. The review process has been frought with insensitivity, inefficiency, and blatant abuses.

Because of the abrupt acceleration of the reviews, many individual cases received only the most cursory examination. State disability determination offices were forced to accept a three fold increase in their workloads without an increase in funding or support. Many reviews were accomplished simply on paper, without ever seeing another human being, or by a 5-minute examination by a physician who had never seen the recipient before. Often the statements of personal physicians have either never been sought or simply disregarded. Most reviews centered on a "profile" of disabled persons who were thought most likely to be able to go back to work. Several days of hearings before the Senate Special Committee on Aging, the Senate Governmental Affairs Committee and other groups have documented an irrefutable pattern of unfair--and improper--denials of disability benefits to individuals, particularly those suffering from severe psychiatric problems.

Nationwide, some 45 percent of the disability recipients reviewed were sent notices that their benefits would be terminated. On its face, that 45 percent would seem to indicate that a good number of recipients were no longer disabled. The records of appeals, however, tell a different story. Twelve percent of the terminations that were appealed received reversals at the reconsideration stage. Over 60 percent of the terminations appealed to social security administrative law judges were reversed. The

General Accounting Office found, in a study of 1400 appealed cases, that 9 out of 10 terminations of mentally disabled persons were reversed by administrative law judges--the first face-to-face interview for most of these individuals. These recipients were still disabled, but subjected to the stressful and unfair process of being re-evaluated.

Those charged with adjudicating appeals, the administrative law judges, have been forced to endure heavier caseloads. Those who have not adhered to the "goals" established have been subjected to retraining and other repraisals.

The Social Security Administration, the lead administration agency, has even admitted that some physically disabled persons died soon after the agency's examiners had ruled them healthy. In four of 11 cases reviewed in an internal GAO study, the former disability beneficiaries died of the very illnesses that the examiners had decided were not disabling. The study admits that the decision to terminate benefits was not correct and although error was admitted, little good it did.

So over-zealous have the examiners been that one man who received the Medal of Honor for valor in Vietnam by President Reagan was cut off from disability upon review. This individual was told he could work even though he had two pieces of shrapnel in his heart, both his arms and legs were severely impaired, one lung was punctured, and he was in constant pain. Although his benefits were restored upon review, he went through countless, unnecessary hours of pain and suffering.

The record of such conduct, by a government founded to help its citizens, has stirred the outrage of many people. During the spring and summer of 1982, corrections, remedies, and improvements were proposed by many of my colleagues. In December 1982, a significant amendment was added to a tax bill that continued disability benefits on appeal for recipients who chose to contest their notices of termination. The amendment also required that recipients be given the opportunity to appear and participate at their reconsideration hearings. This benefit was recently agreed to be continued until June 7, 1984.

Several remedial bills have been introduced in Congress and the House is soon expected to act on corrective legislation approved by the House Ways and Means Committee. The Administration also supports making certain changes in the system, administratively.

These reforms are commendable, but they should have been implemented several years ago, when we already had full knowledge of the tragic consequences of this review process. The Administration, if it intends to effect meaningful change, should not stop with these steps. I support making immediate legislative reforms by Congress along the lines of the Levin amendment and legislation which he and Senator Cohen have introduced, S. 476. I believe we need to guarantee that benefits not be cut off unless the beneficiaries medical condition has improved. A recipients' treating physician must also be consulted early in the review process and entire medical histories must be reviewed. We must also require that each beneficiary be entitled to a face-to-face interview with a right to immediate appeal to an independent administrative law judge. We must also have uniform standards for determining disabilities, and work skills should be put down as regulations and subject to public comment.

These changes and others are badly needed at this time. I hope my colleagues will act as expeditiously as possible to enact needed reforms and to put to an end the pain and suffering which has plagued the disability review process.

STATEMENT OF

CHAIRMAN EDWARD R. ROYBAL

Mr. Chairman, I want to commend you for holding a hearing on the issues of uniformity and equity in the Social Security Disability Insurance Program.

Comprehensive legislation to revise the current disability process is necessary primarily to prevent further mistreatment of literally hundreds of thousands of truly disabled persons. Although I could cite case histories for hundreds of unfortunate people, I think all compassionate Members of Congress are equally knowledgeable about the hardships visited on their disabled constituents. Therefore, I would like to emphasize three other points:

1) the growing discontent and actions of the states charged with making the disability determinations;
2) the growing number of federal court orders which overturn administrative procedures and policies of the Social Security Administration;
3) the increased financial costs of allowing the current chaotic situation to continue.

Since March of 1981, state disability agencies, using stringent Federal guidelines, have notified 470,000 Americans that they are no longer disabled enough to receive benefits. Although two-thirds of those who appeal the initial decision win back their benefits, the Social Security Administration insists that about 97 percent of the states' decisions are correct interpretations of Federal guidelines. Nevertheless, the states and federal courts have effectively stopped the reviews in most of the country and may ultimately lead to the reinstatement of a majority of the terminated beneficiaries.

During five hearings in four states and Washington, D.C., the House Select

Committee on Aging has taken direct testimony from five governors and numerous other state officials. They offer persuasive evidence that the current regulations and subregulatory procedures are grossly unfair. In fact, Mr. Chairman, I was particularly impressed with the early actions of and information provided by Governor John Carlin of your home state of Kansas.

On October 20, I inserted in the Congressional Record a list of state and Federal court decisions affecting the disability program. Senator Sasser subsequently inserted it into the Senate's Record. Since that time, Governors Brennan of Maine, Dukakis of Massachusetts, Clinton of Arkansas, Thompson of Illinois, and Anaya of New Mexico have ordered a halt to the termination of disability benefits pending before Congressional action. Currently, thirty states have either court-ordered or self-imposed moratoriums on further terminations or have otherwise significantly altered the determination process in their states.

In the most recent court cases, brought by New York City, a Federal judge ordered SSA to reinstate benefits to an estimated 62,000 mentally impaired persons. City officials estimated the amount of retroactive payments at $125 million or more. In addition, based on previous SSA estimates of $10 million for the administrative costs of implementing a similar case in the Midwest, the administrative costs of the New York City case will approximate $40 million. Since the court ordered retroactive reinstatement of the former beneficiaries, any marginal benefit savings will be more than offset by the administrative costs of the initial terminations and reinstatements.

Attached to my testimony is an updated list of state and Federal court actions affecting the disability process. In my own state of California, a Federal judge (Lopez vs. Heckler) ordered the SSA to reinstate 75,000 beneficiaries in nine western states.

The beneficiaries were to be rereviewed and could not be terminated from the program unless SSA could demonstrate medical improvement in their conditions. Although the Supreme Court rejected the reinstatement of terminated beneficiaries, the Disability Determination Services (DDS) in the affected states had already begun the administrative process of searching for them. However, a moratorium on all terminations in the nine states was issued by the SSA, pending development of the court-ordered medical improvement standard. If this court order is fully implemented, its administrative costs will exceed the $40 million for the New York case, and again, the benefit savings projected by the Administration will disappear due to the reinstatement of beneficiaries. These are only a few of the several incidences which demonstrate that the backlash to the SSA's harsh implementation of its review procedures may will end up costing the federal government as much as the current Administration wanted to save.

Some argue that the state and court actions destroy the uniformity of a national disability program. In truth, the lack of uniformity was a natural reaction to the Federal Government's attempt to retroactively change the way the statutory definition of disability is applied. The actions by the states and courts were simply an attempt to put back into the program the equilibrium which existed prior to the reviews.

In order to truly establish a national policy which will be accepted by the states and courts, it must be a fair policy. I believe that such a policy must state that an individual cannot be terminated without a demonstration of medical improvement, that substantive policy must be published in regulations subject to the notice and comment provisions of the Administrative Procedures Act and that SSA must either abide by or appeal valid orders by Federal Courts.

The disability legislation currently awaiting action (H.R. 3755/S 2002) will require these changes in the disability review process. If all of the significant revisions in this legislation are enacted and implemented, then I am confident that the turmoil among the states will come to an end. Until that time, however, I am just as certain that the current chaos will persist.

We cannot continue to ignore the medical improvement issue because the courts have been consistent in their rulings requiring a medical improvement standard. We cannot enact piecemeal legislation since the governors have spoken clearly in the unanimous August 2, 1983 resolution by the National Governors Association which calls on Congress to enact major reforms, all of which are contained in H.R. 3755/ S 2002.

For those Members who are concerned about the so-called cost of comprehensive legislation, let me reiterate that there can be nothing more costly in both human and fiscal terms than to allow the current chaos to continue. SSA has imposed a nationwide temporary moratorium. SSA is under court order in at least sixteen states to reinstate benefits to previously terminated individuals. Governors in at least 15 states have indicated they will no longer follow Federal guidelines. In effect, the fiscal cost of this confusion may well be more expensive than the pending legislation which would, at least, get everyone operating under the same guidelines.

I hope that this Committee will act favorably upon reforms similar to the House Committee's bill, H.R. 3755 and S 2002, its Senate companion. In addition, we should reopen previous decisions or otherwise redress the damage already done to help the half million people terminated from the program. Secondly, any moratorium should apply not only to those with mental handicaps, but also to those with physical ailments. There should also be a modification of the rigid three year review requirement which requires SSA to perform up to 500,000 reviews a year, or in the future, be subject to accusation they are not being vigilant. A better approach would be to require a review within three years of initial entitlement with subsequent reviews at the discretion of the Secretary.

In closing, I must reiterate that the Congress has known for almost two years that there are severe problems with the disability process. Because we have failed to act, the states and the courts moved with compassion to protect the due process rights of hundreds of thousands of our constituents. Mr. Chairman, we have it in our power to end the confusion and chaos by enacting comprehensive national legislation which redresses the several grievances outlined by the states and the courts. If we fail to act fairly, then we must accept the fact that other responsible governmental entities ~~activities~~ will justifiably continue their patchwork efforts to put some humane rationality back into the process and prevent the kinds of human tragedies which have been well documented in hearings in both Houses of Congress.

Update of
Major State Actions and Federal Court Decisions
Affecting the Disability Review Process
January 24, 1984

Alabama - Moratorium on terminations ordered by Governor George Wallace on September 19.

Alaska - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Arizona - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Arkansas - Moratorium on terminations ordered by Governor Bill Clinton on December 5. Disability employees required to follow procedures of a July 14 Executive Order by Governor Clinton which requires rereviews of cases terminated since January 1983, under guidelines consistent with the Eighth Circuit Court of Appeals decisions. A joint committee of the state legislature is conducting hearings and investigations. Governor Clinton testified in Washington, D.C. before the House Aging Committee on June 20 and lead successful effort in early August for a National Governors Association resolution in support of specific legislative remedies.

California - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Colorado - Moratorium on terminations implemented by state following Federal court decision (August 16) requiring use of a medical improvement standard prior to terminating benefits.

Hawaii - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Idaho - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Illinois - Moratorium on terminations ordered by Governor James Thompson on December 23. Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983 respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements.

Indiana - Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983

respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements.

Kansas - Disability employees required to follow procedures approved by Governor John Carlin in February, 1983 to rereview cases terminated since 1981 and to implement state interpretation of the federal disability guidelines. Governor Carlin submitted testimony to House Aging Committee hearing on June 20.

Maine - Moratorium on terminations ordered by Governor Joseph Brennan on Octob 16.

Maryland - Moratorium on terminations ordered by School Superintendent David Hornbeck on October 4.

Massachusetts - Moratorium on terminations ordered by Governor Michael Dukakis on December 5. A March 8 Executive Order by Governor Dukakis implemented a District Court decision (Miranda) to require that a medical improvement standard be used prior to terminating benefits. On July 20 the Governor ordered a reopening of previously terminated cases and joined in a lawsuit aganist SSA's disability policies. The state legislature's special commission on disability issued its final report with recommendations in June. Governor Dukakis testified at House Aging Committee hearing in Congressman Barney Frank's district on May 31.

Michigan - Moratorium on terminations ordered by Governor James Blanchard on November 17. Previously SSA had agreed (October 17) to a request by Disability Determination Director William Edmondson to discontinue receipt of CDI cases until November 30. Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983 respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements. The state of Michigan Interagency Taskforce on Disability has issued five lengthy, analytical reports since March 1982.

Minnesota - Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983 respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements.

Montana - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Nevada - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

New Jersey - Moratorium on terminations ordered by Secretary of Labor Michael Boakr in late September based on the legal advice of Attorney General Irwin Kimmelman.

New Mexico - Moratorium on terminations ordered by Governor Toney Anaya on October 21.

New York - Moratorium on terminations ordered by Social Services Commissioner Cesar Perales on July 22. On December 11, a Federal judge in New York City ordered the reinstatement of 62,000 previously terminated beneficiaries with mental impairments. Attorney General Robert Abrams has also filed suit against the Department of HHS on behalf of individuals with heart diseases (August 10).

Oklahoma - First to implement face-to-face interviews at reconsideration following the Director of the Department of Human Services (and former U.S. Senator) Henry Bellmon's recommendation in early 1983 that Governor George Nigh turn back the state disability determination function to the Federal government.

Oregon - Moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

Pennsylvania - Moratorium on terminations ordered by Governor Richard Thornburgh on October 6.

North Carolina - Moratorium on terminations ordered by Governor James Hunt on September 3. The state legislature's special commission to examine the disability process convened their first meeting on September 7. Governor Hunt submitted testimony to House Aging Committee hearing on June 20.

Ohio - Six month moratorium on terminations ordered by Governor Richard Celeste on October 8. Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983 respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements.

Virginia - Moratorium on terminations ordered by Governor Charles Robb on September 28. House Aging Committee held hearing in Cong. Norman Sisisky's district on September 12.

Washington - Moratorium imposed by the State in June prior to the moratorium on terminations imposed by SSA on June 28 following a ruling (June 16) by the Ninth Circuit Court of Appeals requiring use of a medical improvement standard. The court also ordered a reinstatement of benefits to those previously terminated, but this was stayed by the Supreme Court on October 11.

West Virginia - Moratorium on terminations ordered by Governor John Rockefeller on August 12. Governor Rockefeller testified at a House Aging Committee hearing in Congressman Bob Wise's district on May 20.

Wisconsin - Reopening and reinstatement of previously terminated mentally impaired persons ordered by Federal District Court in December 1982 and June 1983 respectively. Court orders require SSA to develop disability guidelines for mentally impaired which are consistent with legal requirements.

Prepared for: Chairman Edward Roybal by the staff of the Subcommittee on Retirement Income and Employment, House Select Committee on Aging, (202) 226-3335.

January 24, 1984

STATEMENT

of the

AMERICAN ASSOCIATION OF RETIRED PERSONS

The American Association of Retired Persons, representing some nearly sixteen million older Americans, appreciates the opportunity to comment on the administration of the Social Security Disability Insurance Program. AARP is greatly concerned about the adverse effect current procedures and standards have on thousands of disability recipients and beneficiaries -- many of whom are older Americans. Although efforts should be made to ensure that only truly disabled individuals remain on the disability rolls, the manner in which disability benefits have been terminated in many cases has been extremely inequitable.

The disabled elderly rely most heavily on the social security disability insurance program and have a great deal at stake with the current review procedures and future changes in the program. Disability insurance is important to them, because for the older worker who becomes disabled, recovery is less likely than for a younger worker. But even if recovery does occur, the older worker tends to be less able to find employment. Moreover, the elderly are often the victims of multiple impairments and their ailments tend to be compounded by the factor of age.

Congress indicated its sensitivity to the inadequacies in the program late in the 97th Congress when it passed H.R. 7093 (P.L. 97-455) which improved some of the onerous procedures in the disability program. Unfortunately, that legislation provided only temporary relief and it did not address many of the substantive issues that have been the subject of controversy. Comprehensive reform must now be enacted in order to ensure that the review process will be humane and fair and will accurately assess the impairments of disability claimants.

Administration's Proposal

In June of 1983, HHS Secretary Heckler announced a package of major reforms, including revisions in the process of reviewing the eligibility of disabled beneficiaries. Although we commend the Administration for initiating program reform, AARP views these proposals as insufficient because they provide relief only to a small portion of harmed disability recipients.

For example, an exemption of 135,000 mental impairment cases from the continuing disability investigations (CDIs) pending policy review affect only a small portion of the mentally disabled -- only those suffering from psychotic disorders. Individuals with non-psychotic disabilities will continue to be reviewed under unfair and inadequate standards. The inclusion of several additional impairments into the "permanently disabled" classification exempts an additional 200,000 individuals from CDIs. AARP supports action to protect from the current CDI process individuals who are permanently disabled. However, we are concerned about those who have been terminated from the rolls with impairments that are now considered "permanent" but were not prior to the Administration's action.

Another proposal provides for the payment of benefits during appeal but only through the reconsideration level, at which time the individual will have a face-to-face hearing. The reconsideration determination occurs shortly after the initial decision but a much longer period passes between the reconsideration level and the Administrative Law Judge (ALJ) hearing. Beneficiaries, many of whom are inappropriately terminated, lose their benefits and suffer irreparable financial injury while waiting for the appeal decision. AARP, therefore, supports legislation which will require the Social Security Administration to pay benefits through the ALJ level, a most crucial period.

Federal legislation is needed in order to broaden the class of truly disabled individuals who have an interest that must be protected and who would benefit from comprehensive program reform.

AARP supports S.476 and H.R.4170 because we believe they adequately address the concerns of disabled and elderly persons. This legislation will greatly improve the disability review restoring confidence in and equity to its administrative and substantive procedures. We would like to comment on a few of the provisions that will help achieve this goal.

Medical Improvement Standard

S.476 provides that benefits may not be terminated unless the Secretary makes a finding that: 1) the individual has medically improved; 2) they have benefited from advances in medical or vocational technology that have enhanced their ability to engage in substantial gainful activity (SGA); new or improved diagnostic techniques indicate that the individual's impairment is not as disabling as it was considered to be at the time of prior allowance; 4) initial decision was clearly erroneous; or 5) the individual has demonstrated an ability to work. H.R.4170 contains a similar medical improvement provision.

AARP is greatly concerned about individuals who are terminated from the rolls without substantial evidence of medical improvement. Many individuals who have been on the rolls for several years were awarded benefits after a proper determination of disability at that time. In many cases, there has been no medical improvement, and often, a deterioration since the original determination of disability. Yet the Social Security Administration (SSA) has taken the position that disabled beneficiaries must meet current disability standards in order to remain on the rolls. As a result, benefits have been terminated with no weight given to the original determination.

Many courts have ruled that SSA cannot terminate benefits unless there has been medical improvement while other courts have held that the burden of proof is on SSA to prove that an individual is no longer disabled. Despite these rulings, SSA has refused to acquiesce and has continued to deny benefits.

The "medical improvement" standard is not foreign to SSA however. SSA considers the chance of medical improvement when deciding which cases will be "diaried" for review. In addition, if an individual has an impairment that is listed as a permanent disability, and thus exempted from the CDI process, SSA will examine that case to see if an individual's condition is likely to improve. If so, they will be reviewed despite the exemption.

Thus, SSA applies the notion of medical improvement when it will subject a recipient to the review process, often resulting in termination.

S.476 and H.R.4170 will legislatively mandate that SSA meet a higher burden of proof by clear and convincing evidence. The medical improvement standard will help insure that individuals who originally have been properly determined as disabled will be reassessed under more appropriate standards. It will also guarantee that improperly awarded benefits will no longer continue and it acknowledges improvements in medical technology that may affect an individual's ability to engage in substantial gainful activity.

Multiple Impairments

As previously stated, the elderly are often the victims of multiple impairments. SSA will only consider the combined effect of impairments if at least one of the impairments, considered separately from the others, is found to be severe. Many elderly are not able to meet this standard and are denied benefits.

H.R.4170 requires that the Secretary consider the combined effect of all of the individual's impairments in determining whether the person is unable to engage in substantial gainful activity. This provision will eliminate the inequities faced by individuals suffering from multiple impairments and assure that all impairments, individually and jointly, are fully considered in determining whether an individual meets the definition of disability.

Vocational Factors

An applicant for social security disability benefits must meet the non-disability requirements (i.e., insured status) as well as establish that they are unable to work due to a disability. The adjudication of claims is accomplished on a sequential basis, the latter considering severity of the impairment(s). Unfortunately, the determination of disability up to this point in the process, is made without considering vocational factors such as age, education and work experience. In the SSI program, the severity of impairment standard incorporates vocational factors into the sequential "medical" evaluation.

SSA has argued that the Congressional mandate states that SSA perform medical assessments initially, without considering vocational factors. In contrast, the court in *Scruggs* v. *Schweiker* stated that "...Congress fully intended that the severity of clinically established impairments be considered in relation to the vocational prospects of the individual." 559 F.Supp.100, 103 (M.D. Tenn. 1983).

The consideration of non-medical factors in awarding disability benefits is particularly crucial for older workers in gaining access to the program. AARP recommends that the Congress legislatively mandate that SSA incorporate into the evaluation process use of vocational factors in determining severity.

Uniform Standards

In adjudicating disability claims, state agencies, ALJ's and the Appeals Council are governed by the Social Security Act, the Code of Federal Regulations, the Social Security Rulings, and Supreme Court decisions. The Rulings amplify SSA policy and provide interpretations of the Act and Regulations. In order to clarify all of these for state disability adjudicators, SSA issues to them a detailed set of administrative instructions known as the Program Operating Manual System (POMS).

The POMS sets forth the objectives of the disability program and standards with which the state agencies must comply in reaching a disability decision. Although the POMS contains the guidelines to be used in determining disability, it does not have the force or effect of the law and, therefore, is not binding on ALJ's or the Appeals council. The POMS is neither published nor subject to rulemaking procedures under the Administrative Procedure Act (APA), and is often at variance with the standards set forth in the Social Security Act, Regulations and Rulings.

S. 476 and H.R. 4170 make the APA requirements of public notice and comment prior to publication of a final rule binding on all disability determinations. In addition, only published rules promulgated pursuant to the APA, rather than informal policies, will be binding uniformly at all levels of decisionmaking. As a result, a single, uniform set of standards will be applied at all levels of the disability determination process.

AARP feels that all adjudicative standards that affect substantive rights should be promulgated through notice and comment rulemaking as required under the APA. The purpose of the rulemaking process is to assure fairness and mature consideration of rules of general application by giving affected members of the public a voice in major policy decisions. The procedures do not merely provide a means to inform interested parties about official actions which may affect them. The main thrust is to permit those parties to be heard before any official action is taken. The process allows the agency to have before it important information and alternative proposals from many individuals and organizations with substantial expertise that can result in properly fashioned policy decisions.

This provision will also remedy the serious problems that have occurred through the application of conflicting standards at various levels of review within SSA.

Cost Implications

Despite passage of the 1983 Social Security Amendments, the short-term solvency of the social security system remains in jeopardy. Due to the financial inadequacy of the 1983 package, the system is currently operating at very minimal reserve levels and as a result, the automatic COLA cut stabilizer could be triggered before the end of the year. A November 16, 1983 Memorandum by Richard S. Foster, Office of the Actuary, SSA, clearly indicates that during the 1985-87 period, the OASI program could face serious cash flow problems which even the automatic stabilizer may not be able to resolve. Beyond triggering automatic COLA cuts, these cash flow problems could also prevent the timely repayment of amounts loaned from the HI and DI trust funds, thereby endangering the financial stability of these two programs as well.

AARP strongly supports passage of disability reform legislation, but we also realize that such program changes may well necessitate additional financing. Estimates of the additional program costs resulting from the proposed DI reforms vary depending upon whether the SSA or CBO estimates are used. Nevertheless, eliminating the current inequities in the DI program will entail additional expenditures. Because AARP does not want to run the risk of triggering the COLA cut stabilizer or of causing additional financial problems for either the OASI or DI program, we propose that the additional DI costs should be covered by raising revenue from broadly based tax sources and temporarily earmarking that revenue for the OASDI trust funds. Potential sources for this additional revenue include, for example, closing existing tax loopholes or increasing excise taxes for alcohol and tobacco.

The existence of the COLA cut stabilizer in the near term interferes with needed changes in the social security benefit structure, especially correction of the inequities in DI. AARP recommends repeal of the automatic stabilizer because, if triggered, the resulting COLA reductions will have an extremely harsh impact on the lowest-income elderly who rely on social security for nearly all of their income. If the stabilizer were triggered year after year, not only would current disability recipients and retirees find their real benefit levels ratcheted down, but even those persons approaching retirement and electing benefits at age 65 would also find their expected benefit levels reduced.

Conclusion

In conclusion, AARP would like to thank the Committee for holding hearings on an issue of paramount concern to the Association. We urge you to act favorably on pending legislation which will substantially reduce the number of people whose benefits are erroneously terminated.

If enacted, S.476/H.R.4170 will strengthen the initial levels of determination, insure complete and accurate assessments of disability, and restore confidence in the public that the social security disability program will operate under humane and efficient standards.

AMERICAN FOUNDATION FOR THE BLIND, INC.

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STATEMENT OF
THE AMERICAN FOUNDATION FOR THE BLIND
BY
GLENN M. PLUNKETT
SPECIALIST IN GOVERNMENTAL RELATIONS
TO THE
SENATE COMMITTEE ON FINANCE

HEARING DATE: JANUARY 25, 1984

THE AMERICAN FOUNDATION FOR THE BLIND JOINS WITH OTHER ORGANIZATIONS, GROUPS AND INDIVIDUALS TO EXPRESS ITS CONCERNS OVER THE ADVERSE EFFECTS ADMINISTRATION OF THE SOCIAL SECURITY DISABILITY PROGRAM HAS ON THE DISABLED, AND TO SUGGEST CORRECTIVE ACTIONS.

THE AMERICAN FOUNDATION FOR THE BLIND WAS ESTABLISHED IN 1921 TO SERVE AS THE NATIONAL PARTNER OF LOCAL SERVICES FOR BLIND AND VISUALLY IMPAIRED PERSONS. THE FOUNDATION IS A NON-PROFIT AGENCY AND ITS REVENUES ARE USED TO PROVIDE SERVICES TO BLIND AND VISUALLY IMPAIRED PERSONS, AND TO MORE THAN 700 LOCAL, STATE, REGIONAL AND NATIONAL PROGRAMS AND ORGANIZATIONS SERVING THEIR NEEDS.

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WE ARE SERIOUSLY CONCERNED BY THE ADMINISTRATIVE CHAOS IN THE DISABILITY PROGRAM AND OVER THE ADVERSE EFFECTS ADMINISTRATION OF THE DISABILITY PROGRAM HAS HAD AND IS HAVING ON THOSE LEAST ABLE TO CARE FOR THEMSELVES OR SPEAK ON THEIR OWN BEHALF....THE MENTALLY IMPAIRED. THE DECISIONS BY SSA TO CUT THE MENTALLY IMPAIRED OFF TH DISABILITY ROLLS THROWS MORE AND MORE OF THE LEAST CAPABLE IN A SOCIE ONTO THE STREETS AND AT THE MERCY OF LOCALITIES WHOSE SERVICES ARE ALREADY INADEQUATE TO CARE FOR THE HOMELESS. IT IS UNFORTUNATE THA SOME OF THE STATES HAVE HAD TO STOP THE DISABILITY REVIEWS OR TO ESTABLISH THEIR OWN RULES IN ORDER TO ENSURE EQUITY AND JUSTICE TO THE DISABLED IN THEIR JURISDICTIONS. WERE IT NOT FOR SOME OF THE STATES, AND THE COURTS, THE TRAUMA OF THE PAST THREE YEARS WOULD BE MORE WIDESPREAD. EVEN SO, HUNDREDS OF THOUSANDS ARE SUFFERING FROM THE EFFECTS OF AN UNJUST AND UNFAIR ADMINISTRATIVE PROCESS.

THERE IS NO NEED TO RECITE AGAIN THE LITANY OF HORROR STORIES ABOUT INDIVIDUALS WHO HAVE SUFFERED FROM THE ADMINISTRATION OF THE DISABILITY PROGRAM....THEY HAVE BEEN DOCUMENTED AND AIRED IN PRIOR CONGRESSIONAL HEARINGS. HOWEVER, CHAOS AND SUFFERING CONTINUES AND THE QUESTION IS STILL PENDING AS TO WHEN THE CONGRESS WILL ACT. CONGRESS SHOULD ACT IMMEDIATELY TO PASS S. 476 WITH PERTINENT AMENDMENTS FROM H.R. 4170 WHICH WOULD:

- ESTABLISH UNIFORM STANDARDS FOR ADMINISTRATION OF THE PROGRAM;
- PROVIDE THAT AN INDIVIDUAL MUST HAVE MEDICALLY IMPROVED, OR BE THE BENEFICIARY OF NEW MEDICAL TECHNOLOGY WHICH PERMITS HIM/HER TO WORK, BEFORE BEING FOUND ABLE TO ENGAGE IN SUBSTANTIAL GAINFUL ACTIVITY;

— PROVIDE THAT A FINDING OF ABILITY TO ENGAGE IN SUBSTANTIAL GAINFUL ACTIVITY BE MADE IN THE CONTEXT OF AN EVALUATION FOR COMPETITIVE EMPLOYMENT;

— THAT ALL OF AN INDIVIDUAL'S IMPAIRMENTS BE CONSIDERED IN DETERMINING WHETHER THE INDIVIDUAL HAS A DISABLING CONDITION;

— BRING A HALT TO FURTHER REMOVALS FROM THE ROLLS OF ALL CASES INVOLVING MENTAL IMPAIRMENT UNTIL THE ADMINISTRATION HAS MADE A STUDY OF SUCH DISABILITIES AND PUBLISHES FINAL REGULATIONS FOR DETERMINING DISABILITY BASED ON SUCH IMPAIRMENTS;

— REQUIRE THAT THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ACQUIESCE IN DECISIONS OF THE CIRCUIT COURT UNTIL OR UNLESS THE DECISION IS OVERRULED BY THE SUPREME COURT;

— REQUIRE THAT APPELLANTS BE GIVEN THE OPTION OF PAYMENT UNTIL A DECISION IS MADE BY AN ADMINISTRATIVE LAW JUDGE.

WE, TOO, ARE COGNIZANT OF PROGRAM COSTS AND THE PROBABLE INCREASED COSTS IN IMPROVING THE DISABILITY PROGRAM AND IN RIGHTING SOME OF THE WRONGS AND INJUSTICES IMPOSED UPON THE DISABLED. HOWEVER, WE CANNOT SEE ANY JUSTIFICATION IN TRYING TO EQUATE JUSTICE TO DOLLAR COSTS IN A PROGRAM ORIGINALLY DESIGNED TO PROVIDE FOR MEMBERS OF OUR SOCIETY WHO ARE SO DISABLED THEY CANNOT WORK. EVEN THOUGH "ADDITIONAL SPENDING MEASURES WERE NOT ANTICIPATED WHEN THE SOCIAL SECURITY FINANCING BILL WAS ENACTED LAST SPRING", WE HOPE THE CONGRESS DOES NOT SEE FIT TO BALANCE THE SOCIAL SECURITY TRUST FUNDS BY PERPETRATING AN UNJUST AND PAINFUL SYSTEM OF DISABILITY REVIEWS....BY MAKING THOSE AT THE BOTTOM OF THE ECONOMIC LADDER WHO HAVE NO CAPABILITY OF IMPROVING THAT STATUS PAY FOR THAT BALANCE.

WE CANNOT ESTIMATE THE ADDITIONAL "COSTS" OF AN IMPROVED DISABILITY PROGRAM, (i.e. IMPROVEMENT IN ADMINISTRATION AND IN CRITERIA), BUT WE SEE THE PROPOSED AMENDMENTS AS LESS COSTLY TO SOCIETY THAN THE HUNDREDS OF THOUSANDS OF INDIVIDUALS WHO WILL BE WANDERING THE STREETS WITHOUT FOOD, CLOTHING, SHELTER AND MEDICAL CARE. WE HAVE EXTREME DIFFICULTY IN ATTEMPTING TO RELATE THE COSTS OF THE DISABILITY PROGRAM THROUGH ANY SORT OF A COST BENEFIT ANALYSIS SINCE THE COST OF HUMAN SUFFERING CANNOT BE OFFSET IN DOLLARS. HOWEVER, IN DEVELOPING PROGRAM COST WE DO NOT THINK THAT ANYONE HAS CONSIDERED THAT PAYMENTS TO THE DISABLED ARE NOT A TOTAL DRAIN ON THE ECONOMY. IN FACT, SUCH PAYMENTS ARE A STIMULUS TO THE ECONOMY IN THAT PAYMENTS RECEIVED BY THE DISABLED RECIPIENTS ARE USED TO PURCHASE FOOD, CLOTHING, SHELTER, SERVICES AND WHERE POSSIBLE, SOME MEDICAL CARE. INASMUCH AS MOST RECIPIENTS OF DISABILITY PAYMENTS ARE GENERALLY DEPENDENT UPON THEIR (MONTHLY AVERAGE $424 (9/83)) BENEFITS, THOSE FUNDS ARE NOT REMOVED FROM THE ECONOMY. IN EFFECT, TITLE II DISABILITY PAYMENTS TO DISABILITY BENEFICIARIES AND DEPENDENTS ($17.1 BILLION* DOLLARS IN 1983) ARE BENEFICIAL TO THE ECONOMY.

*Page 27, Social Security 1983 Annual Report to Congress.

AMHCA
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STATEMENT OF THE AMERICAN MENTAL HEALTH COUNSELORS ASSOCIATION A DIVISION OF THE AMERICAN ASSOCIATION FOR COUNSELING AND DEVELOPMENT (FORMERLY AMERICAN PERSONNEL AND GUIDANCE ASSOCIATION)

BY
EDWARD S. BECK, Ed.D., CCMHC, NCC
PRESIDENT
AMERICAN MENTAL HEALTH COUNSELORS ASSOCIATION
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Before the

U.S. Senate Committee on Finance
Regarding Social Security Disability Reform

on

January 25, 1984

Mr. Chairman:

I am pleased to present testimony before your Committee regarding Social Security Disability Reform on behalf of the 7,400 members of the American Mental Health Counselors Association, a Division of the 42,000 member American Association for Counseling and Development (formerly American Personnel and Guidance Association).

Mental Health Counselors work in a variety of urban and rural, private and public professional settings, and provide up to 50 percent of all direct mental health services, many of which are covered under the terms of Social Security provisions. Consequently, the issue of Social Security Disability Reform is an important priority issue for the Association and for the many disabled and elderly Americans who are served by Mental Health Counselors.

The American Mental Health Counselors Association is pleased to support Senate Bill S. 476 (introduced by Senators Levin and Cohen) and Title IX of House Bill H.R. 4170 (introduced by Representative Rostenskowski). Mental Health Counselors have have long been concerned with the indiscriminate termination of benefits to SSDI recipients and with having to provide frequently contradictory positions to clients for such decisions. We believe that continuation of such policies further adds to the the problems already encountered by our clients and can, with more foresight and humanitarian considerations, be avoided. We believe that S. 476 and H.R. 4170 address these concerns and support our position of being against indiscriminate termination of benefits without adequate review.

This raises our second concern, which is that Mental Health Counselors have not been included in the legislation as providers of direct services, nor are they represented on the proposed Advisory Council on Medical Aspects of Disability.

Last year, President Reagan declared the week of March 20, 1983 as National Mental Health Counselors Week, after Resolutions were passed in both the House and Senate. This recognition, along with the inclusion of Mental Health Counselors (as defined by the terms Certified Clinical Mental Health Counselor, as certified by the National Academy of Certified Clinical Mental Health Counselors and/or licensed as professional or mental health counselors in the state in which they work) in bills affecting services to Older Americans and Social Security recipients has gone a long way to articulate who actually is responsible for providing core services. Most recently, H.R. 4094 (introduced by Representatives Pepper and Roybal) includes Mental Health Counselors as core service providers along side of our colleagues in psychology, psychiatry, social work and psychiatric nursing. We are extremely concerned about the increased cost to the American taxpayer of not providing direct reimbursement to these core service providers, who account for nearly half of all mental health services provided in this country. With increasing frequency, states and federal officials, as well as third-party reimbursers in the private sector, are seeing the wisdom in direct payment for direct services and are including Mental Health Counselors in their base of core providers of mental health services. We would hope that as this Committee studies reform, it will look at this issue and include Mental Health Counselors as full partners in this reform.

Finally, as you continue your study and debate on this issue, I invite you to feel free to contact me directly, with respect to this testimony or any other issue affecting the practice and quality of mental health services in this country.

Thank you for the privilege of allowing me to testify before this Committee.

STATEMENT ON BEHALF OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES BY AINSWORTH H. BROWN, VICE PRESIDENT, BEFORE THE COMMITTEE OF FINANCE, U. S. SENATE - JANUARY 25, 1984

Our Association appreciates the opportunity to provide comments to this Committee on issues relating to Social Security Disability adjudication. A number of issues have been raised within the past few years and within the past two years controversy has intensified due to the continuing disability evaluation process - the so-called CDI cases which have won a measure of notoriety in the media.

One issue concerns the matter of differing standards at the several levels of adjudication. I discussed this issue before the Subcommittee on Social Security of the House Ways and Means Committee as early as October 1981. Since then, there have been some legislative proposals aimed at this issue. Fortunately, those attempting to give regulatory quality to manual issuances have not succeeded. Hopefully, legislation will be passed and enacted to reaffirm the proposition that binding policy for all levels of adjudication must be subject to rule making. Only in this manner will the "legislative" authority granted to the executive be implemented in a manner consistent with the delegation of authority included in the Social Security Act to issue regulations. This will mean that with public involvement that there can be a reasonable degree of public acceptance and understanding of the Social Security disability program. In short, public comment can retard arbitrary and capricious policy making.

The issue of making mere manual issuances "binding" has been a doctrine of recent vintage in the annuals of Social Security adjudication as traditionally manuals were intended only to provide interpretative guidance to non-lawyers performing adjudication duties with the Social Security Administration. The appeals activity in Social Security Administration has recognized as binding, the statute, the regulations and Social Security Rulings. The last named vehicle has been employed recently to incorporate a number of disability policy statements. The impact of this non-rule making form of policy making will not be fully appreciated until it has been sufficiently exposed to judicial review. One would not be surprised to see serious questioning of this approach by the district courts and courts of appeal.

Thus, the legislation to mandate the rule making process as the mode of binding policy making could well have a salutary effect in avoiding more non-acquiescence decisions by SSA with resultant additional litigation. This would insure uniformity of adjudicative standards at all levels.

In cases involving continuing disability, one of the biggest issues relates to whether a medical improvement standard should be employed. SSA has resisted the concept although several circuit courts of appeal have adopted it in various versions, including the 3rd circuit which includes Pennsylvania where I hear cases. It is appropriate for the Congress to speak on this topic and, if it does so, the matter could be substantially settled. If one looks at the subject objectively, a medical improvement standard would appear logical except for the situation wherein the grant of disability was shown to be clearly erroneous. I might point out that this was the Agency's policy until the mid-1970's.

I respectfully request that, as the Committee deliberates on the matter of the Social Security Disability Program as indicated in the press release for this hearing, serious study be given to two other Congressional Committee reports. One report was issued in October 1983 by the Subcommittee on Oversight of Government Management of the Committee on Government Affairs of the United States Senate, Publication 98-111. This report contains findings relating to the pressures on Judges respecting the effort to lower the number of reversal decisions. Recognition of this pressure correlates significantly with the actions taken by a numer of State Agencies which is a concern mentioned in the press release for this hearing.

The other report, which I have not read, is one from the House of Representatives Select Committee on Aging, dated June 20, 1983, Publication 98-395. This document, I have been told, also contains testimony bearing on the entire disability adjudicative process, including the hearing activity.

What I respectively suggest is a coordinated evaluation of all of the Congressional Committee hearings into the controversy over the Social Security Disability Program to assess how the problem arose and what is a satisfactory solution. Some issues can be solved through legislation which is already pending but because of the denial by the Social Security Administration of the thrust of the above cited Senate Subcommittee report, I believe that a further airing of the issues would be appropriate. At the present time, a clear message from Congress to the Social Security Administration on such items as non-acquiescence will mediate against the agency being viewed in the eyes of the judiciary and the public as a "lawless agency." A bipartisan commission, similar to the one that addressed the Social Security funding problem, would be worthy of consideration.

I renew my plea to this Committee that I made in answers to written questions proposed by Senator Heinz contained in the Committee's hearing report of August 18, 1982, at Page 320, that Congressional action is needed to prevent the hearing process from becoming a cynical facade of what it was intended to be.

Testimony for S 2053 - February 1984

To
Senator Dave Durenberger, Chrmn.
Subcommittee on Health
Senate Committee on Finance
Dirksen Office Bldg.,Rm. SD 221
Washington, D. C. 20510

This is a testimony to the lack of fairness and wisdom of S 2053, entitled "Community and Family Living Amendments of 1983". This bill would depart from established principles and legal precedence for the care of developmentally disabled persons and seems based on unproven professional theories. It contradicts the findings of the Supreme Court (Halderman V Pennhurst) and the best judgment and desires of many parents of DD persons.

Our forty one years old son was placed in a state facility about 30 years ago after much effort and money were spent to find something better. We desperately needed relief from the pressures of his behavior patterns on all of the other family members.At that time, the st ate facility was little more than a "warehouse", but our son received some schooling and medical care which would not have been available to him had he remained in our home. He was safer at the state facility than at home. He had some experiences which might well have been harmful to him while at home. However horrible the "warehouse" was, he might not have lived so long in any other care arrangement of which we are aware.

The state facility has changed. No longer is it the only system of care for developmentally disabled people out side the natural home. Consequently the problems of overcrowding have greatly diminished. Society , the public, is more sensitive to the needs and rights of all of its citizens. Special staff make evaluations and arrange individualized programs according to individual needs and suitability. The residents have rooms with some privacy, and are grouped into "families" so that they have some satisfying and lasting relationships. Our son has opportunities for independent movement within the boundaries of the large facility. Minimal medical care is provided, but the facility is not a hospital.

We believe that this state facility is the least restrictive place he can spend his days. Many other parents feel the same way about their children. We have visited many group homes and community ficilities in several states, and we have observed the replacements of others into much less adequate situations.

When our son visited us here in November, he was in good shape and related better than usual, and seemed content. Shortly thereafter he was admitted to the Medical Center several times until a serious problem was detected. In December he underwent three operations and spent five weeks in a community hospital. Due to the unusual nature of his personality and to his inability to communicate properly or to understand what was happening to him, he required "round the clock" nursing sitters. We, too spent a great deal of time with him to bridge the gaps of understanding.He amazingly survived and is now back at the Medical Unit with his Colostomy.

He continues to recuperate, but causes quite a sizeable problem by removing his "bag". The staff is working to train him and to handle the situation, but they are short handed for the constant attention this requires. However, his rehabilitation is taking place in a kind environment of understanding and caring.

Medicaid paid for his hospitalization and extra nursing care. If there had been no such funding arrangement, it would have been disasterous for him, for us, and the community. It would also be disasterous for him and the community if to have no such state-responsible developmental community . Society should provide a variety of services and facilities to meet the variety of needs of disabled people.

The greatest number of inappropriate placements are now into nursing homes. If S-2053 becomes law, group homes will soon have that distinction. There will also be more inappropriately placed in their natural homes. The supporters of this bill or ammendment ignore the development of the last 20 years and would return to an unbalanced care system-this time with no state facilities. The repercussions would be deep and the problems unmanageable.

All disabled and helpless citizens should be eligible for adequate medical care whereever they reside. It is an inhumane method to use such a tool as S-2053 against state developmental communities and to "feather the nests of community providers. Lowell H Barker

Lowell H. and Sarah R. Barker, Parents
of a DD, Severely Retarded, son

DISABILITY ADVOCATES
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FOR RELEASE JANUARY 25, 1984

TO THE SENATE FINANCE COMMITTEE AND TO MEMBERS OF THE U.S. SENATE

My name is Peter Loeb and together with Members of both parties in Congress we have advocated reform of the disability insurance system on a bi-partisan basis over the past three years.

Our efforts in the House of Representatives in the first term met with success on a subcommittee and committee level, Let us be clear that the reform package appended to H.R. 4170 currently represents a package and a series of compromises and indeed all legislation does so ultimately.

We look forward to the hearings which the Senate Finance Committee will hold on pending legislation in this area.

There is every reason to believe that the reform package appended to H.R. 4170 will be passed by the House next term.

Persons with disabilities in this nation have suffered during these years. Many very much want to continue to believe that the system can indeed operate.

As many of you are already aware, the current situation has resulted in many tragedies and in death and devastation for our people.

This coming term of Congress presents us with new opportunities to finnish the job which was left undone in the waning hours of November 1983.It is no longer 1983 but 1984 and in case anyone may have overlooked the fact it is a political year. Many of you are inextricably and properly involved in the exercise of mechanisms so our body politic may thrive. It is an election year.

We appeal to the members of this committee in its deliberations to urge support of H.R. 4170's reform provisions instead of the more limited proposals before you. We are aware that the bill number may change but it is this reform package which is vital to the survival of our people. Passage of the more limited S. 476 will only create political divisions where there ought to be consensus.

We wish to remind all members of the Senate that there was bi-partisan consensus in working out the details of the reform package now in H.R. 4170.

We look to you in the U.S. Senate to preserve the bi-partisan consensus which has grown around this issue, We look to you to act immediately and pass H.R. 4170's reform package.

We commend the Finance Committee for setting early hearings on this very vital matter and look for early Senate action.

goodwill
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STATEMENT OF

DAVID M. COONEY

PRESIDENT AND CEO

OF

GOODWILL INDUSTRIES OF AMERICA, INC.

BEFORE THE

SENATE FINANCE COMMITTEE

ON THE

SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

JANUARY 25, 1984

Mr. Chairman, thank you for the opportunity to submit testimony on the Social Security disability insurance program. Our testimony will focus on the vocational rehabilitation and work incentive aspects of the program. This does not mean that we are not concerned with the issue of disability reviews. To the contrary, we are very concerned. Nevertheless, we recognize the expertise and eloquence of others who have previously testified and choose to support their views while passing directly to those two issues which face us daily -- rehabilitation and work incentives.

For your background, Goodwill Industries of America, Inc. is a nonprofit organization of 176 rehabilitation facilities around North America. Currently, Goodwill Industries annually provides rehabilitation services to 61,000 disabled individuals and employs approximately 30,000 disabled people in our facilities, retail outlets, and industrial contract programs. Our members provide a wide variety of rehabilitation services, including vocational evaluation, job training, employment, adjustment services, job-seeking skills, and job placement.

A major impact of the 1981 Omnibus Budget Reconciliation Act (P.L.97-35) was an immediate and significant reduction in the number of handicapped Americans receiving rehabilitation services, even though they were eligible for those services. Not only did this work a hardship on these citizens and their families, but it added to the tax burden of their fellow Americans by delaying significantly the opportunity of these individuals to reenter the job market as wage earners.

Let me explain: Prior to passage of the 1981 Reconciliation Act, states routinely received allocations from the Social Security trust funds for use in rehabilitation programs. These funds, in a majority of cases, were passed through, after deductions for administrative and counseling costs, as contract fees to the private sector agencies which actually performed the rehabilitation services. With the passage of the Act, no money was distributed pending claimed reimbursement for a client who had successfully completed a course of rehabilitation and had achieved gainful employment for a period of nine months or more. The negative impact was twofold.

First, the states were not able to provide the necessary administrative, counseling, and contracting services without funds. They had no locally appropriated funds to operate as a cash float over the training period of a year or more.

Secondly, because most of the private sector facilities providing rehabilitation services are, like Goodwill Industries, of the nonprofit variety, and because for years they have performed professional rehabilitation services on contract for fees less than the actual cost of the services, they had no cash reserve to support a continued effort during a period characterized by low levels of reimbursement, slow rates of collection, and results very difficult to predict.

In effect, Mr. Chairman, you asked the rehabilitation partner least able to accept any risk, the nonprofit rehabilitation agency, to accept virtually all the cash risk in the execution of the Social Security disability rehabilitation program. For comparison, this action was roughly akin to asking a college to wait for nine months after a student had completed a curriculum, graduated, and gone to work before it collected any of its tuition. Ridiculous on the face of it, and equally ridiculous in the present case.

As a result, it is true, SSA rehabilitation expenditures fell from approximately $160 million in FY 1980 to less than $10 million in 1983. While this might appear to be an up-front savings, we have no real means of measuring its offsetting loss to the Social Security system through the continued payment of benefits to persons who should have been employed, the loss of revenue through reduced tax base, and the diminution of the rehabilitation infrastructure caused by the closure or reduction of facilities, and the discharge of competent and experienced professional personnel at a time when the number of persons requiring services is actually increasing. All in all, this was a very bad piece of work, and the time has come to correct the situation.

It is very difficult to make specific recommendations to you. We are well aware that the previous system was not perfect, that too often funds could not be traced to actual rehabilitation. We do urge you to remember, however, that we are dealing with disabled or handicapped persons, often recently affected by trauma or injury, and whose levels of skill and motivation vary. In short, there are no magic numbers to predict success or guarantee achievement.

Nevertheless, Goodwill Industries agrees with the Congress that we must do better in this area. To that end, we have been anxious to benefit from the results of the demonstration projects mandated by

Section 505(a) of the 1980 Disability Amendments (P.L.96-265). Unfortunately, not only have those demonstration projects not been completed, they have not begun, although their final results must be provided to the Congress by June 1985. In fact, to date, no contracts have been let, and after persistent pressure on the Social Security Administration to "get on with it" we receive only bland assurance that negotiations are proceeding with some states. I point out that the studies were designed to test whether private rehabilitation facilities can have a significant impact on the number of terminations from the benefit rolls, whether the use of such facilities can achieve greater savings to the trust funds and result in lower costs for services than the current system, and whether earlier referral to state VR services will improve the rehabilitation potential of DI beneficiaries. Congress should act now to force SSA to comply with the law.

Despite the lack of data from the demonstrations, certain facts are evident:

It is unreasonable to expect the private rehabilitation facilities to subsidize the cost of training of clients who are unable to, or elect not to, complete their training.

It is unreasonable to expect the private rehabilitation facilities to carry costs of successful rehabilitation for a year or more.

It is undesirable to reduce further the capacity of the rehabilitation system at a time when the number of handicapped Americans is increasing.

It is unrealistic to expect nonprofit organizations to increase their subsidies to SSA clients at the expense of other handicapped persons involved in vocational rehabilitation.

Therefore, some change is necessary. A long-term solution might be for Congress to provide state and private rehabilitation facilities with incentives to provide services to disabled beneficiaries. Such incentives could include: long-term contracts; timely and realistic payment of obligations; sharing cost reduction benefits; and a reduction in red tape.

More immediately, Congress should enact Section 911 of H.R.4170 and Section 212 of the Levin-Cohen Disability Amendments, which allows reimbursement for services, not only where beneficiaries are able to work for nine continuous months after provision of services, but also where individuals recover from their disabilities, or where beneficiaries refuse to accept rehabilitation services or fail to cooperate in such a manner as to preclude their successful rehabilitation.

In addition, we support the extension of Section 1619 of the SSI program, which expired on December 31, 1983. As you know, Section 1619 allows disabled SSI beneficiaries to continue receiving cash payments or Medicaid, even though they may work at the substantial gainful activity level. We thank you for the support your Committee has given this provision and urge you to refine the law to reduce other work disincentives as well. It is bootless to train an individual to work, to motivate him to seek work, only to have such effort wasted because a person loses income by gaining employment.

Mr. Chairman, thank you for the opportunity to submit this statement. We would be pleased to discuss these issues with you or other members of the Committee.

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IAPSRS **INTERNATIONAL ASSOCIATION OF PSYCHO-SOCIAL REHABILITATION SERVICES**
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STATEMENT ON SOCIAL SECURITY DISABILITY SUBMITTED TO THE SENATE FINANCE COMMITTEE

BY

THE INTERNATIONAL ASSOCIATION OF PSYCHO-SOCIAL REHABILITATION SERVICES

The International Association of Psycho-Social Rehabilitation Services (IAPSRS) is an international organization representing nearly 500 agencies and individuals providing psycho-social rehabilitation services to chronically mentally ill adults living in the community. IAPSRS is committed to serving the needs of the chronically mentally ill, many of whom have been severely hurt by the Administration's cutbacks in Social Security disability benefits.

The Disability Insurance amendments of 1980 (PL 95-265) included a provision requiring review of all cases of beneficiaries whose disabilities have not been determined to be permanent. These reviews, known as Continuing Disability Investigations (CDIs) were begun by the Social Security Administration in March of 1981. Although the CDI process has adversely affected disabled individuals in all categories of disability, the chronically mentally ill have been disproportionately affected. During the first year of the CDI process, 28.6% of the initial cessations were accounted for by mentally impaired beneficiaries. However, only 11% of the total disability insurance rolls are made up of chronically mentally impaired inviduals. (House Select Committee on Aging, 1982).

An explanation for this disproportionate impact on the mentally impaired can be found if one looks at the nature and treatment of mental illness. The overt symptomatology of chronically mentally impaired individuals is often reduced by the administration of psyohotropic medication. When medication is combined with provision of an adequate social support system over an extended period of time, overt symptomatology often declines to the point where the individual is able to live independently or in a semi-sheltered environment in the community. This ability to live somewhat independently does not necessarily mean however that the individual is capable of engaging in competitive employment. Unfortunately, the Social Security Administration, in its zeal to implement the Administration's policy of reducing federal expenditures in the health area, developed and implemented a policy which caused many chronically mentally ill recipients to lose their benefits. SSA determined that if a recipient failed to meet the criteria of the Medical Listings, which address the question of overt psychiatric symptomatology, the beneficiary was no longer disabled and was in fact capable of engaging in work activity. This policy was mandated by the Social Security Administration even though federal regulations require that SSA assess capacity to perform work activity as a seperate step from assessing the medical functioning of the individual (20 CFR 404.1545(c) and 20 CFR 416.945(c)). SSA has maintained that if an individual exhibits overt symptomatology of such proportions that he/she meets the Medical Listing criteria, then the individual is not capable of work activity. Conversely, SSA assumed that an individual can work who does not meet the Medical Listing criteria, i.e. does not exhibit overt symptomatology. SSA also contends that an individual who retains some measure of residual functioning which enables him/her to live independently in the community is able to work. Finally, SSA assumes that there is a correlation between psychiatric symptomatology and functional behavior. All of these assumptions directly impact on the rehabilitation of the psychiatrically disabled because of the chronic nature of their illness and the length of time required to achieve the desired rehabilitation, i.e. employment, outcome.

In response to this continuing adverse impact on the chronically mentally ill by the Social Security Administration's CDI process, we have actively participated in efforts to revise SSA policies related to the determination of disability utilizing the Medical Listings criteria and the determination of an individual's capacity to engage in substantial gainful activity. As a result of several meetings between SSA officials and advocacy and professional organizations, three work groups were formed to explicitly address identified problems in the disability determination and redetermination process.

Despite the fact that some administrative changes have been suggested by these work groups and implemented by the Social Security Administration, legislative reform is still desperately needed for several reasons. First of all, the legislation currently in place allows for a great deal of latitude on the part of the Social Security Administration in establishing regulations and setting policy. As noted above, SSA has implemented policies and procedures which have had a severe and adverse impact on the chronically mentally ill. Definitive legislation is needed to spell out more clearly the process for determination and redetermination of disability claims. It is especially important for the chronically mentally ill that these procedures be firmly established because of the nature of their disability. As noted above the chronically mentally ill may often appear to be capable of living independently or engaging in substantial work activity but will in fact break down under conditions of stress which can only be evaluated by a structured work evaluation. Legislation that spells out the details of the determination and redetermination process is needed so that these individuals will not be prematurely and arbitrarily denied benefits or terminated from the disability rolls. The Administration's continuing opposition to legislative reform points clearly and convincingly to the fact that these changes will only be made via Congressional mandate.

For these reasons we actively support the legislation approved by the Ways and Means Committee, HR 4170. The following comments relate to those sections of HR 4170 which will have an immediate and direct impact upon chronically mentally ill clients.

1. Standards of Disability--Section 101

The importance of this section is that it more clearly defines the process by which an individual will be evaluated. It is important to emphasize the fact that everyone being reviewed will be subject to a sequential evaluation process. This is important because it precludes the possibility that an individual will be prematurely terminated before adequate information about the potential to engage in substantial gainful activity has been accumulated. Several years of psychological research now provides convincing evidence which points to the fact that a poor predictor of future work performance is

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psychiatric symptomatology. There appear to be no symptoms or symptom patterns which are routinely related to individual work performance. Based on this research it is clear that assumptions about ability to engage in work activity must not be made on the basis of either the diagnostic category or on the presence or absence of pscyhiatric symptomatology. Rather, determination of an individual's ability to engage in substantial gainful activity must be made only on the presence of clear and convincing evidence.

2. Disability Determination Process--Section 201

This section is of crucial importance to the fair evaluation of individuals with mental impairments. The Listing of Impairments of Mental disorders must be revised to reflect current practice and terminology in psychiatry and psychology. IAPSRS wholeheartedly supports the moratorium on reviews of mental impairment cases because of the difficulties which reviewers face in making appropriate determinations without adequately defined procedures to do so. We further support the concept that the assessment of residual functional capacity shall be designed to realistically evaluate the ability of mentally impaired individuals to engage in substantial gainful activity in a competitive work place environment. In the past, the determination of an individual's ability to engage in substantial gainful activity has too frequently been made on the basis of subjective evidence. We strongly encourage that these determinations be made based on objective evidence which is the result of a structured work evaluation designed to systematically assess the ability to work in competitive employment.

In every study in which work adjustment skills were assessed these skills were found to be significantly related to future work performance. It has been determined that the best clinical predictor of future work performance is a rating of a person's work adjustment skills made in a workshop setting or sheltered job site. Research evidence indicates that this type of assessment is the only valid work assessment procedure currently available. In every instance in which an overall measure of work adjustment skills was calculated, the score on the overall measure was predictive of future vocational performance. Years of psychological research has also demonstrated clearly that there is little or no correlation between a person's ability to function in one particular environment, e.g. an independent living or community setting, and that same person's ability to function in a different type of environment (e.g. a work setting). Further, large scale research results have demonstrated that there is little correlation between ability to work and social activity and basic living skills. It has been concluded that community adjustment involves relatively distinct yet independent dimensions. A review of this data indicates clearly that determination of an individual's residual functional capacity to engage in substantial gainful employment can only legitimately be made in a structured work evaluation site.

3. Qualifications of Medical Professionals Evaluating Mental Impairments -- Section 204

IAPSRS strongly supports section 204 of HR 4170 which states that "A determination...that an individual is not under a disability by reason of a mental impairment shall be made only after a qualified psychiatrist or psychologist...has completed the medical portion of any applicable sequential evaluation and residual functional capacity assessment." In all areas of disability the Social Security Administration must be encouraged to employ individuals with appropriate education, training and experiences which will enable them to systematically evaluate the disability status of individuals in the determination or redetermination process. This is especially important in cases of mental impairment where there is frequently a discrepancy between apparent behavior and true capacity to function independently and engage in substantial gainful activity. Relevant data from both the American Psychiatric Association and the American Psychological Association indicate that there are large numbers of appropriately trained psychiatrists and psychologists who can provide the clinical expertise necessary to make these evaluations. SSA's claim that there are not adequate numbers of qualified mental health professionals to perform the evaluations is clearly erroneous.

4. <u>Benefits for Individuals Participating In Vocational Rehabilitation Programs</u>

This provision is especially importnat to individuals who are chronically mentally ill because of the unpredictable nature of their behavior and illness. It is importnat that these individuals be afforded the opportunity to participate in vocational rehabilitation programs and that this opportunity not be contingent on prior performance of substantial gainful activity over an extended period of time. In order for severely mentally ill persons to become rehabilitated, they need time to develop a work history. The transition from long term unemployment to competitive employment is a very large step for most chronically mentally ill persons. Without immediate vocational rehabilitation experiences it is unlikely that most will develop the capacity for stable, competitive work. The employment base-rate data has repeatedly shown that less than 25% of chronically mentally ill persons are able to maintain competitive employment for six months or more. Therefore, the availability of vocational rehabilitation services for these individuals is critical to the succes or failure of this program.

5. Advisory Council on Medical Aspects of Disability -- Section 304 HR 4170 provides for an Advisory Council on the Medical Aspects of Disability. This Council will assist in the development and evaluation of the process of disability determinations and redeterminations and provide advice and recommendations to the Secretary on matters of general policy with respect to disability.

IAPSRS supports the concept of appointment of a Council of expert outside members. The Council could provide the professional expertise and guidance which has been sadly lacking in SSA's attempts to refine its policies. The charge to the Council as construed in the present legislation, makes clear that thoughtful assistance will be provided to the Secretary on these most important matters.

In conclusion, it must be stressed that action is needed now. The courts are ruling in case after case that SSA is acting illegally. Study after study, by the General Accounting Office and by Congressional Committees, show that the procedures for determining eligibility under these programs are woefully inadequate. And governors are now acting on their own initiative not to follow these flawed procedures. The program is in chaos. Only Congressional action to put necessary reforms in place can restore confidence in the system so that once again the Social Security system can be viewed as a model federal program.

STATEMENT BY ROBERT J. MYERS PRESENTED TO THE COMMITTEE ON FINANCE, UNITED STATES SENATE, JANUARY 25, 1984, WITH REGARD TO CHANGES IN THE SOCIAL SECURITY DISABILITY-BENEFIT PROVISIONS.

Mr. Chairman and Members of the Committee: My name is Robert J. Myers. Until February 1983, I was Executive Director of the National Commission on Social Security Reform. Thereafter, I was a consultant to this Committee during the legislative considerations which led to the enactment of the Social Security Amendments of 1983. The following remarks represent entirely my own views.

In 1980, legislation (P.L. 96-265) was enacted to tighten up the Disability Insurance program, including having extensive reviews of beneficiaries on the roll to determine whether they continue to be disabled.

The Reagan Administration enforced this provision quite vigorously. As a result, although many persons were properly removed from the rolls, a significant number of truly disabled persons were first removed and then reinstated after appeal (although many persons who were removed from the roll did not appeal). Because of much public criticism, steps were taken to remedy this situation -- both by administrative action and by the development of legislative proposals. The matter was originally dealt with in H.R. 3755, which was developed by the Committee on Ways and Means of the House of Representatives. This has now been incorporated into an omnibus bill, H.R. 4170, now pending before the House of Representatives.

I am greatly concerned that the pendulum, first having swung too far in the direction of strictness through administrative measures, will now swing too far in the other direction. Very significantly increased costs may arise. The increased expenditures may be as much as $10 billion in the 1980s, which will have an adverse effect on the financing of the OASDI system. Also, there may be lower COLAs for all OASDI beneficiaries if the trust funds fall to such a low level that the stabilizing provision of "the lesser of wage or price increases" were to apply.

What seems to be forgotten in this flurry of proposed legislation and administrative action is that it is only reasonable to periodically re-examine disability beneficiaries. However, this should be done in a deliberate, reasonable manner. Some of the changes in the pending legislation in this direction are desirable.

However, some proposed changes seem to move too far. One [~~not in the bill, but suggested by the Department of Health and Human Services,~~] would be to terminate benefits only when there has been medical improvement [~~or when the person is able to do the same work as in the past~~] (or, of course, in cases of clear error or fraud). This would be difficult to administer. It would be difficult to determine what the situation was some years ago when the disability began and perhaps impossible to compare the severity at two different times. It is much more preferable to do as in present law; namely, to determine whether the individual currently has the ability to work. Also, it is unreasonable to pay disability benefits to persons who have not medically improved, but who were on the roll erroneously despite being able to perform substantial gainful work, even if not able to do their own previous work.

The bill provides for face-to-face interviews, which I believe to be desirable. However, the payment of benefits should not continue throughout the entire appeal period up through the Administrative Law Judge stage, but only up to the first interview (really, through the date of the decision letter). A number of other things in the bill also greatly encourage making appeals, and thus the continuation of benefits that will be difficult to recoup if the final decision is that the person is not disabled.

Perhaps the worst feature of the bill is that the decisions of circuit courts would be applied through their entire area, unless appeal to the Supreme Court is made (which is difficult). The result would be to have completely different definitions of disability throughout the country. Then, each jurisdiction would compete to be as liberal as possible so that its residents would benefit. In this connection, there is also the problem of people moving between the various circuit-court areas so as to receive the most lenient treatment.

I continue to believe that the Federal courts are not really capable of handling such complex technical matters as the vast number of disability-benefits appeals involve. The solution would be to have a special Disability Court, as the 1979-81 National Commission on Social Security recommended.

I now believe, in balance, that it would be better to have completely federal administration of the DI program rather than involving the states, so as to have uniform administration of the program throughout the nation. Also, I believe that the Administrative Law Judges should not have as much independence of action as they now have, when they sometimes seem to follow their own personal philosophies, rather than the law and the intent of Congress.

In considering the status of the DI program, great importance should be attached to the general atmosphere that now prevails. The state Disability Determination Units (DDU) have already been very much affected by the current climate, under which so many people are talking about easing up on the determination process. Moreover, a number of states are illegally refusing to process disability cessations, a situation that I believe is intolerable and should be remedied by appropriate legal action. As a result, the DDU personnel involved will now tend to swing the other way and be much more lenient in the determinations, thus possibly bringing us back to the unfavorable and undesirable financial situation which prevailed in the DI program in the early 1970s.

Finally, I should like to point out a statistical error that is widely perpetrated as "proving" that the large number of disability terminations which have been made in the last few years under the disability review process prescribed by P.L. 96-265 were largely improper and unjustified. The statistic so cited is that a large proportion of such terminations -- as much as 75 percent in some jurisdictions -- are reversed on subsequent appeal. The implication is that 75 percent of all terminations were erroneous. The fact is that the cases which are appealed are generally only those which were borderline ones, and which the disability lawyers (who are often paid only when they win the case) are thus willing to pursue.

The Commonwealth of Massachusetts
Executive Office of Human Services
State House
Boston, Massachusetts 02133

CHARLES FRANCIS MAHONEY
SECRETARY

AREA CODE (617)

STATEMENT OF COMMISSIONER ELMER C. BARTELS

Thank you for this opportunity to share with the members of the Senate Committee on Finance our Massachusetts experiences with the Social Security disability programs. Governor Dukakis would have liked to talk with the honorable members of the Committee about the disability determination program in Massachusetts, as he did last May at a field hearing of the House Select Committee on Aging in Boston. However, he was obliged to present his state budget to our Legislature on January 25, 1984, and asked me to present the position of the Commonwealth on the critical issues of disability reform. As you may know, the Governor has taken a personal interest in the disability determination program because of the hardships it has caused for disabled people in the Commonwealth and the administrative hardship it has created for the states, which are mandated to conduct disability review.

As the state administrator for the Social Security disability determination program in Massachusetts, I am professionally and personally concerned about this program which has been the target of considerable public criticism and controversy for the past year and a half. This statement outlines the legislative measures that are necessary to reform the Social Security disability program so that it serves all disabled people fairly. The legislation previously approved by the House Ways and Means Committee comprehensively addresses the disability issues that have presented so many problems in Massachusetts. I hope that this honorable Committee will review the concerns brought out in the public hearing and comment process against that legislative package, which reflects the careful compromises and consensus of the bipartison House Committee, and act promptly to enact this much needed reform. Later I will describe the steps that we have taken in Massachusetts to improve the program, but stress that it's critical for Congress to act now on comprehensive legislation to ensure fair and equitable standards for this program.

Briefly we need legislation that will:

1. permanently continue Social Security disability benefits and medicare/medicaid throughout the administrative appeal process.

2. require publically promulgated standards and procedures for disability that accurately measure a person's medical condition and capacity for work;

3. require that the Social Security Administration adhere to a medical improvement standard before terminating benefits once eligibility is initially established;

4. provide for face-to-face meetings between claimants and state disability examiners before a negative disability determination is made in order to secure and use all medical evidence and cut down on the numbers of appeals resulting from incomplete evidence;

5. mandate eligibility standards that are consistent with other disability programs, especially vocational rehabilitation, and a state-level disability review procedure that fully supports continued Social Social benefits during the vocational rehabilitation process.

These reforms and others included in the comprehensive House bill are urgently needed. On behalf of the Governor, I want to thank you for your attention to these problems which critically affect disabled people in our Commonwealth and throughout the Country. Next I want to explain my perspective on the Social Security disability program and the reasons why I believe this list of legislative reforms is necessary.

First, I will stress that my flexibility and discretion in administering the Social Security Disability Determination program is extremely limited. Disability standards and procedures for determining eligibility are tightly controlled by federal laws, regulations and guidelines to a minute level of detail. These standards and procedures are imposed on state agencies and are rigorously monitored by Social Security officials and functionaries in the name of quality control. The results are not good.

Each year thousands of disabled Massachusetts residents fail to meet strict Social Security disability standards and are denied benefits after their cases are reviewed by our state disability determination services division. Yet many of these same people are so disabled that they can not work and cannot effectively participate in our agency's vocational rehabilitation program. Many claimants who appeal are made eligible for disability benefits by Administrative Law Judges who use different procedures and evidentiary standards for evaluating disability. Others do not appeal and so, even though their disabilities might meet the different appeals standards, do not receive the disability benefits to which they are entitled.

This system is not fair to disabled people, yet the unfairness is inherent in the present Social Security System. The disabled people of Massachusetts and the state administrators and disability examiners who are responsible for implementing this program desperately need Congressional intervention to comprehensively redefine the Social Security System so that the program works to treat disabled people fairly.

Much public criticism of our agency focuses on the so-called "reversal rate" for disability appeals. Based on the very strict procedures and disability standards contained in Social Security directives call "POMS", which our examiners are required to use, an individuals is determined not to be disabled. If that individual appeals he or she has at least a 60% chance of getting a favorable decision from an administrative law judge, who sees the claimant face-to-face and uses different rules for the appeal decisions. This situation creates a perception that our agency did a poor job even though we followed the Social Security rules that govern state agencies.

The importance of face-to-face encounters cannot be understated. Recently I met a man on crutches who asked me why our disability examiner had reviewed his medical records and recommended a no disability finding. I couldn't imagine why, but I agreed to check it out. None of the medical records in his file mentioned that he could only walk with crutches. One of his phjysicians later verified the man's need for crutches, but had not mentioned this critical fact in the medical records.

Unlike administrative law judges, our examiners do not ordinarily see claimants, so their potential for mistakes and omissions concerning key medical facts is ever present. Congress should mandate a face-to-face meeting between claimants and state disability examiners early in the disability evaluation process. To cutdown on appeals from decisions based on incomplete evidence would also reduce benefit delays and frustrations for many claimants, and would improve public perception of our agency's accuracy by giving our examiners the information needed to make more complete and accurate determinations.

Another practice that creates different decisional results is the Social Security requirement that out examiners use the POMS, which are lengthy compilations of Social Security policies and directives that are frequently changed without public review or input. The administrative law judges are not bound by the POMS, but may apply statutory and judical law and regulations in their adjudications. The standards used by the administrative law judges directly reflect Congressional mandates and judicial interpretations as well as Social Security regulations that have undergone public scrutiny and comment. Public accountability and decisional consistency would be greatly improved by legislation requiring public review and comment for <u>all</u> disability policies and procedures, including those used by state disability examiners.

A third reason for the disacrepancies between administrative law judge decisions and those of state disability determination units is the Social Security practice of "non-acquiescence", or refusal to apply the statutory interpretations of Appeals Courts within a given federal circuit to disability cases adjudicated within that jurisdiction. In 1982 the Social Security Administration issued a formal non-acquiescence ruling, refusing to adhere to the medical improvement precedents established by the Ninth Circuit Court of Appeals in the Patti case. (Patti v. Schweiker, 669 F.2d 582 C.C.A.9, 1982.) Basically that case held that the Social Security Act eligibility standards assume that an initial disability decision is correct and unless a claimant's condition improves, he or she is still eligible for benefits. Earlier this year, a Ninth Circuit District Court ordered the Social Security Administration to follow the law, as articulated in Patti.

Here in Massachusetts we have also encountered federal reluctance in implementing the improvement standard required by a First Circuit Appeals Court decision. (Miranda v. Secretary of HEW, 514 F.2d 996 C.C.A.1, 1975.) In October, 1982, we wrote the Social Security Commissioner seeking his guidance on this matter. There was no response for months. Finally in February, 1983, we received a letter stating that the case review procedures then in place met the First Circuit improvement standards. In response to directives from Governor Dukakis, our agency moved to refine the process for complying with the First Cirucit standard. This action was met with strong objections from Social Security personnel. In late April Social Security officials contacted our agency to discuss implementation of a medical improvement standard on a pilot basis. Despite numerous discussions with Social Security personnel, no agreement was reached on Massachusetts implementation of a medical improvement standard. This issue is now in federal court.

Given the recalcitrance with which the Social Security Administration has approached the medical improvement issue, we would urge Congress to amend the Social Security Act to expressly require adherence to such a standard. In addition, we ask Congress to clarify the powers of the Social Security Administration to interpret the law with a more appropriate recognition of proper judicial and administrative roles in this process. The legislation, developed by the House Ways and Means Committee, addresses the non-acquiescence issue in a constructive manner and deserves your consideration.

I also want to call your attention to the needs of particular claimant populations who often cannot meet current disability standards but nevertheless cannot work to earn a living. Social Security standards and procedures for evaluating mental impairments do not adequately measure work capacity, particularly for psychiatrically disabled individuals. Restrictive disability policies also disadvantage older people who have received disability benefits and have not worked for a long time. In addition, rigid Social Security requirements for certain medical tests and clinical findings do not properly measure the work capacities of many individuals with hidden disabilities, like painful back impairments, neurological disorders, and cardiac conditions. Legislation to specify the evidentiary weight to be given to claimant's description of pain and treating physicians' opinions would address some of these problems.

In concluding, I will mention that over the past year and a half, our agency has worked with disability advocates, with legislators and with state officials in the executive branch to identify and solve problems in the Social Security disability determination progrma as it operates here in Massachusetts. Last spring our agency provided training programs for advocates to give them more information about the disability determination process so that they could more effectively help their clients apply for and retain benefits. In August, 1982 I convened a Special Task Force including advocates, consumers and agency staff to review the disability program in Massachusetts and make constructive suggestions for improvements. I have included copies of their Report for review by you and members of your subcommittee. In December last year we temporarily suspended notification of benefit cessations while Congress completed action on the legislation temporarily extending benefits through appeal to an administrative law judge, which became P.L. 97-455. I urge you to reenact that provision as a permanent part of the Social Security Act. A Special Legislative Commission was created last December to investigate and study the disability determination process in Massachusetts

Led by Senator Backman and Representative DeNucci, that group has been very actively involved in reviewing problems and developing solutions for reforming it. Their recommendations and the Governor's directives brought about agency action to fully implement First Circuit medical improvement standards. We are continuing to work on our own internal procedures to improve the program, especially the continuing disability investigation process. Despite some negative reactions from the Social Security Administration to certain innovations, we are committed to implementing changes so that the program will give full consideration to disabled people in Massachusetts. We need <u>your</u> support to reform the Social Security Act so that the standards for disability are fair and equitable to add disabled people. We hope that you will quickly approve and enact a comprehensive legislation package containing the provisions that I have discussed here so that the Social Security disability programs can serve all disabled people in the manner that their authors originally intended.

Thank you very much for this opportunity to share our perspectives on this important topic that affects disabled people in Massachusetts.

The Commonwealth of Massachusetts
Executive Office of Human Services
Massachusetts Rehabilitation Commission

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REPORT ON IMPLEMENTATION
OF
RECOMMENDATIONS OF
COMMISSIONER'S TASK FORCE
ON THE
SOCIAL SECURITY ADMINISTRATION DISABILITY PROGRAMS

Elmer C. Bartels
Commissioner of Rehabilitation

November 1, 1983
Date

The Commonwealth of Massachusetts
Executive Office of Human Services
Massachusetts Rehabilitation Commission

ELMER C. BARTELS
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FOREWORD

On behalf of the Massachusetts Rehabilitation Commission and the disabled citizens of this Commonwealth, we wish to take this opportunity to thank the members of the Commissioner's Task Force on Social Security Disability Program for their diligent work and on-going commitment to the improvement of the adjudication process. Through our discussions we uncovered several inherent problems that existed with the national policy that governs this program. In consort with the Special Legislative Commission, we tackled these policy issues head-on. Our combined efforts have resulted in this Commonwealth being a recognized innovative national leader with regards to implementation of improvements to the process.

The recommendations made by this Task Force defined a direction for the implementation of procedures both internally and externally towards total program improvement. The Disability Determenation Services of the Massachusetts Rehabilitation Commission has worked arduously in addressing and appropriately implementing the full intent of these recommendation. To further refine this process of change, full input was elected from this agency's constituencies on an on-going basis. This has resulted in a significantly more responsive and sensitive organization that works harmoniously with its constituency. This relationship further enhances future problem resolution.

Enclosed in this document is a status report on the recommendations. All objectives within the jurisdiction of this agency have either been satisfactorily completed or scheduled for completion with action steps clearly defined. Others reside with Congress for resolution. We hope that the actions taken and resultant procedural changes have met both the individual and group needs expressed during numerous full committee and subcommittee meetings. Our exhaustive efforts have resulted in most fruitful and tangible results.

Once again, we wish to thank each and every member for his/her valuable contribution. It has indeed been a pleasure and privilege working with you. I look forward to your continued involvement and input.

Elmer C. Bartels
Commissioner of Rehabilitation

Kasper M. Goshgarian
Kasper M. Goshgarian
Assistant Commissioner

SECTION A

Massachusetts Rehabilitation Commission (MRC)
and
Disability Determination Services (DDS)

Recommendation #1 - MRC/DDS management staff are to work with examiners and in-house physicians so that every consideration is given to claimants during the initial and review process, with accuracy being the highest priority, including attention to residual functional capacity.

Status:

This recommendation requires the examination and subsequent changes in the organizational environment to assure the optimum level of responsiveness on the part of management, professional and clerical staff towards the client's and beneficiaries we serve. In order to properly address the environmental factors, a clear agency mission with associated objectives is necessary. Towards this end we have embarked on the establishment of a formal planning process with input from all staff. We have already developed a long range plan that attempts to establish program parameters for a five year period. Utilizing this information as a base, we are in the process of establishing a formal annual plan for FY 84. This plan will establish program direction, program objectives, associated action steps and standards for each functional department and region. Within the plan, each functional unit will address the methods of providing adjudication services that emphasize quality and sensitivity. Presented in this formal manner, each employee will have an opportunity for input and a more global understanding of the total agency's mandates and internal policies. In subsequent years, the planning methodology will further evolve with increased total agency participation.

Since the establishment of the Commissioner's Task Force recommendations, the agency has actively worked with staff at all levels to assure the full intent of this recommendation. More specifically, the following actions have been undertaken:

1. On-going examiner discussion groups with Assistant Commissioner and/or Director of Case Processing to identify problem areas and work on identified projects that would serve to enhance the adjudication process.

2. On-going monthly, unit supervisor discussion groups for problem identification and problem solving.

3. Regular meetings with regional professional staff and DDS medical consultants to disseminate information, discuss policy, provide direction and direct input.

4. Provision of training to all DDS medical consultants in the use of RFC format to assure that the RFC provides a clear and complete representation of an individual's functional ability to work.

5. Provision of a formal mechanism for examiners to disagree with RFC assessments provided by physician. Resolution of such conflict to be provided by a higher level of the organization through the management chain of command.

6. Provision of the establishment of a mechanism to utilize quality assurance (Q.A.) results in a developmental, training oriented manner.

7. Provision of a formal rebuttal system of Q.A. finding that may lead to a review at the Assistant Commissioner level.

8. Continuation of open lines of communication vertically and horizontally within the organization.

9. Provision of on-going in service and out service training programs. Training to date has included

   a) Internal medical consultants providing training in specialty areas (i.e., psychological testing, ETT's, treatment of cancer patients, back injuries, psychiatric issues).

   b) Formal planning for communications/sensitivity training of professional and clerical staff to commence October/November, 1983.

   c) Formal planning for participatory supervision program to be conducted October/November, 1983.

   d) Continued approval of job related out service training programs at local universities.

   e) Continued approval of job related seminars.

   f) Continued training of relevant policies and precedures and changes in eligibility of specific psychiatric impairments.

10. The establishment and implementation of CDR supervisory forums to discuss problem areas.

11. The establishment and implementation of internal CDR procedural guidelines and directives consistent with First Circuit Court of Appeals Case law.

12. Development and implementation of new forms to facilitate the CDR adjudication process.

13. On-going monthly meeting with all DDS medical consultants and management/supervisory staff to discuss and resolve Q.A. identified issues.

14. Continued 100% review of all CDR cessations at Q.A.

15. The establishment of procedures to actively solicit treating physician reports before ordering of consulting examinations (CE's).

All of the above actions have been geared towards providing the necessary organizational structure, direction and support to deal in a more equitable manner with both claimants and beneficiaries.

To date, a more positive proactive DDS organization has emerged. Individuals at all levels have been constructive in a professional manner. A careful review of cases and input from discussion groups and forums indicate an organization that is responsive to its consitencies. This responsiveness has been institutionalized. As part of the on-going parctices of the organization.

<u>Recommendation #2</u> - Set up public information and referral system including: a) 800 number; b) training on SSA disability program for the community; c) policy dissemination to the public; d) brochures on agency function; and e) ombudsmen to provide technnical assistance and advocacy to individuals.

Status:

a) 800 number

An 800 number (1-800-422-7200) has been established with several public service announcements being prepared and disseminated to explain its purpose. Originally, this phone line was to be manned by a designated Community Relations Specialist position. A formal job discription was prepared and submitted to the Social Security Administration for funding. This position was seen as a vital link between the agency and its many constituents. Unfortunately, SSA did not provide the funding for this purposed position.

In an effort to assure access to the agency, it was formally decided to utilize SSA funded management staff in manning this line. Presently the phone is answered by a well prepared and trained administrative secretary. This individual takes down the relevant information and refers the call to the appropriate regional director for assistance. The regional director may either provide immediate resolution or investigate the presented issue further. Upon completion of the investigation, the regional director contacts the caller in an effort to provide information and/or problem resolution. A formal log is kept of all calls along with a summary of the nature of the presented problem. On-going monitoring assures timely responses to all inquiries.

Clearly, this is not an optimum arrangement. A community relations position would be more suited to this type of function. Since approval for such a position is not forthcoming, this is the most viable alternative. Responsiveness to the agency's total consituency remains a high priority objective.

b) Training about the SSA disability program for the community.

In our original planning, this type of community training was designated as a major function of the Community Relations Specialist position. Once again alternative methods were established since this important position was not funded by SSA.

An immediate identified need was to educate the treating DDS physician community of the specific SSA medical report requirements. Towards this end, examiners and supervisors were formally surveyed as to identified problem physicians within their respective geographic areas. Based on the identification of the treating physician's deficiencies (quality and/or timeliness) a training package was prepared and sent. This package included relevant program information as well as sample reports by speciality. Additionally, a treating physician dificiency form was developed and disseminated among examiner and supervisory staff. As further deficiencies are identified, examiners will identify them and submit them to the Program Development Department. This department will provide additional training which may include on-site assets.

In order to impact on large groups of community physicians, formal training sessions at hospitals and other medical facilities are presently scheduled to begin in September, 1983. These training sessions will be a part of grand rounds or similar general forums. The trainers will include our medical consultants, medical liaison officers and management staff. This will be a statewide effort that will include both medical and psychiatric facilities.

An important constituency of the agency has been the congressional offices. Congressional staff have made on-going inquires on behalf of their constituents. These inquiries have been addressed by our legislative liaison, ombudsmen, and management staff. In an effort to explain the nature of the disability program, a formal training session was established for all congressional staff. This session was well attended. In a participatory style, relevant issues were discussed with identified action steps being identified.

On an on-going basis state legislative staff inquires have been addressed by the MRC ombudsmen and DDS management staff. Where appropriate, training on the basic program elements has been provided.

Ombudsmen and management staff have been fully responsive to the training needs of legal advocacy groups. On a case by case basis, basic training regarding policies, procedures and guidelines have been provided.

Lastly, on an on-going basis, management has worked closely with citizens advocacy groups. This has included formal meetings and on-going case by case discusses. Additionally, advocacy representation has been included on this Special Task Force and designated forums at the Executive Office of Human Services (EOHS) level. Activity continues to identify constituency training needs and provide such services wherever necessary and feasible.

c) Policy dissemination to the public.

Important policy changes regarding the disability program have been provided through public service announcements and on-going communications with several advocacy groups. Additionally, verbal and written policy inquiries have received priority attention by ombudsmen and management staff. Informing the agency's constituency of future policy changes continues to be a priority activity.

d) Brochures on agency function.

A brochure explaining the MRC vocational rehabilitation program has been included in every CDR cessation since February, 1983. A brochure explaining the DDS and the SSA disability program has been prepared and disseminated in draft form. Input regarding refinement has been received. The final brochure is near completion. Once complete, funding for its printing will be requested from SSA. Upon obtaining this approval, the brochure will be disseminated through identified distribution channels.

e) MRC ombudsmen to provide technical assistance and advocacy to individuals.

The two (2) MRC ombudsmen have been extremely responsive to all claimant/beneficiary and advocate inquiries. All calls are sensitively addressed with careful monitoring of the nature of the issue and resolution. Feedback indicates that the service has proven extremely beneficial in conflict resolution.

<u>Recommendation #3</u> - Continue to review all printed material going out to claimants and physicians from DDS to make print materials understandable and informative. Continue in an ongoing manner as necessary. (N.B. assure inclusion of name and phone number of DDS examiner.)

Status:

<u>All</u> printed materials going out to claimants/beneficiaries have been reviewed and, as necessary, revised to be more readable and understandable. Through this review process, many obsolete letters have been eliminated. In addition, <u>all</u> printed materials sent to claimants/beneficiaries and materials sent to treating physicians and consultive examination (CTE) physicians have been reviewed and revised. This has included the total revision of all letters associated with specific body systems. Additionally, where appropriate, letters and notices sent to claimants now include the name and telephone number of the responsible examiner. Lastly, claimant letters and notices have been translated into Spanish and Portuguese.

Input on the revisions was received from a variety of forms. All materials that would be sent to claimants were made available for review and comment by all unit supervisors with the agency. This input was included in the final draft document. In like fashion, all materials that would be sent to the physicians were made available for review and comment by all in-house medical/psychiatric consultants. This input was also included in the final draft document.

The collective final drafts were presented to a subcommittee of this Task Force for final review and comment. Utilizing this input, final changes were made. Presently, we are negotiating with the agency contractor for inclusion of these new letters and forms. We are scheduled for full implementation of <u>all</u> the revised forms on October 1, 1983.

Recommendation #4 - Include another article in the Massachusetts medical journal to better inform treating physicians as to the requirements of this Social Security Administration Disability Program.

Status:

A comprehensive, informative and timely article was prepared, reviewed, revised and submitted to the Massachusetts Medical Journal for publication. Although an initial favorable response was received, the article was never formally published.

Since this article potentially provided valuable information to the medical community, it has been included in the training packet mailed to all identified deficient treating physicians. Originally, it was the agency's intent to mail a training package including the article to all treating physicians (10,000 throughout the state). However, the funds to complete the mass mailing were not approved by SSA after formal request. The identified deficient physician method was the best viable alternative.

Based on the potential changes in the program at the congressional level, a revised article may be prepared for submission at a later date.

Recommendation #5 - Run a public service announcement on television about the CDI process.

Status:

Several public service announcements have been prepared and disseminated through the office of the Public Relations Officer. These announcements have included information regarding the policies and procedures for continuation of benefits through appeal, implementation of state guidelines consistent with First Circuit Court of Appeals Case Law, and other relevant program and policy changes.

Recommendation #6 - Train vocational rehabilitation counselors on CDI process, as well as DDS examiners on VR (vocational rehabilitation) process.

Status:

Meetings have been held by the DDS Director of Training with Vocational Rehabilitation Program and training staff to determine the specific information needs of counseling staff. Based on the results of these meetings, a pilot training for VR counselors was held with the Northeast Region. Assessment and critique of the training indicated that VR counselors need additional information primarily regarding the Section 301 process. This process potentially makes disability beneficiaries eligible to job related services if participating in a rehabilitation program.

Specific questions regarding the 301 process were formulated and sent to SSA for response. To date, we have submitted a significant number of 301 requests on behalf of rehabilitation clients to SSA. Unfortunately, positive results have not been forthcoming. Follow up on our requests are made on an on-going basis. We will work towards resolution of this issue.

Simultaneously, we have been identifying other training needs with VR staff. This has included attendance at VR staff meetings and associated formal needs assessment methodologies. Based on these results, formal training for VR staff in the adjunctation process will begin in October, 1983.

In terms of training for DDS staff in VR issues, a formal mechanism for retrieval of medical and vocational information has been developed and implemented. Also, staff have been made aware of the automatic referral of all CDR cessations to VR. There is already a familiarity of the available range of VR services to which a claimant/beneficiary may be entitled.

Once training for VR counselors in DDS issues is completed, a formal training agenda of VR issues for DDS examiners will be developed and implemented.

<u>Recommendation #7</u> - Prioritize CDI reconsiderations.

Status:

Formal management directives have been provided to all CDR speciality units requiring prioritization of reconsideration cases. Training has been provided to staff regarding this mandated procedure. In order to facilitate this process, reconsideration cases are prioritized through the CDR intake process. Supervisory and management staff monitor the results. Recent statistical data indicates a significantly quicker processing time for CDR reconsideration cases. This finding fully supports the implementation of this directive.

<u>Recommendation #8</u> - Send further information regarding disability program to treating physicians and records administrators through the Massachusetts Society of Registered Records Administrators.

Status:

A full explanation is provided under Recommendation #2. In summary, SSA has not made available the necessary funds to implement a mass mailing to over 10,000 physicians associated with the Massachusetts Society of Registered Records Administrators. As a viable alternative, the following two methods have been developed and implemented.

a) provide training information to those community physicians who have been identified as deficient in report content and/or timeliness.

b) provide on-site training at major medical once psychiatric facilities throughout the state utilizing medical consultants, medical liaison staff and management personnel.

The above procedures will allow for maximum penetration within the constraints of limited availability of funds.

<u>Recommendation #9</u> - Do vocational rehabilitation outreach to denied claimants in cooperation with the VR Screening Unit.

Status:

Since February, 1983 <u>all</u> beneficiaries who have had their benefits ceased have been automatically referred to the Vocational Rehabilitation Division for necessary outreach. The DDS referral package to VR has included all available, relevant medical and vocational information.

Upon receipt of the referral package, a specialized team of trained vocational rehabilitation specialists initiate outreach by providing written program information through the mail. If a positive response is received, the individual is provided a vocational rehabilitation counselor within close proximity of their residence. If a response is not received within a specified period, a follow up call is placed by the vocational specialist. During this contact, the services under vocational rehabilitation are explained in full detail if the person is deemed eligible. Based on the individual's expressed desires, the case may then be referred to a counselor for further evaluation and provision of services. Additionally, during the phone call follow up, additional information regarding other associated services from public and private agencies is provided. This may include a referral to the Information Center for Citizens with Disabilities that presently operates within and is funded by the MRC Central Office location with annual funding and in kind assistance.

<u>Recommendation #10</u> - Establish a community relations function within DDS for education, liaison and problem-solving with the claimant population and the advocacy world.

Status:

As indicated in Recommendation #2, after formal request, SSA has not made funds available for the provision of a Community Relations Specialist. As an alternative, DDS management staff has assumed responsibility for specific segments of this vital function as follows:

1. Manning of 800 toll free numbers
2. Meeting with legal and citizen advocacy groups.
3. Answering policy & procedure questions from various private and public groups and organizations dealing with disabled citizens.

4. Attending meetings and other forums dealing with disability issues.

5. Providing training to physicians through the provision of training packages and on-site visits at major hospital and other treatment facilities.

6. Other related problem solving activities.

Clearly, the above is <u>not</u> the optimum structure. However, without the availability SSA approval and associated funds, this remains the only viable alternative to meet the major mandate of ongoing responsiveness to the agency's constituencies.

<u>Recommendation #11</u> - Complete the review of the POMS (Program Operational Manual System) and the regulations so that revisions can be proposed to SSA or Congress.

Status:

The POMS and the regulations have been reviewed and a comprehensive analysis recommending urgent needed changes has been developed. A draft document was disseminated to Task Force members and others for review and comment. Input was further analysed and incorporated into the final report as appropriate. This final report was formally submitted to SSA on July, 1983. To support its content and assure proper attention, copies of the final report were provided to congressional staff, legal and citizen advocacy groups and others interested and committed to change in the Social Security Disability Program.

<u>Recommendation #12</u> - Ask claimant if he wants a copy of the treating physician's initial letter which describes necessary medical evidence. If so, copy claimant on said letter so that claimant can better understand the treating physician's responsibility.

Status:

The new printed materials sent to claimants (Recommendation 3) clearly indicate that a claimant/beneficiary may request copies of the treating physician's report. If he/she chooses to have copies of the report(s) he/she is instructed to call the examiner. The examiner will then make this information available to the claimant.

<u>Recommendation #13</u> - Make more accommodations for non-English speaking and deaf population.

Status:

In order to deal with the communication needs of non-English speaking beneficiaries/claimants, management conducted a survey of in-house resources. The results of the survey, indicated that personnel resources did exist with proficiency in several language areas including Spanish, Italian, Russian, Polish, Portuguese, Turkish, Chinese, Greek, and Armenian. These resources were formally identified and disseminated among staff. If a non-English speaking individual either calls or visits the DDS, internal resources are utilized for purposes of translation. Additionally, some resources work with a larger speciality population (i.e., Spanish speaking).

In addition to internal resources, consultative examination (C/E) physicians have also been identified by language speciality. Sending a non-English speaking claimant/beneficiary to a consultant proficient in the same language is clearly the alternative of first choice.

If it is determined that a C/E physician proficient in a particular language is not available, formal translation services are provided. Presently we do business with several translator organizations and private individuals. Examples are El Centro de Cardinal Cushing for translator/interpreter services in Spanish, French and Portuguese and COPA which provides services in Portuguese. We are presently actively working towards further expansion of translation resources. This has required outreach on a statewide basis.

In addition to the above, the major forms and letters have been translated into Spanish and Portuguese. Translated letters are utilized as appropriate to meet the needs of the claimant/beneficiary population.

In order to deal with the communication needs of the deaf population, an extensive study of intake was conducted. It was demonstrated that on a weekly basis, the deaf and hard of hearing population did request a small but consistent percentage of the total claims. The total number was deemed of sufficient magnitude to warrent the purchase and installation of a TTY machine. This machine would enable deaf and hard of hearing claimants to communicate directly with DDS staff.

A result of the study and a formal request for funding was made to SSA. The total cost of the proposal was approximately $1,000.00. To date, a positive response has not be received. Follow up indicates that the proposal remain under advisement at SSA.

Recommendation #14 - Continue consultation examination (CE) oversight functions within DDS including: a) clear notification of travel reimbursement; b) contact claimants after CE by returnable postcard or telephone calls on CE satisfaction; c) keep record of CE phusicians who have been deleted; d) consider centralized CE assignment function; and e) add specific medical information to claimant's CE notification letter.

Status:

a) The travel reimbursement form was revised to make it more readable and clearer in its interpretation by claimants/beneficiaries. All claimant/benficiaries who are scheduled for a consultative examination (C/E) appointment are provided with a copy of the revised reimbursement notice.

Additionally, the internal mechanism has been significantly refined to provide greater ease of use by the claimant population. Further, specialized training in communication skills was provided to the appointment secretary to assure that all claimant inquiries are handled in a sensitive manner.

b) On a weekly basis one hundred (100) claimant satisfaction survey postcards are mailed according to random sampling techniques. If the results of the postcard survey indicate specific problems with a consultive examination (C/E) physician, a more indepth survey is conducted to validate results. If the results are further validated, appropriate remedial action is taken. This action may include further investigation through onsite visitation, written reprimand, remedial training by DDS chief consultants, or dismissal. The specific action taken is based on the nature and magnitude of the survey findings.

In addition to the postcard survey, telephone follow-up to claimants on a random basis is also provided. A more detailed description of this action is included in Recommendation #17.

c) A record of all physicians who have been deleted is kept and updated on an ongoing basis. The record includes the specific reasons and survey findings that support a dismissal finding.

d) The appropriate use of consultive examinations (C/E's) must be considered the responsibility of all medical consultants and professional case processing staff. As such, appropriate training and monitoring must be conducted in an agency wide basis. This assures the necessary level of organizational sensitivity and consistency. Based on the assumption, a centralized c/e function cannot be considered the method of choice.

e) The C/E notification letter to claimants is presently being revised to include more specific information as to why its being ordered. Draft documents have already been disseminated for review and comment. A final product is scheduled for full implementation by November 1, 1983.

Recommendation #15 - Continue monitoring the performance of SSADO's in doing CDI face-to-face interviews and form preparation.

Status:

In order to provide this monitoring function, the position of Selective Screening Specialist was developed and made fully operational. Part of the responsibility of this individual is to review the CDI intake with special emphasis on the 454F Social Security form. This form indicates the sufficiency of information gathered through the face to face interview mechanism.

If it is determined that the information provided is not accurate or complete, the case is referred to the SSA District Office for action. This often results in district office recontacting the beneficiary for futher information. Returning the cases also provides a developmental tool for the district offices to use with their interview staff.

The Selective Screening Specialist prepares regular reports on her findings. This report is provided to management. In turn, DDS management discusses the content with SSA Regional Office representatives and joint resolution is often reached through these discussions.

Based on our findings, an indepth analysis of problem areas was also prepared. This journal document was sent to the SSA Regional Office for action. The SSA District Office has indicated that they are addressing the issues that were raised in appropriate management forms.

Lastly, DDS regional directors and unit supervisors have been directed to make scheduled visits to SSA district offices. During these meetings, staff from both sides discuss problem areas and concerns. A major agenda item at these meetings has been the quality of the face to face interviews. Recommendations regarding their improvement are always provided.

Recommendation #16 - Continue Commissioner's Task Force on SSA disability program and consumer involvement on SSA disability program to assist in implementing the recommendations of this document.

Status:

The Commissioner's Task Force has continued to meet on a regular basis to discuss and provide input into the process of completing specific goals, objectives and action steps as they relate to these recommendations. All task force members have been provided regular feedback regarding the agency's progress towards completion. In addition, all members have been provided draft policy documents, procedural guidelines, proposals to SSA, draft new forms and other related information for review and comment. This comment has always been fully considered and appropriately incorporated within the final product.

The members of the task force represented individuals who were actively involved with disabled individuals and had a functional knowledge base of the SSA disability program. Originally, the membership included concerned individuals from other public agencies, private non profit providers organizations, legal and othe advocay organizations and legislature staff. Later, the membership was expanded to include official union representatives, examiners, disabled citizens and additional advocates on behalf of the disabled. The total membership represented a cross section of backgrounds and experience that service to enhance the process.

In an effort to constructively utilize the membership, several subcommittees were formed including an outreach comittee, a forms and letter review committee, and a legal issues committee. All subcommittees made recommendations to the total group with respect to their identified speciality area. Through the final review and approval precise appropriate forms and letters were revised, a formal mechanism of outreach to denied beneficiaries was established and implemented and associated legal issues were formally addressed. This structure represented a constructive use of the talents and resources of the task force.

Recommendation #17 - Implement claimant satisfaction surveys.

Status:

As indicated in Recommendation #14, one hundred (100) claimant satisfaction survey postcards are mailed according to random sampling techniques on a weekly basis. If the results of the postcard survey indicate specific problems with a consultive examination (C/E) physician, a subsequent 100% survey is conducted with all claimants/beneficiaries the initial finding. Appropriate remedial and disciplinary actions result from the validated satisfaction survey results.

Additionally, ongoing quality assurance surveys are conducted regarding the adjudication process by program development staff. Regularly, claimants are contacted by telephone. Participation is based on random selection utilizing a structured interview methodology. The results of this interview are compiled and analysed for the purpose of management decision making.

Recommendation #18 - When treating physicians provide less than adequate evidence, send them appropriate information and an example so that they can restructure the information in the requested format.

Status:

Sample letters by speciality have been developed and printed. Additionally, a mechanism for the identification of treating source deficiencies has been established. Examiners utilize the Deficient Treating Source Referral Form to identify the name and address of the physician, his/her speciality, and the specific nature of the deficiency. This form is then sent to the Program Development Department. A package based on the identified deficiency is then prepared and mailed. All training packages include sample reports by specialty area. Once the package is sent, the performance of the treating sources are provided. These services may include an on-site visit if it is determined that the source is a major provider of services to the claimant/beneficiary population.

Recommendation #19 - Implement mass mailing to all treating physicians in Massachusetts consisting of relevant information to physicians including "the listings" which are a description of impairments for each major body system which are considered severe enough to prevent a person from working.

Status:

As indicated in Recommendation #2 and #8, SSA has not approved funding for such a mass mailing. Additionally, they have not made available the booklets containing the listings. Without the necessary informational booklets and funding, such a mailing was not possible. As an alternative, the following two approaches were utilized:

1) Examiners and supervisors identified all known treating sources who provided deficient or late reports. A training package including the listings and sample reports were sent to these identified sources.

2) A Deficient Treating Physican Referral Form was developed and implemented. Examiners identify deficient reports as they arrive and make a referral to the Program Development Department using the developed format. Information including the listings and sample reports are sent to these identified sources.

3) Training visits to major medical and psychiatric facilities have been scheduled. Information packets are disseminated during these meetings.

The above alternative approach provides maximum penetration based on limited informational and fiscal resources.

Recommendation #20 - Appropriately staff the MRC Ombudsmen Office, the DDS External Affairs position and the Community Relations position to resolve claimant problems within the system in a timely fashion.

Status:

As previously stated in Recommendation #2, the ombudsmen function and External Affairs positions are fully operational within the DDS. The ombudsmen receive on-going referral from claimants and/or their advocates. Through the establishment of internal procedures, the ombudsmen work directly the examiner, supervisory and management staff. All calls, questions, and complaints are carefully logged and monitored. Response and resolution is provided in a timely and sensitive manner.

The External Affairs Officer works closely with federal and state legislative staff in the resolution of constituency problems and concerns. Again, all inquiries are logged and monitored to assure a continued timely response.

As previously discussed, SSA did not approve funding for the provision a community relations function within the DDS. The major responsibilities of the function is presently being conducted by various management staff. This represents the best available alternative since this function is vital in providing information and education to the agency's constituencies.

Recommendation #21 - Encourage examiners to provide feedback to DDS management on claimant complaints via the appropriate management system.

Status:

Internal procedures have been established which encourage examiners to provide management with feedback regarding claimant/beneficiary complaints. First, a mechanism has been established which requires examiners to document all complaints regarding consultative examinations (C/E's). Information from this C/E complaint referral system is provided to the Program Development Department for investigation. This investigation includes the gathering of additional data and specific action regarding the C/E physician. Such actions may include remedial assistance, repremand and/or dismissal based on the severity of the change and the results of the investigator.

Examiners are also encouraged to share other claimant complaints with the immediate supervisor. Based on the nature of the complaint, the supervisor may decide to personally intervene or refer the matter to the appropriate regional director for subsequent action and resolution. This process maintains the full integrity of the formal organizational structure. Resolution is reached at different organizational levels based on the nature and complexity of the complaint. As a complaint becomes more complex or has more general program change implications, it is handled at progressively higher organizational levels. Major issues that cannot be effectively handled at lower levels or have significant policy impact are referred to the Assistant Commissioner's Office.

Lastly, other organizational communication channels have been established to assure that management remains sensitive to the expressed concerns of beneficiaries and claimants. On a monthly basis, examiner discussion groups and supervisory discussion groups are convened by the Assistant Commissioner and Director of Case Processing. These are informed structures where participants are encouraged to provide either personnel or peer group representatory input. Often such input involves specific complaints of claimants. Within the group settings, group problem solving techniques are utilized. The resolution(s) reached provide data for possible policy revisions and/or guidance in future practice issues. Often the resolution provides the framework for behavioral change in dealing with similar issues that may arise. This type of behavioral change has a long term positive effect on the adjudication process.

Recommendation #22 - Develop and implement an informed consent procedure for release of claimant records in all cases.

Status:

After careful review and discussion, this recommendation has been revised to reflect its original intent as follows:

> Change DDS procedures so that claimants who make appropriate request may see their files while at the DDS.

In order to accomplish this, an indepth investigation of pertinant regulations, rulings and directives was conducted. Additionally, the availability of staff resources was also studied. Based on these findings, it was determined that, in fact, claimants upon request may visit the DDS and discuss their case records with an examiner and other trained professionals as necessary.

To accomodate the above, an interview room has been established near the entrance. If a claimant makes a formal request, the examiner will make arrangements to meet him/her and discuss the case record. Depending on the contents of the case file, the examiner may choose to include a medical physician or psychiatrist at this session as an additional resource.

It should be clear, however, that resources do not allow for this face to face discussion as routine practice. It may only provided through a formal request on the part of the claimant/beneficiary.

Recommendation #23 - Set up an impartial board of three physicians to review the qualifications on incoming DDS physicians, CE physicians, and medical complaints.

Status:

The impartial board of three (3) non-DDS physicians has been meeting on an ongoing basis for several months. The first order of business was to review the total adjudication process especially regarding medical issues. This included a review of the consultive examination (C/E) function, RFC process, recruitment procedures, in-house and C/E consultant contracts and other related issues. A final report of the panel's findings is scheduled for submission by October 1, 1983.

In addition to the review and recommendation process, the panel has been active in providing consultation in issues of medical conflict of interest, ethical consideraions, and resolution regarding identified problem physicians. Lastly, the panel has assisted in the recruiting of C/E physicians in areas of identified need including neurologists and cardiologists. For specific georgraphic locations.

Recommendation #24 - Continue to conduct in-house quality assurance on 100% of the CDI cessations.

Status:

Since the commencement of this task force, the Quality Assurance (Q.A.) Department has been conducting on-going reviews of CDI cessations. If Q.A. staff do not agree with a cessation finding, it is returned to the unit for re-review and reconsideration. Thus, the cessation cases are received for corrections and returned to the units from which they originated as a means of providing on-going training and development.

Additionally, Q.A. has the responsibility of reviewing all cessation cases with respect to their compliance with case law standards. This requires indepth review fo case development procedures, medical recording of evidence regarding improvement, applicability of the remaining cessation criteria, and related compliance issues. Also, Q.A. monitors cessation findings regarding the specific reason for cessation by category and sub category (test type under category #5). The results of this monitoring are provided in a weekly basis to management staff. Lastly, Q.A. has the responsibility to review cases making sure that the following procedure with respect to CDR cases was exhausted before ordering a consultative examination (C/E):

1. Written request to treating physician(s) by examiner
2. Follow-up call to treating physician if repart is not received within a specified period of time.
3. Referral to and follow up by unit consulting physician if examiner follow up is unsuccessful.

Q.A. staff provide management with on-going feedback regarding compliance results.

Management, in conjunction with the Training Department, provide remedial training forums for examiner, supervisory and medical personnel. Training to date has concentrated on development on a documentation issues which more adequately support the adjudication decision.

Recommendation #25 - Develop clearer guidlines to staff on sharing medical information with claimants.

Status:

Such guidelines developed and formally disseminated through a Written Training Bulletin and follow-up in the Fall, 1982. The training information included the discussion of the legal issues and the identification of a process by which medical information may be shared with a claimant/beneficiary or his/her representative. Professional case processing staff have a thorough understanding of the process and share information with claimants regularly. Most often, such sharing occurs through written communication. Additionally, many claimants visit the DDS and sit down with the designated examiner to discuss the information within the case folder in greater detail.

Recommendation #26 - Attend more sensitively to every allegation which follow-up is made to obtain all relevant medical information in order that every disability be fully considered.

Status:

Significant training has been provided to examiners, supervisors and physicians in appropriate case development techniques. Additionally, forms have been developed to facilitate the sending of medical information and comparing new findings with those at the time of previous adudication decisions (CDI Decisional Sheets). A protocol system has been developed that requires both examiner and unit physicians to be actively involved in the retrieval of appropriate medical information form treating sources. Training has been provided for physicians in the completion of the RFC form so as to assume that the final medical assessment is based on a total review of all medical findings. Finally, training in vocational assessment has been provided to examiner and supervisory staff.

The results of the aforementioned activities are monitored by supervisors, directors, and quality assurance staff. Supervisors conduct regular case reviews for all examiners within their respective units. Case development issues are a major focus of such reviews. Remedial action including further training is provided based on the findings of the review. Regional directors also regularly assess the case development practices of staff within their regions. Finally, Q.A. regularly reviews a representary sample of cases to assure compliance with agency dictated practices. Special attention is given to the full development of all claimant/beneficiary allegations of disability. Also, the protocol system of medical information retrieved is carefully monitored and on-going feedback is provided.

Recommendation #27 - Assure that in-house physicians give sufficient weight to treating physician information.

Status:

Previous recommendations have indicated the following major activities regarding treating physician reports:

1. Training for treating physicians identified as deficient

2. Establishment of procedures requiring CDR unit physicians to call treating physicians if the examiner has been unable to gather needed medical evidence.

The above actions result in improved more comprehensive medical reports provided by an individual's treating source. Additionally, previous recommendations indicate that C/E's will not be ordered in CDR cases until and only when all efforts to retrieve treating physician reprots have been exhausted.

All CDR unit physicians have been trained in the aforementioned internal policies and procedures. All physicians realize that complete and adequate treating physician reports are the evidence of choice in the adjudication process. Examinations (C/E's) are ordered only when the treating source(s) does not respond or responds with insufficient federally required data necessary to provide a decision. Additionally, C/E's may be used to resolve conflict in the data provided by two or more treating physicians. Lastly, C/E's may be necessary when a beneficiary alleges a disabling condition outside the speciality of the treating physician. Formal training sessions have been conducted on this matter. Q.A. monitoring indicates that compliance is at a satisfactory level. Continued direction and reinforcement will be provided by management.

Recommendation #28 - Determine whether reconsideration claims should be sent to a unit different from initial claim unit.

Status:

Provisions have been made to assure that all reconsideration claims are sent to a unit other than that in which the original decision was rendered. This has been an on-going practice for several months. It provides the most objective mechanism for re-review through the utilization of different examiners, supervisors, and medical/psychiatric consultants in the decision making process.

In addition, internal processing time parameter have been established for reconsideration cases. It is expected that the vast majority of the reconsideration claims should be developed and processed within a 45 day period. Valid exceptions to the rule do frequently occur. Examples of such exceptions could be the claimant/beneficiary alleging additional disability conditions and/or the resolution of conflict in the medical evidence. Examiners and supervisors are required to document the specific reasons why a case has not been processed within the established parameters. Monitoring lists are provided to each unit on a bi-weekly basis. This mechanism assures compliance and a mechanism for establishing trend analysis regarding reasons for delays.

Recommendation #29 - Assure that claimants who need representatives are identified and assist those claimants with their cases, by referring them to appropriate representatives.

Status:

Four (4) basic systems have been developed and implemented to assure that claimants in need are provided appropriate representation. First, all beneficiaries who have had there benefits ceased are automatically referred to the VR Division. VR professionals send out an information package to all such individuals which contain specific information regarding the VR program and legal advocacy resources (two page document indicating Developmental Disability Law Center (DDLC) purpose and locations). If an individual calls and makes further inquiry, the trained staff provide additional advocacy information including possible referral to the Information Center for Citizens With Disabilities. This organization provides specific advocacy information of a statewide and local nature. If an individual does not respond to the information package, follow-up calls are made by staff. Advocacy and representation issues are often discussed which may result in a formal referral being made.

A second approach scheduled for commencement in October/November, 1983 is training in communication skills for case processing professionals. The goal of this program is to enhance the process through increased sensitivety to claimant needs. Through training, examiners will be better equipped to deal with a claimant's expressed needs and concerns.

Thirdly, all letters and printed materials sent to claimants have been reviewed and revised. As such, instructions regarding appeal rights will be provided in a more clear and concise fashion.

Lastly, examiners often refer a claimant back to the SSA District Office for assistance in understanding and pursuing the appeals process. SSA staff are mandated by law to provide this important and necessary function. It is important to hold them accountable for the proper implementation.

Recommendation #30 - Consideration of in-house psychologists to be used for review of mental retardation cases.

Status:

Since May, 1983, a licensed clinical psychologist has become a member of the agency's medical consultant staff. This consultant brings to the agency an extensive background in psychometric assessment. As such, he provides consultation to staff from all units on difficult retardation and related impaired claimants and beneficiaries. His expertise gives further insight into testing interpretations and subtle subtest score deviations which could result in a different interpretation of functional limitations.

In addition to providing consultation on a case by case basis, the psychological consultant has conducted training in psychological measurement to other medical and psychiatric consultant staff. Also, he is scheduled to conduct in service training sessions for our examiner and supervisory staff.

Indeed, the services of the agency have been enhance through the acqusition of a psychological consultant. All efforts are being made to use this talent in the most beneficial manner balancing case by case consultation with staff training.

SECTION B

Social Security Administration

The Commissioner's Task Force recommended that the Social Security Administration acknowledge the medical improvement standards addressed by First Circuit Appeals Court decisions. To date, this has not occurred. The DDS has been following these standards in evaluating continuing disability claims. However, the SSA review process for these Massachusetts cases has held them without final decision, thereby avoiding direct confrontation of the legal issues which are addressed more fully in Section D of this report. MRC has also initiated a further request to SSA seeking return of all non-appealed continuing disability claims that were adjudicated and terminated within the last year prior to April, 1983 in order to re-evaluate them more comprehensively. Although the request is consistent with the program reform goals announced by the U.S. Secretary of Health and Human Services in June, 1983, there is no official response to the request at this writing. MRC efforts are also underway to develop procedures for re-opening and re-evaluating other cases.

The following is a complete listing of recommendations made by the Commissioner's Task Force to the Social Security Administration:

1. Develop clear and understandable forms, letters, and brochures on the Title II and Title XVI programs taking into account consumer input.

2. Establish CDI policies and procedures which are realistic and supportive of claimants (e.g., don't put people over 55, who have been on benefits for 10 years, through the CDI process).

3. Give all claimants no longer eligible for benefits an 8-month preparation period during which employment counseling and adjustment can take place.

4. Better train DO staff in SSA disability programs and the needs of disabled people.

5. Make DO's more accessible to claimants in the following ways:

    a. Office accessibility
    b. Readers
    c. Interpreters
    d. Home/institutional visits

6. Simplify regulatory procedures including the POMS and revise the "listings," vocational charts ("grid"), and residual functional capacity (RFC) processes so that adjudication decisions more accurately reflect claimants' actual capacity or incapacity to engage in existing jobs.

7. More effectively inform claimants on the extension process and assist in recruiting a representative for those who are in need.

8. Do more extensive training for treating physicians.

9. Establish better tracking system on case files going between SSA and DDS.

10. Assure that complete information is gathered and communicated in initial interviews at SSADO's.

11. Institure appointment system for CDI face-to-face interviews at SSADO's.

12. Revise the interpretations of the regulations to more fairly and accurately define "disability."

13. Acknowledge that medical recovery must be proven before claimant may be denied on CDI's.

14. Establish regional SSA office advisory council.

15. Assure publication of all rules, practices, and regulations in the Federal Register for purposes of public comment.

16. Incorporate Appeals Court decisions into regulations and POMS so that SSA/DDS and ALJ's are using the same standards to make eligibility decisions.

Invited by the Commissioner to respond to these recommendations, Mr. Robert S. Walsh, Regional Office, SSA, addressed the following remarks to Mr. Bartels. Note below Mr. Walsh's letter reproduced in its entirety:

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Refer to: SDB-1B4/DI-17

Region I
John F Kennedy Federal Bldg
Government Center
Boston MA 02203

September 26, 1983

Mr. Elmer C. Bartels, Commissioner
Massachusetts Rehabilitation Commission
Statler Office Building, 11th Floor
20 Providence Street
Boston, Massachusetts 02116

Dear Mr. Bartels:

I wish to thank you for the opportunity to write about your report entitled "Commissioner's Task Force on the Social Security Administration Disability Programs".

During the past year or so we have had discussions on items concerning the "disability process". As circumstances would have it many changes have occurred during the past eighteen months which changed many aspects of the continuing disability review process.

Some of the concerns voiced by your task force were addressed on a national level and some were addressed on a regional and state level.

In order to assist district office employees in conducting a more probing disability interview we issued a "Disability Interviewing Guide". This is indexed by body systems and gives the interviewer some in-depth questions to ask. It is our understanding that the guide is being used in all our district offices.

Improving interviewing skills was not left with that initiative but carried even further. In four different locations we had train-the trainer-sessions. We brought a representative from each district office to a central point where they received more in-depth disability training. In fact one of your DDS employees assisted us at one of the meetings. The newly trained people then returned to their respective offices and conducted training for the district office interviews.

The DDS's and district offices further opened the lines of communication by taking part in our series of cross visits. These visits provide for training and problem solving. The feedback we have had (including Massachusetts DDS employees) indicates the meetings are very worthwhile and informative.

To gain further insight into the concerns of some Massachusetts residents the Director of the Disability Program Branch and the district office Boston Metropolitan Area Director met with interested groups who had concerns about the program. Since the implementation of the Congressionally mandated periodic review process SSA has recognized the need for changes in the disability decision making process-particularly in the periodic review process. We began significant administrative reforms early in 1982.

As you are aware January's Social Security Amendments were remedial and are being implemented successfully. A series of far reaching initiatives was announced by Secretary Heckler in June and they have also been successfully implemented. A major Federal and DDS training initiative (one of the actions) will take place during the late fall and early winter. This will involve all personnel who are involved in disability evaluation including DDS and Federal consulting physicians.

January's legislation allows continuation of benefit payment through the ALJ level. To extend these payments beyond their expiration date of October 1983 will take an Act of Congress.

Secretary Heckler's initiatives allowed us to reduce the number of people to be reviewed every three years. Certain types of mental impairment reviews are being held up pending the adoption of new standards.

Cases to be reviewed are now selected on a formula using a random selection basis. Formerly this was done by a profile of characteristics.

Rather than discuss in detail a long list of other initiatives which I know you are familiar with I'll merely list some of them.

-SSA now begins each CDR with a face-to-face interview.

-The State Agency's attempt to get all evidence from the last 12 months and to consider evidence from prior decisions.

-Requirement for each DDS to establish a mechanism for the ongoing evaluation of CE reports and furnish periodic reports to SSA.

-Evaluation of chronic mental impairments from a long-range context.

-Improvement of residual functional capacity forms.

-Increasing medical consultant time in the State Agencies.

We are committed to improving the CDR process so that we can make our program as humane and fair as possible. If you would like an elaboration or discussion on any of the points listed in this letter or on anything else for that matter please do not hesitate to call me.

Sincerely,

Robert S. Walsh

Robert S. Walsh
Assistant Regional Commissioner
Programs

cc:
R. Green, Regional Commissioner, SSA

SECTION C

Congress

The Commissioner's Task Force recommended federal legislation to reform the disability determination program. Massachusetts public officials and citizen advocates spoke out at public hearings in the Commonwealth and in Washington to support changes that are needed to make this program more responsive to the legitimate needs of disabled people. In May the Governor appeared before a special Boston hearing convened by Congressman Barney Frank to support Congressional efforts to reform this program. The Commissioner also testified before Congressional subcommittees in Boston and Washington urging permanent changes in the law to improve the disability determination process. Throughout the summer the agency worked with advocates, the Massachusetts congressional delegation and their staff, the Executive Office of Human Services and others to develop legislation and support changes in the law to: require SSA to demonstrate medical improvement before terminating benefits in a continuing disability review; mandate Federal Register publication for all SSA disability standards and procedures that substantially affect claimant rights; require SSA adherence to Federal Appeals Court decisions; provide for face-to-face meetings between claimants and state disability examiners; adopt realistic standards and measure for evaluating disability.

In early August the House Ways and Means Subcommittee on Social Security drafted HR 3755, a comprehensive legislative package that incorporated many reform measures that appeared in bills previously filed by members of the Massachusetts Congressional Delegation, including Congressmen Conte, Frank and Shannon and Senator Kennedy. If enacted, the reform package will address the key issues raised by Massachusetts advocates and should substantially improve the disability determination program on a national basis. The agency, working with members of the advocacy community, other public officials and the Massachusetts Congressional Delegation will continue to advocate for the statutory changes needed to reform this program and to provide public information about them.

SECTION D

The Courts

Recognizing the complex legal issues surrounding the state/federal disability determination program, the Commissioner's Task Force supported further legal research and utilization of the courts to resolve legal issues not appropriately addressed by accountable parties. Research undertaken by agency staff disclosed a conflict between the legal interpretations and decisions of the First Circuit Appeals Court and Social Security practices and POMS directives concerning the appropriate standards for terminating disability benefits to claimants involved in continuing disability investigations. The First Circuit standard, articulated in Miranda v. Secretary of HEW (514 F.2d 996, CCA1, 1975) held that, once eligiblity for disability benefits had been established, such benefits could be terminated only upon an SSA showing that the individual's condition had improved or was not as serious as once supposed. In October, 1982, the agency sought SSA advice in resolving this legal conflict, and received a response in February, 1983 directing the agency to continue evaluating disability claims using the POMS prescribed procedures.

The special commission was not satisfied with the approach of the Social Security Administration to this legal conflict, nor was the Governor. On March 8, 1983, supported by a resolution from the special commission, the Governor formally directed the agency to comply with First Circuit legal standards. With the support of the Executive Office of Human Services, the agency met with Social Security administrators, attempting to reach agreement on new procedures to implement the First Circuit standards. Special federal and state informational bulletins were developed to further define the standards and procedures for evaluating continuing disability claims in Massachusetts.

In April Social Security administrators expressed strong reservations about actual implementation of the special state procedures but subsequently initiated negotiations with Massachusetts officials to implement such procedures on a pilot basis to test the Miranda improvement standard as a national policy model. Again there was disagreement about how to implement these standards. Massachusetts officials sought protection for the residents whose disabilities would be evaluated under the pilot program so if eligible under the pilot standards that they could retain benefits until the next regularly scheduled review. The Social Security Administration was unwilling to concede this point. Negotiations reached an impasse in July.

In mid July Governor Dukakis announced that the Commonwealth, having reached impasse, would join disabled Massachusetts residents represented by Greater Boston Legal Services in litigation to seek judicial resolution of the disputed legal issues affecting the disability determination program. The Attorney General, representing the Commonwealth, filed a complaint and a motion to intervene as coplaintiffs in the law suit against the U.S. Secretary of Health and Human Services and the Social Security Administration. These motions were opposed by the U.S. Attorney on behalf of the federal defendants. After legal briefs are filed by both sides, hearings in Federal District Court will be scheduled for late fall.

SECTION E

Advocacy Community

Recommendation #1 - Compile and distribute to claimants listings of paralegals, lay advocates, and knowledgeable lawyers to assist in CDI and appeals process.

Status:

The SSI Project out of the Developmental Law Center (DDLC) was granted $500,000 from the Massachusetts Supreme Judicial Court to provide legal assistance to disabled individuals with Social Security Disability claims (SSI and SSDI). Thirteen (13) legal offices located throughout the Commonwealth provide this legal assistance through paralegals assigned to a caseload. These offices provide either advice or free or low cost legal representation.

Each individual whose benefits have been ceased through the CDR process is sent a listing of SSI Project services by the MRC Division of Vocational Rehabilitation Referral Unit.

Recommendation #2 - Request, attend, or provide training sessions on SSA disability programs.

Status:

State agency programs at DMH and DPH continue to provide adovcacy in SSA disability programs for their staff as well as for claimants and representatives.

The Client Assistance Project (CAP) at the Massachusetts Commission for the Blind (MCB) has requested and received a commitment from SSA regional office to conduct sensitivity training for District Office (DO) staff on the treatment of blind claimants. CAP has also requested and received assurance from SSA for listings of DO managers and large print information material. The Information Center for Individuals with Disabilities (ICID) has offered to assist SSA regional offices in program and sensitivity training for DO staff who work with the general disability population, advocates, and representatives. Meetings between ICID and SSA and MCB and SSA have made it clear where deficiencies in DO staff activities have occurred.

Recommendation #3 - Provide information, referral, representation services to claimants in need.

Status:

In addition to the above mentioned services continuing to be provided by the DDLC SSI Project, referrals are also made to private attorneys for representation in appropriate cases.

ICID provides extensive information and referral services to all Social Security claimants. An agreement between the DDS Hot Line staff and ICID has resulted in the referral of claimant questions concerning financial eligibility and effects of earned income on amounts of checks from DDS to ICID. This is especially helpful to claimants who have had difficulty getting complete and correct information from DO representatives.

Stop Abuse to the Disabled (SAD) is a consumer run, volunteer organization which continues to provide information, referral, and representation services to Social Security claimants. SAD has also set up a self-help support group for individuals adversely affected by SSA disability programs.

The SSI/SSDI Task Force has provided similar services for the mentally ill and mentally retarded populations.

Chances are each individual member of the Commission's Task Force has, in some way, provided information on Social Security to someone in need.

<u>Recommendation #4</u> - Lobby for the Supreme Judicial Court to make an expeditious and appropriate grant of $500,000 for implementation of advocacy plan.

Status:

Not only did the SJC grant the initial $500,000 for FY'83 to DDLC for the SSI Project, but level funding, plus prior appropriations continued, was secured for state FY'84. Needless to say, DDLC had a great deal to do with the lobbying effort for this funding.

<u>Recommendation #5</u> - Lobby for the Congressional changes described in Section C above.

Status:

See Section C - "Congress" - above.

SUMMARY OF STATEMENT SUBMITTED BY JAMES A.COX, JR. FOR THE NATIONAL ASSOCIATION OF REHABILITATION FACILITIES

THE HEARING ON THE SOCIAL SECURITY

DISABILITY INSURANCE PROGRAM

January 25, 1984

Public policy should be focused on maximum placement of disabled people in competitive employment. Many disabled people may not achieve such placement, but may benefit from sheltered employment. NARF supports changes in the SSDI and SSI programs to provide incentives for beneficiaries to become self sufficient.

I. Continued Special SSI Benefits

The Social Security Disability Amendments of 1980 added incentives for employment for SSDI and SSI beneficiaries. One of these was the special cash benefits program under Section 1619(a) and the continuation of medical and social services under Section 1619(b). Under Section 1619(b) some people may continue to be eligible for Medicaid and other services if ending benefits would impair their ability to continue to work and if they cannot purchase equivalent benefits. The provision was effective through December 31, 1983.

This program provides SSI disabled recipients every incentive to seek employment in spite of a disabling condition, without the fear that all income will be lost on reaching the substantial gainful activity level nor that all supportive medical and social services will be lost. Savings would accrue in the form of fewer benefits paid. S. 1737 would make it a permanent program.

Recommendation: We support S. 1737

II. Beneficiary Vocational Rehabilitation Program

The purpose of the beneficiary vocational rehabilitation program is to return people to work thereby resulting in savings to the trust fund. In 1981 $124 milion was available for both SSI and SSDI beneficiaries and aproximately 150,000 people were served. All studies of the program show it to be cost effective. The Omnibus Budget Reconciliation Act of 1981 amended the program.

The new provision provides that states will be paid only for successful rehabilitations. A successful rehabilitation is defined as a person performing substantial gainful activity for nine consecutive months. States and facilities have very little financial incentive to participate. Section 923 of HR 4170* amends the program to allow payment in two additional circumstances: in the event of medical recovery and when a person refuses without good cause to cooperate. These changes are helpful but do not address unsuccessful rehabilitations. It is imprudent for facilities to take referrals if they must pay the cost whether or not the rehabilitation is successful, unless there is a financial incentive to participate.

One standard for referral is rehabilitation to placement in competitive employment and no longer requiring cash benefits. The SSI disabled population is younger, female, has more mental disabilities, and less work experience than the SSDI population. This group may not be able to work in a competitive employment - but rehabilitation services will help them do some work and reduce the need for, and amount of, benefits.

Recommendation: The vocational rehabilitation program should adopt the proposals in Section 923 of HR 4170* and be amended to provide a financial incentive for providers to participate. This incentive should be in the form of a premium over the cost for services. Second, placement in competitive employment should not be the only standard for referral for SSI beneficiaries. Placement in sheltered employment or placement in competitive employment with supportive services with a concomitant reduction in benefits due to earnings should also be considered a basis for referral and payment for services. Along these lines we support Section 927 of HR 4170* to require the Advisory Council on Medical Aspect of Disability to study various issues related to SSI beneficiaries and rehabilitation.

The 1980 amendments gave SSA the authority to conduct demonstration projects on the effects of earlier referral for rehabilitation and the greater use of provider organizations to perform or stimualte new forms of rehabilitation. To date these projects have not been conducted.

Referrals for rehabilitation services are not made until months after the disabling condition occurs. Delay in referral and receipt of services may compound the severity of the disability.

Recommendation: When an applicant or beneficiary applies for a disability determination or services, a direct referral should be made to a public or private nonprofit organization for work evaluation, evaluation of vocational potential, developing a services plan, delivery of rehabilitation services and case management. Facilities have the experience and expertise to deliver these services.

While some of these recommendations may require expenditures, in both the short and the long run, the overall result is savings - in the form of fewer benefits and immeasurable personal savings in the form of personal independence.

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*Identical provisions appear in S. 2002.

Mr. Chairman:

This statement is submitted by the National Association of Rehbilitation Facilities (NARF). NARF is the national voluntary membership organization of community based rehabilitation facilities. These facilities provide comprehensive rehabilitation services to over 400,000 disabled people each year. Many of these people are social security disability insurance and supplemental security income beneficiaries. Many have currently undergone review under the continuing disability investigation (CDI program).

Public policy should be focused on maximum placement of disabled people in competitive employment. However, there are large numbers of severely disabled people who are unlikely to achieve such placements but who may benefit, financially and otherwise, from supervised employment in the community or sheltered employment designed to utilize their abilities. With respect to the SSI and SSDI programs, we have historically supported changes in the programs which provide incentives to help beneficiaries become self sufficient, but not through a system that eliminates benefits to do so. This statement focuses on continuation and improvement of such incentives.

I. Special Cash Benefits

The Social Security Disability Amendments of 1980 included several provisions which broadened opportunities for disabled people to return to gainful employment and incentives to do so. These included eliminating the second Medicare waiting period for SSDI beneficiaries, continuing Medicare benefits for an additional 36 months after cash benefits ended under SSDI; counting wages from sheltered workshop employment as earned income and allowing extraordinary work expenses to be deducted from the earnings of beneficiaries for determining substantial gainful activity.

Another provision allows people who are able to engage in SGA to be eligible for special cash benefits under Section 1619(a). They may continue to receive cash benefits equivalent to those under the regular SSI program. Cash benefits cease when the person's earnings equal the amount that would cause federal SSI payments to stop, referred to as "the breakeven point." Under Section 1619(b) Medicaid and social services may continue if the Secretary finds ending these benefits would impair a client's ability to continue to be employed and if he cannot purchase equivalent private health insurance and other services. This provision expired December 31, 1983.

This program gives SSI disabled recipients every incentive to seek employment whether or not the disabling condition continues. It provides a safety net of continued benefits and the medical and social services a disabled person often needs to obtain and maintain a job, whether it is in competitive employment or a sheltered workshop.

In both the long and short run, it lessens the total amount of cash benefits paid out because people either terminate all three kinds of benefits, a percentage of cash benefits, all cash benefits and/or portions of medicaid and social servics benefits. Hence, people would not remain totally dependent financially, medically and socially.

We support S. 1737 to make this program permanent. We also recommend to the Committee that it encourage the Department of Health and Human Services to be more vigorous in its implementation of the provisions. While most workshop managers may be aware of the provision, the local SSI offices have not made its existence or operation known.

II. Vocational Rehabilitation Services Program

Prior to the Omnibus Budget Reconciliation Act of 1981, the beneficiary vocational rehabilitation program authorized funds to be paid to states agencies for services delivered to SSDI and SSI beneficiaries. The purpose of the program was to return them to work, thereby resulting in savings to the trust fund. In 1981, $124 million was available for both SSI and SSDI beneficiaries and approximately 150,000 people were served. All studies of the program have shown it to be cost effective.

The Omnibus Budget Reconciliation Act of 1981 amended the program and, in our opinion, rendered it almost useless. The new provision provides that states are to be paid either in advance or by way of reimbursement for successful rehabilitations. A successful rehabilitation is defined as a person performing substantial gainful activity for nine continuous months.

It has been our experience that since the program has been amended, states and others have very little incentive to participate in it. The Administration has not made sufficient funding available. Only $6 million was requested last year, and the same amount was proposed for fiscal 1984. Second, states and facilities are paid only on the basis of successful rehabilitations. The assumption appears to have been the states are expected to use funds under Title I of the Rehabilitation Act to provide these servies. These two programs address different parts of the total disabled population. Title I of the Rehabilitation Act is formulated to serve all disabled individuals who are referred to state agencies with a priority that state agencies serve the more severly disabled. People served under the beneficiary rehabilitation program are those who have been determined to be able to benefit from a vocational rehabilitation program, regain the ability to work, and will no longer require benefits. Usually this population is not the more severely disabled client. Given the virtual elimination of the program and little increase in funds under the Rehabilitation Act, many states are turning clients away.

Section 923 of HR 4170 pending in the House and an identical provision in S. 2002 would amend this program to allow payments in two additional circumstances: in the event of medical recovery and in cases where the person refuses without good cause to accept services or fails to cooperate. It would also require the proposed Advisory Council to examine the entire rehabilitation program and report back to the Secretary with recommendations on how to improve the program. We support these changes to strengthen the program.

While these changes will be very helpful in expanding the circumstances for which services would be paid, they leave open the question of covering the cost of delivering services for unsuccessful rehabilitations. If the program is going to reimburse facilities or states only for services outlined above, both facilities and states will be at risk for good faith efforts to rehabilitate beneficiaries that do not result in a successful rehabilitation. While agencies may use the basic state grant funds such funds would then be depleted for other clients. Facilities, however, would have to pay for funds for services out of their own capital, which means they would be decreasing their service capcity. We believe it would be imprudent for the facility to accept referrals if they must pay the cost whether or not the rehabilitation is successful, unless there is an incentive for a financial payment commensurate with the risk.

Even the best evaluation techniques do not guarantee one hundred percent success. If the cost paid is for successful rehabilitations, and none for unsuccessful ones, the facility can, at best, only come out even. Actually, they will always be losing funds.

If facilities accept such referrals and the risk of nonsuccessful rehabilitations, we recommend that there be an incentive and reward for doing so. This incentive should be payment in the form of a premium over the cost of services. We make this recommendation acknowledging that the payment for unsuccessful rehabilitations would be zero.

Second, the committee may wish to examine closely the nature of the disabled SSI population and the differences from the SSDI population. According to a report conducted by the State government in Michigan a higher percentage of the SSI population does not have an extensive employment history prior to the disability, a higher percentage is female and, 24% vs. 7 % are under 30. And, increasing numbers of these people are suffering from a mental disability which may preclude their working in a competitive environment independent of supportive servics.

Currently, people are referred for services only if they are considered to be able to be fully rehabilitated off the rolls and placed in competitive employment. This is part of the successful rehabilitation standard. Those people who benefit from services, but do not obtain economic independence, and no longer need the special medical and social services mentioned above, are generally not referred to this program.

However, for these people there may still be a net savings for the SSI program if the services result in the person reaching his or her maximum functional level and income. We recommend that the current standard for a succesful rehabilitation which requires placement other than in competitive employment which results in fewer benefits paid to be part of the definition of a successful rehabilitation and therefore payment for services. We support Section 927 of HR 4170 which would start this.

III. <u>Referral and Case Management</u>

Given the nature of the disability determination process, a beneficiary is not referred for rehabilitation services until many weeks or months after the onset of the disability. First the state disability dtermination office must make a determination of disability. This is done, at least for SSDI applicants, after the five month waiting period has expired. At the same time the disability determination is made, the state DDS office will consider whether the person has vocational rehabilitation potential. If according to HHS criteria the state DDS office feels the person will be rehabilitated he is referred to a state vocational counselor. If the person doesn't get lost in the paper shuffle, the vocational counselor will conduct an evaluation and eventually refer the person for a program of services. In certain cases this delay in referal and receipt of services may actually compound the severity of the disability.

NARF urges that the vocational program be amended to allow direct referral of beneficiaries to public and private nonprofit organizations for evaluation of rehabilitation potential and delivery of services as early as possible during the disability process. An evaluation should occur at the time of the initial contact with the district SSA office. Interim rehabilitation services should be delivered during the waiting period to the determination of a disibality, thereby improving the prospect for a successful rehabilitation. We urge the committee to provide for direct referral to public and private organizations at the time of application for disability.

Second, we recommend that in addition to direct referral that district SSA offices be allowed to contract with lcoal, public and private nonprofit organizations to provide service plan development and case management of applicants and beneficiaries. Services to be provided by such organizations, including rehabilitation facilities, would include work evaluations, planning and managing beneficiaries receiving services and tracking the progress of those who are working during a trial period and while receiving special benefits. Rehabilitation facilities have considerble experience and expertise in case management and evaluation.

Mr. Chairman, these are our impressions of what can be done to help disbled SSI beneficiaries be self-sufficient. As a society we should never give up on anyone and leave them in a dependent state and without any hope for improvement or negate it with complex and conflicting programs. While some of these recommendations require expenditures, in both the long and short run the overall result is savings - savings in the form of fewer benefits paid out and immesurable personal savings in the form of personal independence.

Rochester Center for Independent Living, Inc.
306 SEVENTH STREET N.W.
ROCHESTER, MN 55901
507/285-1815 TTY/285-1704

January 25, 1984

MEMORANDUM

TO: United States Senate

FROM: Bill Malleris
Executive Director

RE: Summary of Testimony on Supplemental Security Income Program
SSI - Special Benefits, Section 1619

On behalf of the National Council of Independent Living Programs and disabled persons we urge extension of Supplemental Security Income - SSI - Special Benefits, Section 1619 which is a work incentive program for disabled individuals across the nation.

Enclosed is written testimony on the impact of SSI - Special Benefits, Section 1619. In summary this provision will continue the necessary support for disabled persons to become contributing citizens of our country as described by the following points:

1. Section 1619 provides needed partial payments for disabled individuals who are engaged in work activities.
2. Section 1619 allows disabled persons eligibility for Title XIX Medicaid and Title XX - Social Services which is necessary to pay for in home assistance while working.
3. The Three Disabled Individuals discussed in the enclosed Testimony clearly indicates how they have avoided the return to institutional care and are continuing their employment.
4. SSI - Special Benefits allows disabled persons to receive some payments which makes it possible to pay the additional expenses of living independently, and lead productive lives with dignity.
5. Disabled Persons are now paying taxes because of this program and are contributing to their own assistance instead of relying totally upon the government.

The National Council of Independent Living Programs is willing to work with the Social Security Administration in further educating the public and disabled community on the availability of SSI - Special Benefits.

As a person with a disability and my own experience in achieving independence, I hope you will take the needed action for several other disabled individuals to also acquire independence and employment.

We urge immediate extension of SSI - Special Benefits, Section 1619 by the United States Congress.

TESTIMONY ON THE SUPPLEMENTAL SECURITY INCOME PROGRAM

BY

WILLIAM MALLERIS
EXECUTIVE DIRECTOR OF THE
ROCHESTER CENTER FOR INDEPENDENT LIVING PROGRAM
ROCHESTER, MINNESOTA

ON BEHALF OF THE
NATIONAL COUNCIL OF INDEPENDENT LIVING PROGRAMS
BEFORE THE
UNITED STATES SENATE FINANCE COMMITTEE

WEDNESDAY, JANUARY 25, 1984

Mr. Chairman, members of the Committee, my name is Bill Malleris, and I am the Executive Director of the Rochester Center for Independent Living Program. The Rochester Center is under contract with the Minnesota Division of Vocational Rehabilitation to assist disabled individuals reach independent and productive lives.

On behalf of the National Council of Independent Living Programs and persons with disabilities, I appreciate the opportunity to discuss with you today the Supplemental Security Income Program.

My own experience of having a disability has been a struggle through the years, but I am proud to have met the challenges. I have a rare neurological disability that leaves weakness in my arms and legs, but knowing the educational opportunities available I was able to overcome and attain a college degree and be actively involved in disability awareness programs. After college while living independently in the community, I worked in the private sector obtaining a true concept of what the challenges are in business, still active with disability awareness. However, the time came that my own experience and background would assist other disabled individuals reach the goals I had attained, therefore, becoming director of a rehabilitation program provided this fortunate opportunity.

It is truly an excellent feeling when one can be employed and assist others through similar experiences and challenges.

We must not forget that the general public has to be continually educated on the abilities of persons with disabilities in all areas of employment across the nation. People are still unaware though, we have progressed through the years.

While walking down the street one day, a friend asked, doesn't it bother you the way people constantly look at the way you walk or get up from a chair? My reply was, no for they don't understand so why hold it against them. It is my responsibility as a disabled individual to show that I am a person like they are and that there is nothing to fear. Therefore, we must collectively diminish the attitudinal barriers and fears between the disabled and non-disabled population of this country.

Disabled persons want to be productive citizens. We want the opportunity to contribute to our society rather than be dependent upon help from the government. We need a hand up instead of a hand out.

In essence, this is why I am here today to discuss with the members of this Committee that the disabled population has the ability to move forward and contribute to our society as all of you are doing as leaders of this nation in the United States Congress.

People with disabilities want the chance to live independently, obtain an education and sustain employment just as all of you do. However, prior to 1980, there were many disincentives to employment in Social Security programs. As a result, many handicapped individuals were forced to depend upon total public assistance rather than pursue their employment objectives and contribute to the funding they needed to live in the community.

Finally, we were helped by the passage of the Social Security Disability Amendments of 1980 under Public Law 96-265. Section 1619 (A) & (B) of these Amendments, which provides for the continuation of Supplemental Security Income payments and eligibility for Title XIX Medicaid and Title XX Social Service assistance for those severely disabled individuals engaged in work activities, has been particularly beneficial.

This amendment provides Special payments to employed SSI recipients unless earnings are high enough to gradually phase them out. It also provides Special SSI status to some disabled persons enabling them to receive crucial services such as Medicaid (Title XIX) and Social Security (Title XX) though they may no longer receive SSI cash payments.

As a result, many people with disabilities have avoided the return to institutionalized care and are continuing their employment activities.

The SSI Special Benefits Amendment (Section 1619 A & B) initially was a three year demonstration project with strong support for becoming a permanent program, and is now before you to review and authorize for continuation, since the three year period has concluded.

In order for this committee to realize the impact of Section 1619, a description of two cases should provide you with information that will, hopefully, assist in your decision. The first is a 26 year old woman who is a quadriplegic and requires an attendant to assist with her personal care and home care needs such as bathing, dressing, grooming, cooking, shopping and other needs. Vocational Rehabilitation helped her complete a college program, providing funds for training and for attendant care. After graduating from college, she obtained full time employment as a computer operator with earnings of $650 a month. Although she briefly received attendant care under a state medical program, she eventually was told she must either quit working or lose her eligibility. Since she was unable to pay this herself, she decided to quit working.

The second individual is a young woman with cerebral palsy that graduated from a State University in 1981. She was unable to receive employment during 1982 and continued receiving SSI which she began with in 1979.

On January 1st 1983 she began part-time employment at the Rochester Center for Independent Living on contract to assist fellow disabled individuals achieve independence as she has by living in her own barrier free apartment. She did obtain additional part-time employment through a Community Action Project sponsored by the County on a temporary basis. In October of 1983 her 9 month trial work period concluded and she went on the SSI Special Benefits Program where she still receives partial payments while working under Section 1619. If SSI Special Benefits is not continued she will be forced to quit her present employment.

The third case is of a personal friend on SSI who has overcome great barriers with his disability. He is a quadriplegic who has no use of his legs, right arm and limited mobility with his left arm. He obtained his Bachelor's degree in 1975 with assistance from the Vocational Rehabilitation Program. He then moved to Minnesota to continue with graduate school. Since no Medicaid Title 19 was available to assist with Attendant Care costs, he was forced into institutional care. In 1978, he was able to move out into the community of Minnetonka, Minnesota due to the Attendant Care Program funded through the Federal and State Governments.

While finishing his education, he began full time work for a Rehabilitation Center, but after the nine month Trial Work Period, he would lose SSI status and, therefore, eligibility for Medicaid Title XIX and Social Services Title XX which paid for his Attendant Care. Ultimately, he had to quit an excellent position at the conclusion of his Trial Work Period or be forced to return to a life of dependency and institutional care. The cost of such care far exceeds the cost of continuing to live independently in the community with partial benefits.

Again passage of the 1980 Social Security Disability Amendments, which included the provisions in Section 1619 (A) & (B), changed the picture dramatically for these individuals. In 1981, my friend was able to obtain employment at another Rehabilitation Center in Minneapolis. He has retained Medicaid Title XIX and Social Services Title XX, and receives some SSI payments which make it possible to pay the additional expenses of living independently.

Today, he holds a new position with a Private Non-Profit Consulting Firm that provides technical assistance on disability awareness to Corporations and Businesses in the private sector. The firm sponsors seminars that show supervisors and management how to work and communicate with disabled employees, thus, creating increased employment opportunities for persons with disabilities.

If SSI Special Benefits Amendment is not continued, he will again be forced to quit his job in order to avoid institutional care, since he cannot afford the cost of attendant services without public assistance while engaged in employment.

Disabled individuals have indicated they are eager to take advantage of the Special SSI Benefits and pursue employment if it were a continued program. And, this is where the United States Congress can make a difference that will have a profound impact on the lives of thousands of severely disabled Americans.

The cases described here indicate the effectiveness of the combined services of Vocational Rehabilitation, Medicaid Title 19, Social Services Title 20, and SSI Special Benefits. Employment for people with disabilities has other benefits for taxpayers as well.

A cost/benefit study recently completed by the Minnesota Division of Vocational Rehabilitation showed that the average annual rate of return on tax dollars invested in rehabilitation was 34.8 percent.

DVR clients increased their earnings by $11.44 for every Vocational Rehabilitation dollar spent. They also increased their taxes, payments and dependency on public assistance was reduced. As a result, taxpayers' benefits averaged $7,758.25 for every client rehabilitated.

In Minnesota, the Division of Vocational Rehabilitation is serving approximately 1,000 Supplemental Security beneficiaries. While the earnings, taxes paid and benefits reduced are below the averages quoted, the taxpayer "profit" ranges from approximately $2,000 to $5,000 per client -- a significant amount.

However, if you, the members of this Committee, do not continue SSI Special Benefits for disabled persons, the individuals described here will become unemployed and increase the burden to taxpayers with the total cost of their care. It does make financial sense to have a disabled individual employed, contributing to their own support and sharing the "privilege" of paying taxes.

Supplemental Security Income (SSI) Special Benefits allows the goals of disabled individuals to be realistic and achievable. This Committee is in the position of making the difference in the lives of many persons with disabilities. Yes, you will decide whether the disabled will have productive lives or be totally dependent upon the government. We need you to provide the direction for SSI Special Benefits to be reenacted by the United States Congress.

We, the disabled, are depending upon you to make the right decision, and once it is made, the disabled community and government must work together for successful implementation with results that will assure independence and employment for the handicapped.

The National Council of Independent Living is willing to work with Social Security in further educating the disabled as to the availability of SSI Special Benefits.

In Rochester meetings have been held with Rochester Center for Independent Living and Local Social Security Office to develop combined presentations to Rehabilitation Agencies and Disabled Consumers in our community for further awareness on the availability of SSI Special Benefits. However, this program must be continued through Congressional Action and final passage as soon as possible before we can proceed.

I am thankful that I have had the chance to assist fellow disabled individuals, and now you have the chance to help these persons to become productive contributing citizens by allowing the SSI Special Benefits to be a continued program. Mr. Chairman, Members of the Committee, I extend my sincere thanks for the opportunity to speak to you today; and share the needs, dreams, and aspiration of the disabled achieving independence and employment.

TCRC
TRI-COUNTIES REGIONAL CENTER 222 E. CANON PERDIDO/SANTA BARBARA, CALIFORNIA 93101
(805) 963-6717

January 9, 1984

Congressman Robert Lagomarsino
814 State St.
Santa Barbara, Ca 93101

Dear Congressman Lagomarsino:

Your support of legislation mandating continuation of Section 1619 (a) of the 1980 Social Security Amendment is deeply appreciated. The active assistance of your aides, Ed Bedwell (Santa Barbara office) and Chris Williams (Washington office), has been invaluable in keeping us informed about the legislation and in educating us about the legislative process. Please extend our appreciation to them.

In order to assist you in becoming more familiar with Tri-Counties Regional Center and the developmentally disabled, whom we serve, I am enclosing information about this Regional Center which I hope will be helpful to you. We look forward to meeting with you on January 11, 1984.

Although an interim administrative solution to the continuation of Section 1619 (a) of the 1980 Social Security Amendment has been found, we recognize that legislative action in the new Congress is necessary and would like to request your support. This program, which enables disabled individuals to be partially self-supporting, despite continued severe medical impairment, benefits the taxpayer and the disabled. We hope the attached information, illustrating the value of this program, will be helpful. Information about additional concerns relating to Social Security has also been included for your review. We look forward to discussing these concerns with you personally when we meet on January 11th.

Again thank you for your support on behalf of the developmentally disabled.

Sincerely,

Katharine R. Humphreys.

Katharine R. Humphreys, ACSW
Program Coordinator

KRH:dmr
Encl.

Serving the Developmentally Disabled in Ventura, Santa Barbara, and San Luis Obispo Counties.

SSI Case

Client A is 30 years old. He is developmentally disabled in association with mental retardation, neurological handicaps and epilepsy. He is severely medically impaired. He lives with a roommate, also developmentally disabled, in an apartment in Santa Barbara. He works in a selected vocational placement two days per week in the kitchen of a retirement home.

If he were not working he would:

1) receive $477.00 per month in SSI Benefits. ($5724.00 per year with no taxes paid.)
2) receive Medi-Cal Benefits..

By age 65, if the benefit level didn't increase, he would:

1) receive $200,340.00 in SSI Benefits upon which he would pay no taxes.
2) receive Medi-Cal.

Since he is partially self-supporting he saves the taxpayer $1,182.00 per year. By age 65, he will save the taxpayer $41,370.00.

By age 65, if his salary doesn't increase, he will pay into the system:

1) $3447.00 in Federal Income Taxes.
2) $7938.00 in Social Security Taxes.
3) $949.00 in State Disability Taxes.

TOTAL SAVINGS $12,334.20
+ 41,370.00

$53,704.20

Independent Living Resource Center

423 W. Victoria
Santa Barbara, CA 93101
(805) 963-0595 Voice
(805) 963-1359 TDD

A Non-Profit Organization

Social Security Insurance Case

Client B is 34 year old male; spinal cord injury, C-4 compression. He is quadraplegic, confined to wheelchair, severe involvement with hands. He works as a Peer Counselor for a non-profit agency, 25 hours per week. This is the maximum number of hours allowed for the position.

If he were not working:

1. 460.70 in SSI
   420.00 in SSDI
   880.70 monthly

   $10,568.40 in yearly non-taxable income

2. Medi-Cal Benefits
   By age 65 if the benefits level did not increase,
   a. $2,7301.70 in benefits
   b. Receive medical benefits

Because of employment, he:

a. pays $819.60 per year in Federal withholding

b. pays $82.80 per year in State Disability

c. pays $560.00 per year in Social Security

* By age 65, he pays in:

a. $25,407.60 Federal withholding

b. $2,566.80 State Disability

c. $6,840.00 Social Security

(* All yearly totals have been multiplied by 31 = 65 yr - 34 yr = 31 yr)

He earns $702.00 monthly. $8,424.00 is earned yearly.

$10,568.40	Benefits and medical (untaxed)
8,424.00	Earnings - medical (taxed)
2,144.40	Why work?

By age 65, if all facts remain constant:

> Client B would have saved the taxpayer $66,476.40 in benefits payments and paid in $57,814.40 in work-related deductions (Federal, State, Social Security)

Concerns About Termination of Eligibility Under 1619

Section 1619 (a) of the 1980 Social Security Amendment eliminated some but not all barriers to disabled individuals attempting to obtain and maintain employment in the community. Although disabled individuals, who perform substantial gainful activity despite severe medical impairment, continue to be eligible for reduced SSI Benefits under this program (dependent upon income), this program is not without risk for the disabled individual, particularly the developmentally disabled.

Each month eligibility for benefits under 1619 (a) is determined by eligibility for cash benefits the previous month under 1611 or 1619. Therefore, when eligibility for benefits under 1611 ends because the recipient has engaged in substantial gainful activity and the recipient does not have continuing benefits payable under 1619 (a) for that month because of countable income, eligibility for benefits under 1619 (a) is no longer possible thereafter unless benefits under 1611 are first reinstated. When disability termination and reinstatement of benefits under 1611 can no longer apply, no further potential for continuing benefits under 1619 (a) exists.

Job placement for developmentally disabled individuals is difficult due to limited and less versatile vocational skills, deficits in communication and social judgement. These individuals are more vulnerable to the fluctuations of the economy, and contract changes.

Proposal:

Developmentally disabled individuals, who continue to be medically eligible should be eligible for reinstatement under 1619 (a) on a lifetime basis. Their general lack of transferability of vocational skills, mandates a lengthy job search with considerable training and support.

By:

Katharine R. Humphreys, ACSW
Program Coordinator
Tri-Counties Regional Center

SSI Benefits to Hospital, SNF and ICF Clients Limited to $25/month Since 1974

Problem:

42 U.S.C. Section 1382 (e) (1) (B) provides that SSI Benefits for any individual residing in a hospital, extended care facility, skilled nursing facility (SNF) or intermediate care facility (ICF) are limited to $300/year ($25/month).

This amount was set in 1974 when the SSI program was created and has never been increased. Residents of these facilities are omitted from receiving cost-of-living increases as provided in 42 U.S.C. Section 1382f.

No States (to our knowledge) supplement the $25/month benefit.

With the $25/month ($45 for those who have SSA Benefits) the resident must purchase clothing, laundry (which uses most of the money), personal hygiene needs, medications not covered by Medi-Cal, snacks, transportation, recreation, etc. The amount is grossly inadequate.

Solution:

Amend 42 U.S.C. Section 1382 (e) (1) (B) to increase the benefits for the first time in ten years.

Amend 42 U.S.C. Section 1382f to provide for regular cost-of-living increases to these deserving individuals.

By:

Loi Sorensen

WTP INC.

A NON-PROFIT ORGANIZATION HELPING PEOPLE TO HELP THEMSELVES

227 N. Nopal Street ● Santa Barbara, California 93103 ● Telephone: (805) 963-1686
5660 Shoup Avenue, ● Woodland Hills, California 91367 ● Telephone: (213) 999-5080
STEFEN A. SORSOLI, EXECUTIVE DIRECTOR

WORK TRAINING PROGRAM, INC.

January 10, 1984

Ms. Kathy Humphries
Program Coordinator
Tri-Counties Regional Center
222 East Canon Perdido Street
Santa Barbara, CA 93101

Re: Job Placement for Developmentally Disabled
SSI/SSA recipients

Dear Ms. Humphries:

Over the past year our job placement counselor has had an increasingly difficult time placing graduates of our prevocational/vocational training program into appropriate competitive employment situations. Instead, an ever increasing percentage of these graduates are being referred to sheltered workshops which are funded for approximately $400.00/month, per client by State Rehabilitation agencies. Past graduates who have lost their jobs for a variety of reasons, are also being referred to workshops rather than be returned to competitive employment.

There is one major reason accounting for the above changes in placements. With the expiration of the 1980 "Pickle" legislation, providing work incentives (or more precisely removing disincentives) scheduled for 12/31/83, competitive employment has become the risky option. Our graduates are generally able to contribute to the job market in small ways under limited situations. This results in part-time, temporary, and/or low wage and no benefits placements. Quite often our graduates can hold a job for from 2-3 months to 2-3 years, but eventually lose the job as a function of their disability. Without the 1980 work incentive they risk losing the safety net of SSI and Medi-Cal as soon as their nine months of trial work are used up. For this reason we can only make competitive employment placements which offer full-time, permanent employment with full benefit packages. Since most of our graduates can't qualify for these positions or can't maintain the standards in these positions, the only really viable choice is to attend a sheltered workshop where the State subsidy can be as much as twice as high as one would receive from an SSI benefit reduced by wages.

(over)

We strongly encourage that the 1980 Ammendments be made permanent and that they be expanded to include both SSI and SSA disability benefits. This will greatly increase the opportunity of developmentally disabled SSI recipients to participate in the job market up to their fullest potential without fear of losing their safety net of financial benefits and medical care.

Sincerely,
David Farris
David L. Farris, M.A.
Client Services Coordinator

DLF:vs

SSI Case

Client C is 23 year old. She is developmentally disabled in association with mild mental retardation. She is severely medically impaired. She lives with a roommate, also developmentally disabled, in an apartment in Santa Barbara. She works in a selected vocational placement 32 hours per week picking up and setting tables in a retirement home.

If she were not working she would:

1) receive $477.00 per month in SSI Benefits ($5724.00 per year with no taxes paid.)
2) receive Medi-Cal Benefits.

By age 65, if the benefit level didn't increase, she would:

1) receive $240,408.00 in SSI Benefits, upon which she would pay no taxes.
2) receive Medi-Cal.

Since she is partially self-supporting she saves the taxpayer <u>$2,124.00</u> per year. By age 65, she will save the taxpayer <u>$89,208.00</u>.

By age 65, if her earnings do not increase, she would pay into the system:

1) $32,407.20 in Federal Income Taxes.
2) $ 5,336.48 in State Income Taxes.
3) $22,125.60 in Social Security Taxes.
4) $ 4,640.96 in State Disability Taxes.

<u>TOTAL SAVINGS</u>	$60,510.24
	+ 89,208.00
	$149,718.24

SSI Case

Client D is 21 years old. She is developmentally disabled in association with athetoid cerebral palsy. She is severely medically impaired. She lives with a roommate, also developmentally disabled, in an apartment in Santa Barbara. She works in a selected vocational placement 20 hours per week as a teacher's aide in a day care center.

If she were not working she would:

1) receive $477.00 per month in SSI Benefits ($5724.00 per year with no taxes paid.)
2) receive Medi-Cal Benefits.

By age 65, if the benefit level didn't increase, she would:

1) receive $251,856.00 in SSA/SSI Benefits, upon which she would pay no taxes.
2) receive Medi-Cal.

Since she is partially self-supporting she saves the taxpayer $4,644.00 per year. By age 65, she will save the taxpayer $204,336.00.

By age 65, if her wages do not increase, she would pay into the system:

1) $6,864.00 in Federal Income Taxes.
2) $10,897.92 in Social Security Taxes.
3) $1,298.88 in State Disability Taxes.

TOTAL SAVINGS by age 65	$ 19,060.80
	$204,336.00
	$223,336.80

SSI Case

Client E is 29 years old. She is developmentally disabled in association with central nervous system dysfunction, severe dyslexia and severe perceptual motor difficulties. She is severely medically impaired. She lives in a board and care home for developmentally disabled adults. She works in a selected vocational placement helping in the kitchen of a retirement home on part-time basis.

If she were not working she would:

1) receive $559.00 per month in SSA/SSI Benefits ($6,708.00 per year with no taxes paid.)
2) receive Medi-Cal Benefits.

By age 65, if the benefit level did not increase, she would:

1) receive $241,448.00 in SSA/SSI benefits upon which she would pay no taxes.
2) receive Medi-Cal Benefits.

Since she is partially self-supporting she saves the taxpayer $1536.00 per year. By age 65, she will save the taxpayer $55,296.00. By age 65 she will pay into the system:

1) $ 7,629.12 in Federal Income Taxes
2) $10,056.96 in Social Security Taxes.
3) $ 1,200.96 in State Disability Taxes.

TOTAL SAVINGS	$18,887.04
	$55,296.00
	$74,183.04

SSI Case

Client F is 24 years old. He is developmentally disabled in association with mild mental retardation, cerebral palsy and emotional problems. He is severely medically impaired. He lives in an apartment in Santa Barbara.

This client, at best is only marginally employable in selected vocational placements with high intensity support from appropriate social agencies. His previous employment has been obtained through family friends or social agencies. His productivity is minimal. His social judgement and social skills are poor usually resulting in termination of employment after a short period of time (on a recurring basis). Because he has used up his trial work period, due to disability related job terminations, he is not eligible for Social Security (SSA) Benefits as an adult child dependent. The safety net of benefits under 1619 (a) is critical for him. The jobs he is able to obtain on night cleaning do not have medical benefits.

If he were not working he would draw $477.00 per month in SSI Benefits and Medi-Cal. By age 65 he would receive $234,684.00 plus Medi-Cal.

Since he is partially self-supporting he saves the taxpayer $3,995.76 per year. By age 65, he will save the taxpayer $163,826.16. By age 65, he will pay into the system:

1) $26,095.68 in Social Security Taxes.
2) $41,147.60 in Federal Income Taxes.
3) $ 3,112.72 in State Disability Taxes.
4) $ 4,903.60 in State Taxes.

TOTAL SAVINGS

$163,826.16
$ 75,259.60

$239,085.76

SC mtg
Exec. Comm. 1/4/83

STATE COUNCIL ON DEVELOPMENTAL DISABILITIES

SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES:

--A BRIEFING PAPER FOR GEORGE DEUKMEJIAN, GOVERNOR-ELECT OF THE STATE OF CALIFORNIA

NOVEMBER 1982

1507 21ST STREET
SACRAMENTO, CALIFORNIA
TELEPHONE (916) 322-8481

BEST AVAILABLE COPY

APPOINTED MEMBERS

- JOSE J. GONZALEZ, Council Chairman. Appointed as the parent of a child with a developmental disability, Mr. Gonzales is also disabled as a result of polio. An active leader in the Hispanic community, Mr. Gonzales is a health planner by profession.
- DEBORAH KAPLAN, J.D., Council Vice-Chair. Appointed as a consumer with a developmental disability, Ms. Kaplan provides a perspective as an attorney specializing in disability rights.
- ERMA BRIM, R.N., Appointed as the guardian of a child with a developmental disability, Ms. Brim is an active leader in the Black community advocating for the rights of the developmentally disabled. Ms. Brim is a registered nurse in the public health field.
- GEOFFREY GOEDECKE, Chair, Consumer Involvement Sub-Committee. Appointed as a consumer with a developmental disability, Mr. Goedecke is a founder and activist in the movement for self-advocacy by primary consumers.
- PATRICIA A. KABORE, Vice-Chair, Select Committee on Prenatal Screening. Appointed as a parent of a child with a developmental disability, Ms. Kabore is a leader in the Black community. She is also a professional administrator of a job training program in Watts.
- RICHARD KOCH, M.D., Chair, Select Committee on Prenatal Screening. Appointed as a representative of higher education training facilities because of his responsibilities at a major university hospital, Dr. Koch has had experience as a regional center director, Department of Health official, and a provider of direct medical services to persons with developmental disabilities.
- A. ROBERT LITTLE, Chair, Council Committee on Planning and Evaluation. Appointed as the parent of an adult with a developmental disability, Mr. Little has been extensively involved in local service development and community leadership through his tenure on the local regional center and area boards. Mr. Little is the Deputy Director in charge of planning for a major state department.
- HELEN MA, Council Liaison, Special Education. Appointed as the parent of a child with a developmental disability, Ms. Ma has been active in organizing Asian families with members who have developmental disabilities. Ms. Ma is a professional mental health counselor with a local county mental health agency.
- OWEN MARRON, Council Liaison, Habilitation Services. Appointed as a representative from a non-governmental group concerned with the provision of services to persons with developmental disabilities (i.e., organized labor), Mr. Marron works with disability groups and industry to promote integrated job placements.
- DOUGLAS MARTIN, Ph.D., Chair, Select Committee on State Hospital Placements. Appointed as an individual with a developmental disability, Mr. Martin has been active in the movement to promote independent living for persons with disabilities. Mr. Martin is an urban planner by training.
- CONNIE MOYA. Appointed as the parent of an individual who resides in a state hospital, Ms. Moya was the founder of an infant development program and has been active in promoting the establishment of quality standards for all services. Ms. Moya is the president of a corporation in Southern California.
- JUDY WAGONER, Council Liaison, State Legislature. Appointed as the parent of a child with a developmental disability living in the community, Ms. Wagoner has been involved as an advocate and leader on the local a board and as a member of the previous State Council. Ms. Wagoner is a recreation administrator by profess

STATUTORY MEMBERS

- DAVID E. LOBERG, Ph.D., Director, Department of Developmental Services. Dr. Loberg was represented by Allan Toedter, Director of External Affairs.
- MARIO G. OBLEDO, Secretary, Health and Welfare Agency. Mr. Obledo was represented by James Connor, Undersecretary.
- DOUGLAS X. PATIÑO, Ph.D., Secretary, Health and Welfare Agency. Dr. Patiño was represented by José Dias.
- ROBERTA POWELL, Organization of Area Boards. Mrs. Powell represents herself on the Council.
- WILSON RILES, Superintendent of Public Instruction. Mr. Riles was represented by Dr. Louis Barber, Director of Special Education.
- EDWARD ROBERTS, Director of Department of Rehabilitation. Mr. Roberts was represented by William McCauley.
- TWILA THOMPSON and DOUGLASS WILHOIT. Represented the County Supervisors Association of California.

EXECUTIVE SUMMARY

California is fortunate to have a fairly well-designed and effective system of services for approximately 300,000 citizens with developmental disabilities. It is a system which was created and evolved in response to an overwhelming grassroots movement of families demanding help. It is a system which has traditionally been the recipient of solidly bipartisan support.

The developmental service system has its foundation in both state and federal laws which guarantee rights and provide the framework for delivery of services. Most unique to California is the Lanterman Developmental Disabilities Services Act of 1976. This body of law is the centerpiece of the services network. It creates the State Council for planning and system review, area boards for regional monitoring, and regional centers as the primary point of contact with consumers and their families.

Major responsibilities for purchase and/or provision of services also devolve to the Departments of Education, Developmental Services, Health Services, and Rehabilitation. Such services are usually delivered through contracts or agreements with local public or private entities. However, the Department of Developmental Services not only contracts with regional centers to purchase services for approximately 61,000 people in community settings at a cost of $206 million, it also directly operates eight state institutions for almost 8,000 persons with developmental disabilities at a cost of approximately $329 million on campuses valued at excess of $3/4 billion dollars.

While California's system is fundamentally sound, problems inevitably have arisen. Currently, most of these problems are the consequence of declining real resources in the face of increased demands for service. The causes of these conflicting trends are basically twofold: (1) there is an increased incidence of developmental disabilities due to improvements in medical technology and steady increases in minority populations which experience a higher incidence of severe disabilities; and, (2) declining resources are, quite simply, reflective of general decline in state revenues.

In this briefing paper, the State Council has identified specific issues which it believes should receive timely attention from the Deukmejian administration. These include protection of substantive and due process rights, assurance of service quality (especially through adequate provider rates), establishment of incentives for appropriate services (especially through new funding mechanisms), and a continuing commitment to the development of services needed but unavailable. The Council also recommends that attention be given to improving the relationship between the Department of Developmental Services and the 21 regional centers. Finally, the Council suggests a focus by the administration on particular aspects of prevention.

The State Council has developed this briefing paper for Governor-Elect Deukmejian and his transition team with the hope that it will prove useful in the consideration of new policy directions over the coming several months.

I. THE STATE COUNCIL ON DEVELOPMENTAL DISABILITIES

A Source of Information and Advice for the Governor of the State of California

THE STATE COUNCIL ON DEVELOPMENTAL DISABILITIES IS AVAILABLE TO THE NEW ADMINISTRATION AS A VALUABLE SOURCE OF INFORMATION AND ADVICE ABOUT SERVICES TO PERSONS WITH DEVELOPMENTAL DISABILITIES, INDEPENDENT OF ANY SINGLE STATE DEPARTMENT OR COMMUNITY INTEREST GROUP. IN PARTICULAR, THE COUNCIL WOULD LIKE TO BE OF ASSISTANCE TO THE NEW ADMINISTRATION DURING THE CRUCIAL TRANSITION PERIOD. ACCORDINGLY, THIS BRIEFING PAPER WAS DEVELOPED FOR GOVERNOR-ELECT DEUKMEJIAN AND HIS TRANSITION STAFF.

THE IMPORTANCE OF THE COUNCIL'S ADVICE TO THE ADMINISTRATION AND THE LEGISLATURE STEMS FROM ITS FUNCTIONING AS A FORUM FOR NEGOTIATION OF POLICY DIRECTION AMONG THE VARIOUS STATE DEPARTMENTS AND OTHER MAJOR INTERESTED CONSTITUENCIES. THIS ROLE HAS EVOLVED BY VIRTUE OF THE COUNCIL'S MANDATE AND ITS MEMBERSHIP WHICH INCLUDES KEY DEPARTMENT HEADS; REPRESENTATIVES OF COUNTY GOVERNMENT, NON-GOVERNMENTAL AGENCIES, AND HIGHER EDUCATION; PERSONS WITH FAMILY MEMBERS WHO ARE DEVELOPMENTALLY DISABLED, AND INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES. MEMBERS OF THE COUNCIL ARE APPOINTEES OF THE GOVERNOR.

THE STATE COUNCIL HAS MANDATED RESPONSIBILITIES UNDER BOTH FEDERAL AND STATE LAW TO PLAN AND COORDINATE RESOURCES SO AS TO PROTECT THE LEGAL, CIVIL, AND SERVICE RIGHTS OF PEOPLE WITH DEVELOPMENTAL DISABILITIES (APPENDIX I).

IN THE SYSTEM OF SERVICES TO PERSONS WITH DEVELOPMENTAL DISABILITIES. COUNCIL MEMBERS HOPE AND TRUST THAT THIS DOCUMENT WILL PROVE TO BE OF ASSISTANCE TO THE NEW ADMINISTRATION THROUGH THE TRANSITION PERIOD AND BEYOND.

Statement on

Social Security Disability Insurance Program

by

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

before the

Committee on Finance
United States Senate

January 25, 1984

The UAW recommends several major changes in the Administration's Continuing Disability Investigation (CDI) program which reaches Disability Insurance beneficiaries under Titles II and XVI of the Social Security Act. We speak for more than 1 million active workers and 388,000 retirees (many of whom are disabled) in the UAW who have a keen interest in the protections that Disability Insurance benefits offer.

Section 311 of the "Social Security Disability Amendments of 1980" (P.L. 96-265) requires the Secretary to review every three years those cases where disability is not expected to be permanent. We do not oppose, in principle, the spirit of that provision of the law. The government has an obligation to conserve the trust funds and to pay disability benefits only to those who have met its rigorous proofs and continue to be disabled. However, and we want to emphasize this strongly, the government has an equally important obligation to protect the rights of disabled beneficiaries by preserving the highest regard for fair treatment and due process in all of its administrative contacts with disabled people (and all other Social Security beneficiaries).

We are fundamentally opposed to the gross mishandling of the CDI program by the Reagan Administration. The record of this Administration over the last three years has been one of systematic abuse of the rights of disabled people. These abuses have been well and thoroughly documented for the Congress and the Administration. The UAW has been calling for a legislative remedy to this abuse of discretion for two years. The human costs of further delay in fashioning a legislative solution will be measured in tens of thousands of broken lives as disabled workers and their families are capriciously denied their rightful benefits.

The UAW supports speedy enactment of disability legislation modeled on the basic features of S.476, the "Social Security Disability Amendments of 1983" (as amended by its co-sponsors, Senators Levin and Cohen on June 29, 1983). We consider the parallel bill in the House of Representatives (H.R. 3755, formerly appended to H.R.

4170) to be a more comprehensive and desirable bill, but recognize that both contain similar core provisions.

The UAW strongly recommends passage of disability reform legislation with the following key provisions:

A Medical Improvement Standard

The accelerated CDI program has placed the benefits of several hundred thousand disabled people in jeopardy by challenging their continued eligibility without ever having to show a change in their medical condition. Current Social Security regulations (Section 404.1594) state that,

> "When the medical or other evidence in your file shows that your disability has ended, we will contact you and tell you that the evidence in your file shows that you are able to do substantial gainful activity...."

The Secretary has been interpreting this regulation to allow the State agencies to "retry" CDI cases as if they were simply initial decisions. Claimants are thus required to totally reprove their disability, even in situations where there has been no change in the material facts of the case. Such a cruel, illogical and expensive standard demands a remedy from this Congress.

The entire CDI process needs to be overhauled by establishing an equitable standard which would require consideration of current medical evidence and a showing of medical improvement in disability cases before stopping monthly benefits and critical Medicare coverages. Both H.R. 3755 and S. 476 provioe sensible exceptions to this standard in situations where: there are substantial improvements in a disabled person's "residual functional capacity"; new or improved diagnostic techniques indicate that the impairment is not severe enough to qualify as total and permanent disability under the law; the initial decision was clearly erroneous or fraudulently obtained; or the person is found to be engaging in substantial gainful activity.

A Permanent Provision for Payment of Benefits on Appeal

Payment of monthly benefits should continue while disabled workers appeal their initial denial (at the state agency level) through the formal hearing step of the appeals process. Under current law payments on appeal ended December 7, 1983. Continuation of disability benefits on appeal is justified out of simple fairness to those who have already satisfied the rigorous proofs the government requires to meet the definition of disability and who are now being "re-tried" by the Administration; these disabled workers have a legitimate claim for benefits until the point when they have had a chance to rebut the government's findings and have had a decision returned after a full and fair hearing before an Administrative Law Judge. Furthermore, given the lengthy delays in scheduling hearings (owing mainly to the Administration's sharp increase in the number of reviews), it is grossly unfair to disabled workers to stop benefits and leave them without income for many months when they have no control over the timeliness with which their case will be handled.

Public Notice and Comment for All Social Security Regulations

Some persons have been preoccupied in recent years with the fact that an increasing number of people have been awarded benefits at the third step of the appeals process. That same concern has been raised again in the context of the CDI program, as about 60% of those who appeal a denial to the hearing level have their benefits reinstated. Other things being equal, it is not surprising to find a different pattern of decisions at the hearing level because it is a "de novo" procedure, not bound by the record to date. The Administrative Law Judges (ALJs) who preside at hearings are required to weigh all of the evidence, including evidence of a medical condition which may worsen during the appeals process. The fact that ALJs base decisions on a more-comprehensive evidentiary record and are bound to follow court rulings and regulations of the Secretary means that their decisions can be expected to differ from those of the first two levels of the process at the state agency, where the examiners are also bound by internal standards (The Program Operations Manual System - POMS) developed by the Secretary without the opportunity for public notice and comment.

Administrative Law Judges have accounted for a greater and greater share of all disability decisions in the last few years. In 1974, the first two steps of the process accounted for 95.3% of all new awards made to disabled workers (ALJs accounted for 4.2%). In 1978, the first two steps accounted for 85.2% of the awards and in 1979 the share dropped to 82.8%. By 1980 the state agencies' share of all Disability Insurance awards had dropped to 78.9% and ALJs were accounting for 20.6% of all new awards. The problem, therefore, appears to be not in the hearing level of the appeals process, but in an inordinate number of denials at the first two steps of the procedure at the State agency levels. The last two Administrations have obviously tightened the interpretation of the statutory definition of disability in recent years.

Many of the problems of unfair and inconsistent administration of the Social Security Disability program have been caused by the Administration's setting of disability determination standards for the initial levels of the appeals process which are not in accord with public law and regulations binding on higher levels of the appeals process. In order to make the appeals process more fair and uniform and open to public scrutiny, the Social Security Administration should be required to use the public notice and comment provisions of the Administrative Procedures Act in setting all policies and regulations affecting the determination of disability for all levels of the appeals process.

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TESTIMONY OF

THE COUNCIL OF STATE ADMINISTRATORS OF VOCATIONAL REHABILITATION

The Council of State Administrators of Vocational Rehabilitation (CSAVR) is an association comprised of the chief administrators of all the state agencies providing rehabilitation services to physically and mentally disabled persons in the States, the District of Columbia, and the territories. Founded in 1940 to furnish state input into the State-Federal Vocational Rehabilitation Program, the Council has, since then, served as a quasi-official advisor to its federal partner, the Rehabilitation Services Administration, and has provided a forum for State Rehabilitation Directors to study, deliberate and act upon matters pertaining to the successful rehabilitation of persons with disabilities.

Through its Committee on Disability Determinations Services (DDS), the Council interracts with Social Security Administration officials on the administration in the States of the Social Security Disability Program. Thirty-seven State Rehabilitation Agency Directors oversee the administration of the State DDS.

Through its Committee on Social Security Relationships, the Council interacts with the Social Security Administration (SSA), the Rehabilitation Services Administration (RSA), and other groups with respect to the special Rehabilitation Programs authorized by Title II (SSDI) and Title XVI (SSI) of the Social Security Act.

Mr. Chairman, the Council is pleased to have this opportunity to present to the Committee its views and concerns with respect to the time-sensitive issue of Social Security Disability Reform, as well as the issue of the Social Security Beneficiary Rehabilitation Programs.

I. SOCIAL SECURITY DISABILITY REFORM

In thirty-seven states throughout the Nation, the State Vocational Rehabilitation Agency Administrator also oversees the Administration of the State DDS Unit. Because of this relationship, the CSAVR has a Standing Committee on DDS, made up of State Rehabilitation Agency Directors, State DDS Administrators working within the State Rehabilitation structure, and State DDS Administrators working outside of the State Rehabilitation structure. The Committee is comprised of ten State DDS Unit administrators from a State in each of the ten Federal Regions, making the Committee a truly representative body.

As those charged with the direct administration of the Social Security Disability Program in the states, we are gravely concerned about the program and its impact on the lives of persons with mental and physical disabilities.

The interpretation of the law on medical eligibility, as enacted by the Congress, depends on who is doing the interpreting. It is being interpreted by the Administration in one fashion, and in other ways by the Federal judiciary. Many States, acting to protect the legitimate interests of their citizens, have taken a variety ot positions of their own on standards for medical cessation of benefits. The result of these uncoordinated and separate actions is that, at present, there are at least a dozen different standards for continued eligibility for program benefits simultaneously in effect in different parts of the country.

There are many reasons for this situation. Some are recent, some past, and some are inherent in the structure of the adjudicative process as it has been created and implemented over the history of the program.

There are several proposals now pending before the Congress which address various aspects of the problems now besetting the program and the disabled public it serves. We intend to discuss the issues raised in the various proposals in detail. Our comments will specifically address those issues raised by S. 476, as drafted by Senators Levin and Cohen, and by Title IX of H.R. 4170.

Prior to a discussion of the issues raised by the various legislative proposals, however, it is necessary to discuss some broad issues which underly the specific provisions of each measure, and which must ultimately be resolved for the program to operate as envisioned by the Congress.

As the disability adjudication process is now organized, the States and the Social Security Office of Disability Programs operate under one set of adjudicative standards and use a specific process which relies exclusively on written medical evidence. This evidence is reviewed and evaluated by staff doctors and examiners and a decision is reached. At the appellate levels, both in the SSA office of Hearings and Appeals and in the Federal Courts, as well as in the new face-to-face evidentiary hearings of the reconsideration level, a different set of standards and a different decision making process exist. These fundamental facts underly most of the problems facing the Social Security Disability Program and persons with disabilities today.

At the initial level of review, detailed written policy is applied and interpreted by qualified medical practitioners and disability examiners. These medical practitioners and examiners do not even have the opportunity to meet with or observe the person with a disability whose eligibility for benefits is under review.

At the appellate levels, the decision maker is able to meet with and observe the individual and is given broader discretion with more general guidelines because of this ability to directly observe the individual under appeal. The appellate decision maker is not, however, required to make use of medical expertise in interpreting the medical facts on which that decision rests.

Various elements of the bills now under consideration address the issue of uniform policy and face-to-face viewing by all decision makers. What is still missing, however, is the requirement for adequate evaluation of medical evidence at the appellate levels. Decisions based on medical evidence made by decision makers untrained in medicine creates a significant potential for error and, we believe, have contributed to widening the gap between the two levels of disability adjudication.

If the disability decision making process is to be uniform and to apply consistent standards at all levels, then the same elements must be present at each level. These include a detailed objective medical evidence, the opportunity to meet the applicant face-to-face, one set of consistent policy guidelines, expert medical interpretation of medical evidence, and sufficient latitude in interpretation of policy to reconcile observed facts about the claimant with the interpreted medical data. These are the basic requirements that must be met at each level of adjudication if consistency of standards and uniform application of those standards is to exist.

The legislation under consideration today moves in the direction of greater uniformity in a number of respects. It touches on all of the needed elements except for medical expertise at the appellate levels. Clearly, further work on the process will be needed and this organization is willing to profer its services in support of continued efforts in that direction. It is, however, critical that the Congress act now on the two issues of benefit continuations through the appeals process and the standards to be used for determining continued eligibility.

On benefit continuation during appeals, the intent of the Congress to provide this resource seems clear. In addition, the Social Security Administration has suspended processing of Title II terminations since the previous extension of this provision expired on December 7th. It is a just provision which should be reinstated in law at the earliest possible moment.

On standards for termination of benefits, the need for Congressional action is even more pressing, and stems largely from the periodic review provision of the 1980 Disability Amendments. Periodic review has dramatically increased the number of continuing disability reviews performed. As a result, the lack of concensus on standards for termination of benefits has become a crucial program concern.

States, the Courts and the Administration are floundering in inference and indecision based on a lack of statutory guidance.

The Council of State Administrators of Vocational Rehabilitation strongly urges that standards be enacted for the termination of benefits. Those proposed standards contained in the measure introduced by Senators Levin and Cohen would provide a realistic and appropriate balancing of individual rights against the need for program fiscal integrity.

Of even greater concern, however, is the need for Congress to speak on the issue. Any firm position by the Congress on benefit termination standards would be better than the current situation. For the Social Security Disability Program to survive and meet the social needs for which it was created, there must be National uniformity. Legislation enacted by Congress is the accepted cornerstone for such uniformity and the only source which can provide the needed guidance to the states, the Courts, and the Social Security Administration on this issue.

While the two issues of benefit continuation during appeal and standards for termination of benefits are the overriding issues, there are a number of other aspects of the Disability Reform Program and the pending legislative proposals which are, or could be, of fundamental importance to the long-term effective operation of the disability program. Most of these are directed toward increasing the uniformity of various levels of adjudication. The following is a discussion of some of these programmatic issues addressed by the pending legislation introduced by Senators Levin and Cohen.

Case Development and Medical Evidence. The CSAVR believes that evidence from treating sources is and should be the basis for disability adjudication and we welcome a statement to that effect in the law.

Our concern is for the operational impact of requiring the exhaustion of all efforts to obtain evidence of record before ordering a consultative examination. Any statutory language on "medical evidence of record" should be written, however, to provide that efforts to obtain treating source evidence be exhausted before a decision can be made on an individual claim. The States must be permitted to schedule a consultative examination at any point in case development, once the examiner is aware or believes that critical information either does not exist in treating source records, or that the information would not be forthcoming without additional efforts. If this modification cannot be made, a dramatic increase in the amount of time required to complete action on individual claims would occur -- perhaps by as much as thirty to forty days.

Our experience has shown that, in many cases, treating source information is either unavailable or grossly inadequate. Concurrent pursuit of consultative examination evidence and treating source evidence with a requirement that every reasonable effort to obtain treatment records be made and documented, will protect the claimant from undue reliance on consultative examination evidence and still provide a reasonably prompt decision.

Evidence of Pain. There does not seem to be at present enough information available about the proper evaluation of pain to permit it from being reasonably weighed in a disability decision. The CSAVR supports, at least, a study on the use of subjective evidence of pain.

Uniform Standards. The issuance of uniform standards appears to be the only way to adequately ensure consistent adjudicative rules at all levels of adjudication. It also has the further benefit of exposing adjudicative standards and assumptions to public review and comment. This exposure has at least the potential to provide useful and constructive review of the rules adopted. The process might tend to further politicize rule making undesirably and would undoubtedly make it impossible to change standards quickly, but uniformity of standards is such a critical issue that it outweighs these undoubted liabilities.

Multiple Impairments. There currently exists a clear gap in adjudicative policy, for a small, distinct population of older workers. The combined impact of multiple, relatively non-severe impairments reduces their function so substantially as to effectively preclude them from working. The gap must be closed, and would be by the provisions on Multiple Impairments included in the proposal ot Senators Levin and Cohen.

Advisory Council. The concept of periodic consultation with independent experts to review the standards and policies on the medical aspects of disability is sound. But rather than the one-time advisory council called for in the various legislative proposals, we suggest requiring that such a body be convened every four years to review, revise and update medical policies and standards. This approach would keep medical policies and standards from becoming outdated and would provide for periodic input from the national medical community on a regular basis. This would enhance both the appropriateness and the credibility of the rules used to evaluate disability by the SSA.

Qualifications of Medical Professionals. We suggest that each State be required to obtain the services of at least one qualified psychiatrist and that each state be required to submit to the SSA a plan describing how they intend to use the consultant or consultant's services.

Compliance with Court Orders. The principle of acquiescence on appeal, as put forth in the various legislative proposals, is attractive. We are concerned, however, that in the event of conflicting Federal Circuit Court rulings, program consistency would be seriously compromised. Also, certain cases are inappropriate for appeal for reasons unrelated to the policy or practice at issue. Safeguards must be provided against the arbitrary exercise of non-acquiescence by Social Security. These safeguards, and other assurances, are found in the Cohen-Levin proposals.

Appeals Procedure.

The CSAVR strongly supports any proposal which enables the State DDS to incorporate face-to-face contact with the claimant as part of the decision making process. Previous Social Security studies supports this concept, as does the logic that uniform processes are more likely to yield uniform results.

II. SSDI AND SSI BENEFICIARY REHABILITATION PROGRAMS

Prior to October 1, 1981, State Rehabilitation Agencies received monies from the SSDI Trust Funds (allocated on a quarterly basis) and from the General Revenues (appropriated by the Congress) for the provision of rehabilitation services to eligible SSDI beneficiaries and SSI recipients. In FY 1981, State Rehabilitation Agencies received over $124 million to implement these programs, and provided services to over 115,000 beneficiaries with mental and/or physical disabilities.

Despite the demonstrated cost-effectiveness of these programs, the law was changed -- as a part of the Omnibus Reconciliation Act of 1981 -- to provide that State Rehabilitation Agencies would only be reimbursed by the Social Security Administration for the cost of rehabilitation services resulting in the client's participation in Substantial Gainful Activity (SGA) for nine months. While current law does not mandate that payments be made to the states in advance, the SSA, for the present time, has chosen to do so. During Fiscal Year 1983, approximately $10 million was advanced to the States, a cut in funding from FY 81 of over 90 percent.

Under present law, states may have to wait two or more years before full reimbursement funds are made available. In addition to the period of nine months of substantial gainful activity, there are also the many months, even years, which are required to successfully rehabilitate a severely disabled person.

Prior to reimbursement, the states incur, and will continue to incur, substantial expenses for services which will significantly exceed the "advance" monies provided by the SSA. Because of this, fiscal planning is being severely disrupted, since State Agency administrators are unable to ascertain when or in what amount the reimbursement will be provided for services rendered.

The Council has serious misgivings about some of the provisions and limitations of the current BRP. Therefore, we urge the Subcommittee to consider the following technical recommendations which we strongly believe would, if enacted into law, improve the operation of these important programs.

RECOMMENDATIONS

1. In order for the current program to work effectively, the Council urges the Subcommittee to replace the "reimbursement" language in current law with clear language providing that payment to the States be made in advance. Prior to FY 1982, such payments were made in advance.

2. Current law limits the definition of a "reimbursable" expense to such a degree that many State Agencies, in many circumstances, are hesitant to provide services, not knowing if the SSA will reimburse that expense. A broadening of the definition of a "reimbursable expense" will eliminate these disincentives, and make the program more operable.

--State Rehabilitation Agencies should be reimbursed for all monies expended on beneficiaries who are terminated from the SSDI rolls due to "medical improvement," regardless of their work status. As the goal of SSA is to reduce the number of beneficiaries, State Rehabilitation Agencies should be reimbursed for expenses provided to an SSDI beneficiary who, while receiving services under an approved rehabilitation plan, medically recovers and no longer requires SSDI benefits.

--State Rehabilitation Agencies should be reimbursed for all evaluation costs associated with SSDI related cases, even if that case does not result in the achievement of SGA for nine months. This system would result in a more active and comprehensive referral system, thus resulting in the provision of services to, and the potential rehabilitation of, a much greater number of SSDI beneficiaries.

--State Rehabilitation Agencies should be reimbursed for all monies expended on SSA related cases who "refuse services without good cause" or who "fail to cooperate with good reason" in the Agency's efforts to provide such services. State Agencies currently accept for services those SSDI recipients who meet eligibility requirements, and who express an interest in receiving services. In many cases, after services are planned and sometimes provided (and after many dollars are expended) a client, for various reasons, will decide not to continue in a rehabilitation program. State Agencies should not be penalized for their efforts in providing rehabilitation services to these individuals.

3. There should also be established a separate program, which supports the provision of rehabilitation services to SSA beneficiaries whose benefits have been terminated due to medical improvement. Most of these individuals are long-term recipients of benefits who have been out of the work force for an extended period of time.

In addition, being no longer "disabled" under the Social Security Act does not mean that the former beneficiary is readily employable. It merely means that the former beneficiary's medical condition does not preclude the performance of some type of work available somewhere in the national economy. Vocational training or counselling, or additional rehabilitation services, may be needed before that individual is able to return to productive life. For many of these beneficiaries, the needed services are only available through the State Rehabilitation Agency.

For these reasons, we strongly recommend that a program for terminated beneficiaries reimburse State Agencies for the provision of any service that may be reasonable and necessary to return the former beneficiary to suitable employment.

4. Current law places the responsibility of administering the BRP within the Social Security Administration. While we have no major complaint with the performance of the professional staff at the SSA charged with the day-to-day operation of this program, we do question the commitment towards this program of the chief decision-makers within the SSA. Therefore, we recommend that the Commissioner of the Rehabilitation Services Administration be charged with the administration of the Beneficiary Rehabilitation Program.

The BRP is a program of Vocational Rehabilitation Services, an area in which the Rehabilitation Services Administration has far more expertise than does the Social Security Administration.

The BRP represents a miniscule portion of the Social Security Administration Budget, and consequently, is given a low priority in the SSA organization.

While the Council enjoys good working relationships with the SSA regarding the implementation of the current BRP, we are convinced that the ultimate goals of this program -- the provision of necessary services to eligible beneficiaries, and the saving of monies to the Trust Funds -- would be further advanced if it were administered by the Rehabilitation Services Administration.

CONCLUSION

The Council firmly believes that if the current Beneficiary Rehabilitation Program is to be successful, certain limitations in the current law must be expanded, and certain other ambiguities must be made clear.

Mandated payments to the states, to be made in advance, are vital. Without this guarantee, planning is difficult and the provision of timely and cost-effective services is jeopardized. In that the State Rehabilitation Agency can offer the SSDI beneficiary the most comprehensive and coordinated service delivery system to meet their particular needs, a stable and reliable funding source is essential.

In addition, if the BRP is to achieve the dual goals of providing necessary rehabilitation services to eligible beneficiaries, and to achieve a savings to the Trust Fund, the providers of services must be reimbursed for the cost of all rehabilitation services provided beneficiaries that result in a direct savings to the Trust Fund, regardless of a beneficiary's ability or inability to engage in SGA for the required time period.

III. TITLE XVI, Section 1619.

In the First Session of the 98th Congress, a small, but important provision of law was allowed to lapse. Section 1619 of the Social Security Act provided for the continuation of eligibility for SSI benefits (and thus medical benefits), for individuals with severe medical impairments, even if that individual is earning above the threshold "substantial gainful activity" level.

While not many individuals have been effected by this provision, it was extremely valuable to the individual who must now choose between work, and the ability to pay for expensive medical care. It is clear that the Congress must reinstate this provision of law.

The Council of State Administrators appreciates this opportunity to express its views on this important Program.

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