

ORIGINAL

1 MARKUP SESSION  
2 TUESDAY, MAY 15, 1984  
3 U.S. Senate  
4 Committee on Finance  
5 Washington, D.C.

6 The committee met, pursuant to notice, at 10:15 a.m. in  
7 room SD-215, Dirksen Senate Office Building, the Honorable  
8 Robert Dole (chairman) presiding.

9 Present: Senators Dole, Danforth, Chafee, Heinz, Wallop,  
10 Symms, Grassley, Long, Bentsen, Moynihan, Bradley, Mitchell  
11 and Pryor.

12 Also present; Carolyn Kuhl, Department of Justice;  
13 Lou Enoff, Social Security Administration; John O'Shaunnessy,  
14 Department of Health and Human Services; Don Gonya, Social  
15 Security Administration; and Pat Owens, Department of Health  
16 and Human Services.

17 Also present: Roderick A. DeArment, Chief Counsel and  
18 Staff Director; Michael Stern, Minority Staff Director;  
19 Joseph Humphreys; and Carolyn Weaver.

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1 The Chairman. Let me indicate, on today's agenda are  
2 Modifications of Disability Insurance Review Procedures. I  
3 think every member has had notice of that and has been  
4 involved with staff and others who have an interest in that.

5 We also have on the agenda Retroactive Relief in the  
6 Dickman Case. We will not get to that today. If anybody  
7 here is waiting for that to happen, this would be a good time  
8 to leave.

9 Now, as I understand -- well, I do understand -- that  
10 the S. 476, the proposal by Senators Cohen and Levin and  
11 others, is the document that we will start with, and I will  
12 offer a substitute containing 17 provisions which will then  
13 be open for amendments. I understand there may be amendments,  
14 so I think we have addressed some of the concerns that  
15 Senator Moynihan and others have, but there still may be  
16 some. I know Senator Long may have an amendment, Senator  
17 Heinz may have an amendment.

18 But I wonder if we might -- let's see, one, two, three;  
19 we still need a couple of people.

20 While we are waiting for a couple of other members to  
21 arrive, I wonder, Carolyn, if you could indicate -- S. 746 is  
22 the Cohen/Levin bill; is that correct?

23 Ms. Weaver. That's correct.

24 The Chairman. If there is no objection from the Senator  
25 from New York, who is also a sponsor of that bill as well as

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1 the Pickle --

2 Senator Heinz. Excuse me. I didn't hear the Chairman's  
3 motion.

4 The Chairman. Oh. I haven't made any motion; I just  
5 suggested we start with S. 476, and at the appropriate time I  
6 would offer a substitute, approval of which would then be  
7 open for amendment.

8 Senator Moynihan. May I say, I have not the least  
9 objection to that. I would like to keep in mind, in a  
10 paternal way, that Representative Pickle has introduced  
11 legislation and the House side has passed it. I introduced it  
12 on this side, and we will meet in conference with basically  
13 that bill.

14 I think, thanks to Carolyn Weaver and others, we seem  
15 to be getting very close to a fit, and that's the point. I  
16 want to thank Carolyn for her efforts here.

17 The Chairman. I think Carolyn and others on our own  
18 staff and HHS representatives, from the Administration and  
19 others, have worked fairly late into the night on a number of  
20 evenings. I hope we have a proposal that can be passed.

21 Senator Baker has indicated he would bring this up on  
22 the 22nd of May, but that was before we became totally bogged  
23 down in whatever we are not doing on the floor -- we are not  
24 doing anything, so it must be something we are not doing --  
25 on deficit reduction. It may be that that schedule will not

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1 be followed, but we would like to complete mark-up on this  
2 bill this week, hopefully today.

3 Carolyn, S. 476, then, if there is no objection, we  
4 will consider that. And I would offer a substitute, which  
5 would then be open to amendment. If there is no objection,  
6 we will proceed on that basis.

7 Now, could you go through the substitute provision and  
8 I think point out where it is similar to the Pickle/Moynihan  
9 bill and the Cohen/Levin, et al, proposal? I think we all  
10 have that before us, but I think the record should reflect  
11 just what the similarities and differences are. It is titled  
12 "Summary of Proposal."

13 Does everyone have this document?

14 Ms. Weaver. No.

15 The Chairman. Oh, they don't?

16 Ms. Weaver. It's just the short form.

17 What you should have before you is three handouts.

18 The Chairman. Oh, excuse me. Here it is -- Attachment  
19 One.

20 Ms. Weaver. That is the long handout that describes  
21 the Dole Proposal, the entire package.

22 You have an Item 2, Attachment Two, which is a set of  
23 cost estimates and background cost estimates, and then  
24 Attachment Three, which is an explanation of how the Medical  
25 Improvement Standard would work in some detail.

1 of the Secretary to establish that there had been some other  
2 type of change in condition or circumstance that would  
3 potentially warrant termination. And then the Secretary  
4 would make a judgment as to whether the individual can  
5 perform substantial gainful activity.

6 The Chairman: Could I suggest something? I know we  
7 have Administration witnesses here, and maybe they could  
8 come to the table, and we may want to clarify or verify that  
9 you support certain provisions or all of the provisions.

10 Anyone else? Social Security? Justice Department?

11 Mr. O'Shaunnessy. Let me introduce everyone. I am  
12 John O'Shaunnessy with the Department of Health and Human  
13 Services. This is Lou Enoff, whom you all know from the  
14 Social Security Administration, and Ms. Carolyn Kuhl from  
15 the Department of Justice.

16 Ms. Weaver. All right.

17 So, once having established that there is some change  
18 in the condition of the claimant, such as whether it be a  
19 vocational improvement, for example, or a new improved  
20 diagnostic or evaluative technique which demonstrates the  
21 impairment is not as severe as originally believed, or  
22 the original decision was fraudulently obtained, or it was  
23 an erroneous initial decision.

24 Once having shown one of those, then the Secretary would  
25 move to a determination of whether or not the individual

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1 could engage in substantial gainful activity.

2 If one of those exceptions could not be demonstrated  
3 by the Secretary -- that is, one of those changes in  
4 circumstances -- benefits would be continued. Effectively,  
5 you would short-circuit that process and not go on to  
6 determine substantial gainful activity.

7 The way we have written it up in a longer handout  
8 attachment, Three, I believe, explains that at any point in  
9 the process at which it can be shown that an individual,  
10 given the evidence in the file, should be allowed, that would  
11 be permissible at any point in the process; otherwise, you  
12 need to continue through this new procedure to determine  
13 ineligibility.

14 The Chairman. Joe, if you want to add anything, or  
15 Mike, as we go along, or anybody in the Administration, feel  
16 free to do so.

17 Mr. O'Shaunnessy. We have worked on this provision,  
18 and we are in agreement with it.

19 The Chairman. As I understand, it is somewhat similar  
20 to the other bills. I guess there are three differences as  
21 far as the burden of proof, and the length of the provision,  
22 and the fact that the Secretary may offer additional  
23 evidence. Is that correct? Are those the three major  
24 changes?

25 Mr. O'Shaunnessy. Yes. And with regard to the burden

1 of proof, the Social Security Administration would assist  
2 the individuals in obtaining evidence which would be required.

3 Senator Moynihan. Would you say that again, sir, in  
4 regard to the burden of proof?

5 Mr. O'Shaunnessy. Yes.

6 With regard to obtaining evidence, the Social Security  
7 Administration currently works with the individuals who are  
8 claimants to assure that they have an adequate file, and  
9 we would continue to carry that burden.

10 Senator Heinz. How is the system going to be different  
11 when it comes to the question of burden of proof than it is  
12 now?

13 Mr. O'Shaunnessy. The fundamental premise -- that is,  
14 that the individual, according to current law, has the  
15 obligation to show that they are entitled to benefits --  
16 that fundamentally would remain the same under the standard  
17 which would be in effect, and that is if they could show  
18 that they had not improved, then the process would take place  
19 as is currently outlined. However, we would work with the  
20 claimants on that evidence.

21 Senator Heinz. Well, what you have said is that it is  
22 pretty much the same process as it is now.

23 Mr. O'Shaunnessy. No, I think it would be a fundamental  
24 difference.

25 Senator Heinz. Where?

1 Mr. O'Shaunnessy. With regard to the question of  
2 whether there had been no medical improvement. If there is  
3 no medical improvement, then the burden really is on the  
4 Secretary to show positive evidence that one or the other  
5 changes had taken place.

6 Senator Heinz. As I understand it, the claimant who is  
7 being reviewed comes in, and the burden of proof is on the  
8 claimant to show that there is no medical improvement.

9 Now, the examining officer looks at that evidence and  
10 says, "Well, that really is not sufficient. I am looking at  
11 your listings, and I think you can work," which is exactly  
12 what he decides now.

13 Mr. O'Shaunnessy. No.

14 Senator Heinz. The standard that the examiner is  
15 supposed to apply is, "Is this person capable of gainful  
16 employment?" Is that not the standard that is applied?

17 Mr. O'Shaunnessy. No. There would be a difference;  
18 and that is, the first finding would be with regard to the  
19 question of whether there had been medical improvement.

20 Senator Heinz. Well, I understand that.

21 Mr. O'Shaunnessy. It would not pertain to substantial  
22 gainful activity, currently.

23 Senator Moynihan. Now, was the burden of proof on the  
24 recipient to prove that there hadn't been? Or was the burden  
25 of proof on the agency to prove that there has?

1 Mr. O'Shaunnessy. Well, the obligation on the part of  
2 the agency is to make a finding with regard to the evidence  
3 which is presented, and the claimant would bring in medical  
4 evidence showing, presumably, that there had not been or  
5 that the claimant felt that there had been no medical  
6 improvement.

7 In that process of developing that information, the  
8 agency would work with the claimant in obtaining all of the  
9 evidence which is required.

10 Senator Moynihan. Can you -- I don't mean to  
11 interrupt Senator Heinz.

12 Senator Heinz. Well, I just thank Senator Moynihan  
13 for his question. I would be happy to yield, but I understand  
14 that the claimant comes in, and the question is essentially  
15 asked: Has there been medical improvement? And the claimant  
16 comes in, with your help, and says, "Here are my medical  
17 records," and I think they show that I have not improved  
18 medically. All right?

19 This is essentially what claimants do now. We don't  
20 tell them to ask the question or to state the answer to the  
21 question about medical improvement.

22 But physically what they do is, they show up with  
23 records and say, "I'm sick." That's what they say. "I  
24 can't work. I'm not a medical expert. I feel just as  
25 crippled today as I was five or ten years ago when I got

1 on the rolls. And you are asking me, the claimant, to say  
2 that I have not improved medically. I don't know anything  
3 about that; I just know that my right arm still doesn't  
4 work very well," or "I've got my heart problems," and  
5 everything like that.

6 Now, the examiner has in front of him or her, as I  
7 understand it, essentially two pieces of information: (1)  
8 pretty much the same medical records that have been  
9 produced in the past, and (2) an individual, a person,  
10 saying "I can't work. I'm sick. I'm still injured. I  
11 haven't improved medically," a person saying, "I am still  
12 not able to seek gainful employment."

13 Now, that is pretty much business as usual, as I  
14 understand it.

15 Mr. O'Shaunnessy. No.

16 Senator Heinz. What new piece of information does the  
17 examinaer get? Or, alternatively, how does the examiner  
18 approach his or her job differently now that the claimant is  
19 down there with all kinds of records?

20 Mr. O'Shaunnessy. Let me ask Mr. Lou Enoff to address  
21 the specifics of how the examiners would conduct themselves.

22 Mr. Enoff. Senator, I think the difference would be,  
23 under the current process and in the current standard there  
24 is no medical-improvement standard; therefore --

25 Senator Heinz. This, we know. But how would that be

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1 different?

2 Mr. Enoff. Let me walk through, if I might, the way  
3 I understand this new process would work, and that is, the  
4 individual would be notified of the new standard, including  
5 a medical improvement standard, which they are not now  
6 notified.

7 When they came to the Social Security Office, they would  
8 produce any evidence they had or indicate to us any  
9 evidence that they thought might be relevant to the medical  
10 improvement standard as well as whether or not they could  
11 work. That would be in addition to what now happens.

12 Senator Heinz. But as a practical matter, would that  
13 really result in any kind of different evidence than is now  
14 produced?

15 Mr. Enoff. I think it could, Senator. In particular  
16 instances where the person wanted to show that they had  
17 not improved medically, where that might not be relevant  
18 to what is in the file, they might want to ask us to obtain  
19 additional evidence for them from their physician, or they  
20 might bring it with them. But I think it might result in  
21 additional evidence.

22 Senator Heinz. Yes, it might, it could, there are  
23 circumstances under which it is conceivable; but in most  
24 cases -- and that is really what I am trying to get at; I  
25 am not saying that it couldn't change in some instances -- is

1 it really going to be that different? You are the  
2 expert, I am not. In most instances, is it really going to  
3 be that different than the present system? I don't know; I  
4 am just asking.

5 Mr. Enoff. I would hesitate to put the adjective "most,"  
6 but I think certainly in a significant number of cases there  
7 would be additional evidence that the beneficiary would  
8 either ask us to obtain or would bring with them.

9 Senator Heinz. Could you go on to the second step, as  
10 to how the examiner will make his judgment and how the  
11 way he makes his judgment will really be different than the  
12 way he does now?

13 Mr. Enoff. I think the critical difference, again, would  
14 be that the examiner would address first the issue of  
15 medical improvement. And if there had not been medical  
16 improvement, then that person would meet that standard of  
17 not having improved medically and, except for these few  
18 exceptions that have been noted of technology advances and  
19 so forth, that person would then remain on the rolls, and  
20 that would be different from today's standards.

21 Senator Heinz. If you are the examiner, you will use  
22 medical records to establish non-improvement?

23 Mr. Enoff. Yes, sir, that is correct. You would  
24 compare a condition that existed at the time of the person's  
25 initial entitlement, and what it is now. That's correct.

1           Senator Heinz. Now, since under this procedure the  
2 burden is on the beneficiary to prove non-improvement, what  
3 do you as the examiner need to do to disagree? What burden  
4 is on you, given some kind of reasonable showing of  
5 evidence, as opposed to an airtight case, because I assume,  
6 like most of us, most of these people wouldn't know how to  
7 present an airtight case if their lives depended on it.--  
8 what is the burden on the examiner now?

9           Mr. Enoff. Well, I think the examiner would, as I say,  
10 compare the condition as it existed at the time and as it  
11 exists now and look for whether there was any difference  
12 in the condition that would indicate improvement or no  
13 improvement.

14           Senator Heinz. Now, the examiner says, "Frankly, your  
15 blood pressure is not quite as high as it was. It looks  
16 to me like -- you have improved medically," and he finds  
17 some reason. Is there any sufficiency test?

18           I mean, I can always figure out some way to say you  
19 have improved. You know, "You have lost more hair, you don't  
20 have to work as hard to comb it." That's an improvement,  
21 right?

22           (Laughter)

23           Senator Heinz. Now, how much does the examiner have  
24 to find to disprove the showing of the claimant? What burden  
25 is on you? It can't just be arbitrary, or is it?

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1           Mr. O'Shaunnessy. Let me just raise a point here. The  
2 evidence must show that the improvement had been related to  
3 workability. And I will let Lou continue with that one.

4           Mr. Enoff. Yes. Well, I think it would have to be  
5 related to the impairment and not some other area, non-  
6 related.

7           Senator Heinz. You got down here to the office, you  
8 were judged not able to walk.

9           Let's take a real example: It has often been found  
10 in cases I have been familiar with that there are people  
11 with heart conditions that have been found capable of doing  
12 so-called "sedentary" work, even though they can't handle  
13 the stress of the work for more than a short period of time.  
14 How does the system change in a real-life situation like  
15 that?

16           Mr. Enoff. Well, I think, Senator, that what you have to  
17 say is, where there is an indication that there is improvement  
18 that also the examiner is going to be looking at, again,  
19 can the person engage in substantial gainful activity? That  
20 is then going to be the test of whether they remain on the  
21 rolls.

22           If the examiner finds improvement --

23           Senator Heinz. All the examiner really has to do is  
24 make a judgment that the showing of non-improvement is  
25 sufficiently weak that this person really is capable of

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1 gainful employment.

2 I am trying to put myself in the job of the examiner,  
3 and I would want to know -- you know, what does "weak" mean?  
4 Or how do I know when there has been a sufficient showing?  
5 Or what do I have to do to disprove it? What is the burden  
6 on me, the examiner?

7 I am a little worried right now, because I am not getting,  
8 as a prospective employee of yours, very clear instructions.

9 Mr. O'Shaunnessy. Senator, let me raise a point. You  
10 will recall that when an individual comes in for the medical  
11 review, or for the review process, they are informed about  
12 the importance of medical information, and we do assist  
13 them in obtaining that.

14 Secondly, when the examiner is looking at the record,  
15 to the extent that additional medical advice is required,  
16 then the examiner is empowered to go out and obtain that.

17 So it is not as if an examiner is acting in a void here;  
18 they are seeking qualified medical assistance, professional  
19 assistance, at all points in this process.

20 Ms. Kuhl. Perhaps I could try to clarify.

21 When the issue is medical improvement, first of all  
22 there has to be some improvement shown; that is the test.  
23 And the burden being on the beneficiary, it has to be more  
24 probably than not that there has been some improvement,  
25 based on the information that the claimant and the claimant

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1 and the administrator have worked together to gather it.

2 Senator Heinz. The beneficiary is saying that he has  
3 to prove a negative.

4 Ms. Kuhl. Well, the examiner will have medical  
5 evidence in front of him, and the question is, has there been  
6 improvement? Or, is the condition the same, or worse?

7 But now, in addition -- and I think this is what you  
8 were trying to get at -- in addition to there having to be  
9 some medical improvement, you also have to have that  
10 improvement be related to his workability, so that if you  
11 have some improvement that is sufficiently minor, sufficiently  
12 unrelated to the real substance of the person's ability, that  
13 isn't enough. It has to be related to workability.

14 Then, separately, after you have come to that conclu-  
15 sion, you then go on to look at substantial gainful  
16 activity.

17 And remember, the fail-safe in all of this is always  
18 that the condition of the person has to be such that he can  
19 engage in substantial gainful activity. At the end of the  
20 process, this person has got to be found to be able to work  
21 in some way.

22 Senator Heinz. Let me ask you this last question. I  
23 have taken too much of the committee's time already, but I  
24 think is probably the key issue that we have to deal with,  
25 Mr. Chairman, and I wish it was the kind of thing you could

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1 handle under the five-minute rule. I apologize to my  
2 colleagues.

3 The Chairman. No problem, if we can settle this one.

4 Senator Heinz. Yes, this is the biggie.

5 Would it be a reasonable process to say the following?

6 The beneficiary comes in, and the beneficiary should present  
7 reasonable evidence that they have not medically improved.  
8 And at that point -- I am not a lawyer, so bear with me;  
9 what is reasonable seems to be "reasonable" -- what I think  
10 I hear you saying is that Social Security, the Social Security  
11 examiner plus any medical expert, then comes in and looks  
12 at all of the evidence, and then really says, affirmatively,  
13 "I have looked at all of the evidence, and, to the contrary,  
14 the preponderance of evidence shows that you have not  
15 medically improved"; that is, "there is more evidence,  
16 51 percent-plus preponderance of the evidence, shows that  
17 you have not medically improved. And in effect, you have  
18 rebutted the presumption that the beneficiary initially made  
19 showing reasonable evidence.

20 Now, is that what we are talking about here,  
21 Mr. O'Shaunnessy?

22 Mr. O'Shaunnessy. Yes, it is.

23 Senator Heinz. Is that what we are talking about here?

24 Mr. Enoff. I think so. You said "has not improved,  
25 and rebutted."

1 Mr. O'Shaunnessy. I think you meant "improved."

2 Senator Heinz. Yes, excuse me. All right. Let me  
3 try it one more time. Sometimes you drop a little word  
4 like "not" out, and it does mess up the record.

5 The beneficiary comes in, and he says, "I have not  
6 medically improved." And he provides reasonable evidence  
7 to you that he has not medically improved.

8 At that point the examiner consults a medical  
9 professional, his crystal ball, his medical listings, what-  
10 ever it may be, and he looks at all of the evidence taken  
11 as a whole and says, and is required to say I guess under  
12 your regulations, "No; the preponderance of evidence here,"  
13 that greater than 51 percent, "actually establishes that  
14 you have medically improved, and therefore you go on to  
15 the next step."

16 Now that is what you want to do.

17 Mr. Enoff. That is right.

18 Senator Heinz. Do you have any objection to our saying  
19 in the statute that that is what you want to do?

20 Mr. O'Shaunnessy. No. I believe that that is a fair  
21 description of what we are about.

22 Senator Heinz. Mr. Chairman, what I would like to do  
23 then is offer at the appropriate time an amendment that  
24 will track basically what we have just said. And as I  
25 understand it, they are in agreement with what we just talked

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1 about.

2 Senator Bentsen. Well, let me understand that, because  
3 I have some concern about this. I feel that, on this question  
4 of burden of proof, when you are talking about the well-being  
5 of an individual, that if you try to put all of that burden  
6 of proof upon the government, you have got yourself a real  
7 problem.

8 Senator Heinz. Well, let me repeat what I said.

9 Senator Bentsen. I must say I was interrupted, so I  
10 didn't hear what the distinguished Senator was saying; I  
11 just want to be sure where we are headed on this.

12 Senator Heinz. Well, we just had a discussion here  
13 where they say that the way the system ought to work with  
14 respect to medical improvement is that when a person comes  
15 in, he has to show reasonable evidence that he is not  
16 medically improved. So there is a burden of proof on the  
17 beneficiary in the first instance.

18 Then that burden of proof -- to make a short cut out of  
19 it -- establishes a rebuttable presumption initially in favor  
20 of the beneficiary, "intially" in favor. But it is rebuttable  
21 by the state agency acting as agent for HHS, that, looking  
22 at the evidence in its entirety, there is more evidence  
23 which suggests that the person has medically improved than  
24 that he hasn't; that is to say, the preponderance of evidence  
25 shows that the fellow really has gotten better. And that is

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1 what they say they want to do.

2 I am saying: If that is what they want to do, I would  
3 like to be sure that that is the way it operates.

4 Ms. Kuhl. Senator Heinz, could I clarify? Because there  
5 are a lot of knots in this, and we don't want to get into  
6 the sort of clever distinctions that lawyers make after  
7 the fact here.

8 But let me try to restate this in terms of what we have  
9 in mind here, and that is: The burden of proof, again, to  
10 prove more probably than not, is on the claimant, to show  
11 that his condition is the same as or worse than when he  
12 was previously evaluated.

13 If he is unable to show that a preponderance of the  
14 evidence -- in other words, after all the evidence is  
15 assembled, if looking at it the examiner finds that a  
16 preponderance of the evidence does not show that he is the  
17 same as or worse than he was before, then he has not met his  
18 burden. The Secretary then goes on to the next step.

19 I think what you were trying to say was -- perhaps we  
20 didn't understand what you were saying before, but I think  
21 what you were trying to say was, after that you would then  
22 somehow shift the burden over to the Secretary to show by  
23 a preponderance of the evidence.

24 Senator Heinz. No. I was saying what I was saying.

25 Ms. Kuhl. I am not sure we are understanding that, then.

1           Senator Heinz. Let me explain where there is a  
2 difference between what you said versus what I and the  
3 two men to your right said.

4           My thinking goes like this: The beneficiary isn't  
5 going to show up with doctors and a battery of lawyers to  
6 establish a case initially where the preponderance of  
7 evidence -- which is presumably the full basket of evidence --  
8 has got to be on his side. That seems to me to be a  
9 threshold that is too high for the average beneficiary to  
10 mump over.

11           I just want you to understand where I am coming from.

12           Therefore, what I thought we were talking about, and at  
13 least two out of three thought I was talking about, was  
14 that the beneficiary comes in, typically not being a lawyer  
15 or a doctor, and says, "Here is evidence, and some halfway  
16 decent evidence, some reasonable evidence, that my condition  
17 really is the same that it was 10 years ago; at which point,  
18 if the beneficiary has presented reasonable evidence, not  
19 "preponderant evidence," not an open-and-shut case but  
20 reasonable evidence, then the examiners will consult their  
21 tealeaves and their experts, and so forth, and look as experts  
22 at the largest possible body of evidence available to them,  
23 and they then say, as the facts fit the situation, "The  
24 preponderance of evidence, which includes my consulting a  
25 qualified medical professional" -- right? That's what they

1 do. -- "the preponderance of evidence after I have consulted  
2 somebody, which is a larger set" says Yes or No.

3 Ms. Kuhl. I now think that I understand what your  
4 problem is. There really are two issues. There is the issue  
5 of who has the burden of producing the evidence -- okay? --  
6 and the burden of who ultimately has to show that it is more  
7 probable than not -- okay?

8 Senator Heinz. That's right.

9 Ms. Kuhl. Because of the way --

10 Senator Heinz. In my final analysis, SSA, to come up  
11 with that last percentage point, that they have to come up  
12 and say, "Fifty-one percent of the evidence is that you have  
13 medically improved."

14 Ms. Kuhl. Because of the way Social Security  
15 operates, the burden of producing evidence is a shared  
16 burden -- that is, the examiner assists the claimant in  
17 developing his evidentiary record.

18 And it is only when the evidentiary record is as complete  
19 as it can be made and everything relevant is there that you  
20 reach the issue of which way does the balance tilt, and that  
21 is the burden of proof issue.

22 Our position on burden of proof, then -- and this is to  
23 try to take care of your problem that, you know, he is not  
24 a doctor and so forth and so on -- he has had the assistance  
25 of the examiner in developing his record. His record is as

1 complete as it can be.

2 And then the burden of proof, the burden of --

3 Senator Heinz. I have to tell you, this is not in any  
4 way to denigrate the examiners. I am sure most of them  
5 are well-meaning people.

6 I am a little nervous when you say the examiner is going  
7 to help the person develop their case, that the examiners  
8 are also under conflicting pressures. They have been told  
9 in the past, through a variety of mechanisms, and we have  
10 established these in hearings -- you know, they get sent  
11 messages.

12 Senator Moynihan. Ms. Kuhl, just a final word here.  
13 You have twice now said that when the examiner finds that  
14 the record is as complete as can be made, I don't think you  
15 have a record "as complete as can be made" until you have  
16 had three weeks in Sloane Kettering. "As complete as can  
17 be made" is an absolute aseertion.

18 The typical examiner is a GS-13 -- no? A GS-15?

19 Mr. Enoff. A GS-11.

20 Senator Moynihan. A typical examiner is a GS-11 and  
21 is not a medical doctor, and he is to determine that a  
22 medical review is "as complete as can be made"?

23 This is not an adversary relationship here, we are just  
24 trying to learn. That is not possible.

25 Mr. Kuhl. I am sorry, Senator Moynihan. We are trying

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1 to get the best mix of expertise that we can here. I am  
2 a lawyer, and I am trying to explain to you the burden of  
3 proof.

4 Senator Moynihan. But you see, this is going into our  
5 record.

6 Ms. Kuhl. I may have overstated the "as complete as  
7 can be."

8 Senator Moynihan. Don't feel bad if you have.

9 Ms. Kuhl. But the point I was trying to get across is  
10 that the burden does not relate to --

11 Senator Moynihan. But let me ask you: Do you mean  
12 "reasonably complete, given the resources of the community  
13 and the individual and the nature of the information that  
14 can be got"?

15 Ms. Kuhl. I am trying to indicate that the burden does  
16 not go to -- the claimant does not bear the sole burden of  
17 putting the record together.

18 The Chairman. Could I just interrupt? I have been  
19 speaking with Carolyn a lot about this.

20 There may be some who don't want -- we want to keep the  
21 burden of proof on the claimant and not shift it to the  
22 government. That is my whole point. There may not be enough  
23 votes to do that, but if we are going to say nobody can ever  
24 be taken off the rolls, then I am going to oppose everything  
25 that happens.

1 Now, we have been spending a lot of time on this.

2 Carolyn, do you understand the difference in what

3 Senator Heinz proposes and what we have?

4 Ms. Weaver. I think I do, yes. And I think you can  
5 understand it by referring to Attachment Three. I think I  
6 have pinpointed where Senator Heinz's concern is.

7 The Chairman. Is that page 1?

8 Ms. Weaver. Refer to the top of page 2, and then to  
9 the top of page 3. And it is really getting at the issue  
10 of burden of proof with regard to medical improvement. Okay?

11 At the top of page 2 it says, "If the Secretary finds  
12 that there has been no medical improvement in the individual's  
13 condition, then the Secretary has the burden to establish  
14 some other change in condition that might possibly warrant  
15 termination."

16 Note the language at the top of page 3. It is there,  
17 explicitly to maintain the burden of proof on the claimant  
18 in medical improvement cases. It says, "If the Secretary  
19 finds the evidence does not establish that the individual's  
20 impairment is the same as or worse than at the time of the  
21 prior determination," they you would proceed through the  
22 evaluation process.

23 It does not state, "If the Secretary finds the evidence  
24 in the record shows that he has medically improved," okay?  
25 This is indicating that there may be circumstances in which

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1 the case is either a poorly developed case, or a marginal  
2 change in condition, or whatever. The circumstances must  
3 demonstrate, on page 2, "the evidence in the file must show  
4 that there has been no medical improvement."

5 Senator Bentsen. I am having trouble finding which  
6 pages you are referring to.

7 Ms. Weaver. We are on Attachment Three.

8 Senator Moynihan. Can I ask a question here,  
9 specifically, Carolyn?

10 I wonder if there isn't a problem in the way the first  
11 block of language reads on page 2. Follow me, if you can,  
12 because I think we are going to be okay here. It says:

13 "If the Secretary finds that there has been no medical  
14 improvement in the individual's impairments, the Secretary  
15 then determines whether any of the following factors are  
16 met: (a) the individual has benefitted from medical or  
17 vocational therapy or technology."

18 This sentence reads as if it was a sequence that would  
19 be followed. What I think you mean is: "The Secretary must  
20 then determine" or "may then determine", or "that possibility  
21 is open." It doesn't automatically follow that that is the  
22 next thing you do. That sentence contradicts itself. Do you  
23 see?

24 Ms. Weaver. If there is no medical improvement, then  
25 the Secretary must demonstrate one of the following in order

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1 to continue to --

2 Senator Moynihan. Carolyn, you just used the word I  
3 said was needed here, that the Secretary "must determine -- "

4 As it reads, it just says "The Secretary then  
5 determines -- " as if this was an automatic sequence.

6 Do you follow me?

7 The Chairman. That would be mandatory.

8 Ms. Deaver. I think that is what we mean; that is, you  
9 must proceed. If it is a case of no medical improvement,  
10 you must proceed through that process before determining  
11 whether the individual --

12 Senator Moynihan. I am not being picky; this is  
13 absolutely essential. As it reads here, it is not "required."  
14 I says the next thing the Secretary does is this. Well,  
15 you can use "must," then. I think "shall" is also  
16 automatic.

17 Carolyn, you used the word "must."

18 Ms. Weaver. I don't believe there is a difference. I  
19 mean, I don't believe that what you are arguing is causing  
20 us any problem, that there is any difference here.

21 Senator Moynihan. Do you mind putting "must" in there?

22 Ms. Weaver. I am not aware of that creating a problem.

23 Senator Moynihan. That "The Secretary must then  
24 determine whether any of the following factors are met"?

25 The Chairman. I think that was the intent. If it is not

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1 clear, we ought to make it clear.

2 Ms. Deaver. That was the intent, yes.

3 Senator Moynihan. Well, how much nicer it would be to  
4 see it.

5 The Chairman. Well, now it has been clarified.

6 Ms. Weaver. We will.

7 The Chairman. Does that answer Senator Heinz's problem?

8 Ms. Deaver. Well, I think page 2 is the clearest  
9 statement of how burden of proof works, in the sense that,  
10 if the claimant provides the information with the help of  
11 the Secretary, that there has been no medical improvement,  
12 then what happens is that, on a mandatory basis, the burden  
13 of proof shifts to the Secretary to establish some other  
14 change in condition that might warrant termination. And  
15 then she runs through and does a regular evaluation of  
16 ability to work.

17 I suspect Senator Heinz's concern still comes on page 3.

18 Senator Heinz. Carolyn, one of the things that I think  
19 may confuse us is that on page 2 the Secretary is affirmatively  
20 charged with finding that there is no medical improvement.

21 And then, on page 3 the Secretary -- presumably it is  
22 the same person -- simply has to find that the evidence  
23 doesn't establish that the individual's impairment is the  
24 same as or worse than. Now, those are supposed to be saying  
25 the same things, but they say it in very different ways, and

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1 in the way they say it, the burden on the Secretary is quite  
2 different.

3 Ms. Weaver. I will try to explain this, and if I make  
4 an incorrect statement possibly Carolyn Kuhl can step in.

5 This is my understanding, and this is central to  
6 maintaining the burden of proof on the claimant with regard  
7 to medical improvement. So this states two different things:

8 Number one, if the individual's case has clearly improved  
9 and it is clear on the face of the record, then he would  
10 fall into this category.

11 There are other circumstances where the record is  
12 simply not clear, because of some inadequacy of the original  
13 file, or it is just unclear, the weight of the evidence,  
14 whether or not the person has improved.

15 Unless the weight of the evidence establishes that  
16 his condition is the same or worse, then we would continue  
17 through the procedure.

18 The Secretary does not have to make a positive finding  
19 that his condition has gotten better -- not necessarily. It  
20 may well be that that can be demonstrated.

21 Senator Heinz. When one of these cases ends up before  
22 an Administrative Law Judge, what happens? What does the  
23 Administrative Law Judge ask who to establish?

24 Ms. Kuhl. That is exactly what we have described.  
25 That is what happens.

1           Senator Heinz. What I have described, or what they  
2 have described, or what you have described?

3           Ms. Kuhl. No, what Carolyn has just described. That  
4 was an accurate statement of it. And the only reason for the  
5 terminology about the Secretary determining is that ultimately  
6 when the final issue is reached, it is the Secretary's  
7 determination, after all, that the stages of review are  
8 gone through. We call it "the Secretary's determination."

9           Senator Heinz. Well, I would just like to hear in  
10 your own words, if I may, how that works before the  
11 Administrative Law Judge.

12           Does the Administrative Law Judge put any burden on  
13 anybody? Or what does he do?

14           Ms. Kuhl. After the evidence is collected, he looks  
15 at the evidence before him, and he determines whether by  
16 a preponderance of the evidence the claimant has shown -- or  
17 whether "the evidence shows," if you want to put it that  
18 way -- that the person's condition is the same as or worse  
19 than previously. And that is the determination that is made.

20           Senator Heinz. Thank you.

21           The Chairman. As I understand, you may have an  
22 amendment in this area, John?

23           Senator Heinz. I may, Mr. Chairman, yes.

24           The Chairman. Senator Long?

25           Senator Long. I am looking at what I took home with

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1 me last night in trying to do justice to the case of  
2 Lorraine Polaski against Margaret Heckler, a class action  
3 decided by a District Judge against the Department.

4 Now, does this represent a departure from the view  
5 taken by the Secretary in that case?

6 Mr. O'Shaunnessy. We have a Mr. Don Gonya from the  
7 Social Security Administration, one of the lawyers for SSA,  
8 who can best address that.

9 Mr. Gonya. Yes.

10 Senator, that Polaski case would represent a case where  
11 it was decided under a medical-improvement standard,  
12 contrary to the present agency policy which would be a  
13 current-medical evidence standard.

14 We would disagree with the conclusion that was reached  
15 in Polaski.

16 Senator Long. But I am asking: As far as the  
17 Secretary's position, does what is being proposed here  
18 represent a departure from the position taken by the  
19 Secretary or by the Department in that Polaski Case?

20 Mr. Gonya. In Polaski, Judge Lloyd did describe what  
21 his concept was of "medical improvement."

22 Senator Long. I know what he described; I've got the  
23 case right here. I read it. But there is language in that  
24 case. The Judge said a lot about the medical improvement, and  
25 he also said a lot about the standards to be applied.

1 I just want to know if this represents a departure from  
2 the position taken by the Department in the Polaski Case.--  
3 what you've got here now.

4 Mr. Gonya. Senator, Judge Lloyd in Polaski did not get  
5 into the burden of proof or the burden of persuasion and  
6 the procedural issues that we are discussing here this  
7 morning.

8 Senator Long. Well, he described what he thought the  
9 Secretary's position to be in that Polaski Case, and I assume  
10 that that is what the Secretary's position was at that time.

11 I want to know if what is being considered here repre-  
12 sents what the Department's position was then or if it  
13 represents a departure from that position.

14 Ms. Kuhl. Senator, the Secretary's view is that current  
15 law has no reference to any medical-improvement standard.  
16 And that is the position that was taken by the Secretary  
17 in the Polaski Case.

18 Senator Long. And what you are saying here does have  
19 reference to a medical-improvement standard?

20 Ms. Kuhl. That is correct, Senator.

21 Senator Long. Well, let me say this, then. I didn't  
22 think that the judge in that case was fair to the Secretary.  
23 I don't think that he correctly construed what the majority of  
24 us had in mind when they passed the law, and it seems to me  
25 as though the position taken by the Secretary makes better

1 sense and is more like what Congress intended than was this  
2 decision by this District Judge in that case.

3 Now, here is my impression of this thing: I just don't  
4 think you can look at this whole thing without reference to  
5 what has been going on here. And I think the judge was  
6 in error in the way he construed all of this.

7 Now, I voted, and I was a cosponsor of this disability  
8 thing at the time the Department was opposing it. That has  
9 been many years ago. That was when the thing first got  
10 started. I was one of the cosponsors.

11 Walter George who was the former chairman of the  
12 committee was the principal sponsor; he stood out there on  
13 the floor and explained what we had in mind. And basically  
14 the type of standard he had in mind when he spelled it out  
15 to the Senate would amount to about 1 percent of our work-  
16 force being on the disability rolls.

17 Now, in due course this thing expanded to where you had  
18 about 5 percent of our workforce being on the disability  
19 rolls.

20 At that time, Secretary Califano, speaking for  
21 President Carter, recommended that we in the Congress should  
22 not try to raise taxes enough to pay the whole five percent,  
23 that we should raise taxes to take care of about the 2.3 that  
24 we have now, and that we should call upon the Department to  
25 take a closer look at these cases on the theory that we had:

1 far too many on the rolls the way it was.

2 So, we proceeded to vote language which I assume was  
3 put in that statute, fully cleared with Secretary Califano --  
4 who is not a bad lawyer himself.

5 So the whole purpose of it was to tighten up on what is  
6 sad because we have too many people on here, far more than  
7 we had in mind.

8 Now, here is a quote from this Polaski Case. And  
9 incidentally, the Judge granted a class action and proceeded  
10 to undertake to tell the Department that in about seven  
11 States, or some such thing as that, all the way from  
12 Arkansas to Minnesota, you had to put all of these people  
13 on the rolls under a standard that the Judge calls "Eighth  
14 Circuit Law," mind you -- not Congress law, not Supreme  
15 Court law, but "Eighth Circuit Law." Okay?

16 Now let me just read this one sentence. He is  
17 quoting from a Law Review article written by another judge.  
18 This is how he views it:

19 "The Act is a remedial one which should be broadly  
20 construed and liberally applied to effectuate its humanitarian  
21 goal."

22 Now, I am telling you, if that is how it is going to  
23 be, we had better put about a 5-percent across-the-board  
24 tax on Social Security that is not there now, because that  
25 is what you are asking for; if you are going to broadly

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1 construe and liberally apply to establish a humanitarian  
2 goal.

3 Now, as I understand it, this case says that you are  
4 to put these people on the rolls, if you don't have anything  
5 more to go on, if you can't rebut their own self-serving  
6 statement about their pain, that they would go on the rolls.  
7 That is the way I read that case. Is that the way you  
8 read that, Ms. Kuhl? Or Mr. Shaunnassy? Who is familiar  
9 with that case here?

10 Mr. Gonya. Me. Don Gonya, Assistant General Counsel  
11 for Social Security.

12 The sentence that you refer to, Senator Long, is not  
13 an unusual statement that unfortunately you may find in  
14 many court decisions as to the remedial nature of the  
15 legislation.

16 As Ms. Kuhl indicated, we disagree with the conclusions  
17 that were reached in the Polaski Case; it did not apply the  
18 present Agency standard. It disregarded the arguments that  
19 were made.

20 Senator Long. I know what we had in mind, because I  
21 am one of the living cosponsors at the time we passed that  
22 thing.

23 We intended to have a strict standard for disability.  
24 It was intended to be a very strict standard for disability.  
25 All you have to do is read Walter George's speech; that was

1 put into effect by a Senate floor amendment, not favored by  
2 the Department at the time. And we didn't intend for the  
3 standard to be liberally applied. We didn't have in mind  
4 putting people on the rolls by their own representation of  
5 pain which could not be supported by medical evidence.

6 Then when we amended the Act, at Secretary Califano's  
7 recommendation, we called upon the Department to tighten  
8 up.

9 We didn't mean that these people would be put on the  
10 rolls simply on the basis of their own self-serving  
11 evidence, their own self-serving declarations. It was  
12 intended that there be some sort of medical proof for it.

13 Now, the judge in this case discusses what he thought  
14 the Secretary's policy was at that point, which seemed to  
15 me to make better sense than what we are looking at at this  
16 moment.

17 The way I read it -- he didn't spell it out this way,  
18 but this is what it would mean to me -- is that when you  
19 would examine a recipient, you would examine this recipient  
20 to find out if they were disabled according to the language  
21 in the Act. And the language in the Act talked about whether  
22 he would be able to do any "substantially gainful" task.  
23 Okay.

24 And if that person is not disabled, basically if they  
25 are able to do some substantially gainful activity, then you

1 you don't have to prove that the person was qualified to  
2 begin with or not qualified to begin with. If the person  
3 is not disabled, it would seem that either the person never  
4 was disabled or the person's condition has improved. It  
5 might be by medical treatment, or it just might be by the  
6 healing effect of nature.

7 But in any event, why should a person be on the rolls if  
8 a person is not disabled now?

9 Ms. Kuhl. The Senator has correctly stated what the  
10 current view of the law is from the Department of Justice  
11 and Social Security. That is our current view of existing  
12 law, Senator.

13 Senator Long. Well, would anybody tell me now, from  
14 the Department, if you examine the person and they are not  
15 disabled, what difference should it make if they were  
16 found disabled at some earlier point?

17 Mr. O'Shaunnessy. Senator, let me address that.

18 What we have been trying to do here is to stay as closely  
19 in accordance with the original intent of the Disability  
20 legislation that we can, at the same time that we have been  
21 trying to deal with groups that have had other views with  
22 regard to what is the appropriate standard. And what we are  
23 coming up with, we feel, is a change which we trust will be  
24 adequate to give us a national uniform program which has the  
25 support of the States and the Congress.

1           Senator Long. Well, just in terms of common sense,  
2 I would like to know from you or anybody else here, if the  
3 person is not disabled, if a person can engage in  
4 substantially gainful activity, they why should the person  
5 be on the rolls?

6           Mr. O'Shaunnessy. Well, Senator, we are proposing that  
7 we certainly get to that test of substantially gainful  
8 activity, but we are interposing one additional step before  
9 that, and that has to do with the question of whether there  
10 has been medical improvement, which we have discussed here.

11           We feel that step is necessary in view of the concerns  
12 that have been expressed, in the States in particular at  
13 this point.

14           Senator Long. Well, you see, by the time you get  
15 involved in that it seems to me as though you're arguing about  
16 how did the person come to improve? Maybe it was nature.  
17 Maybe it was the drug that the person took.

18           A while back I had trouble with my leg and carried a  
19 bunch of pills around with me -- had some difficulty getting  
20 around. Since that time it has all gone away, and I don't  
21 know whether medicine did it or what did it, but it's gone.  
22 I'm fine today. And what difference did it make why it  
23 happened? It seems to me if the disability is no longer there,  
24 it's just not there, and there is no reason why anybody should  
25 do anything about it any further, including there is no reason

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1 why anybody should pay anybody anything for it, even for  
2 treatment.

3 Mr. O'Shaunnessy. Well, we believe that with the  
4 standards that we are now talking about, that even where  
5 there has been a case of no medical improvement we would  
6 still be able to get into that question of therapeutic  
7 devides and the other items which are identified on page 2  
8 of the committee's handout here.

9 So, I think the question you are specifically raising  
10 would be adequately treated.

11 Senator Danforth. Can you imagine any hypothetical case  
12 of a person who is able to perform a substantially gainful  
13 activity, and who would still be eligible for disability,  
14 because the Government couldn't meet one of the additional  
15 standards?

16 Mr. O'Shaunnessy. I think that is certainly a possible  
17 outcome. Yes.

18 Senator Danforth. Can you tell us a hypothetical?  
19 Because I can't think of one. I mean, it is my guess that  
20 items 1 through 7 cover everything.

21 Ms. Weaver. One problem might be demonstrating, for  
22 example, with substantial reason to believe that the original  
23 decision was erroneous. Okay, that's one area where you may  
24 have difficulty.

25 Senator Danforth. But if you have a situation where --

1 let's hypothesize a person who can engage in a substantially  
2 gainful activity and who has formerly been on disability.  
3 It would be difficult to imagine the case that couldn't  
4 be fitted into one of the 7.

5 Mr. O'Shaunnessy. Senator, if I might address that?

6 I believe the items which are specified here are really  
7 quite specific, for example with regard to benefitting from  
8 medical or vocational therapy or technology, as well as new  
9 and improved diagnostic and evaluative techniques, as well  
10 as showing that the original determination was fraudulent.

11 Senator Danforth. To me, this says that the person  
12 is now able to engage in substantial gainful activity, and  
13 the difference is either that the person was erroneously  
14 put on disability in the first place, by fraud or by factual  
15 error or by diagnostic methods which are antiquated; or,  
16 in the alternative, the person has improved. And the person  
17 has improved either because the person has improved by  
18 nature or the person has improved because of some sort of  
19 therapy.

20 So I have to say that I am in general agreement with  
21 Senator Long's position. But I am not sure what has been  
22 by 1 to 7 other than to satisfy the criticisms of those  
23 who think that --

24 Mr. O'Shaunnessy. Once again let me point out that  
25 in this particular area we are talking about, "What is the

1 burden on the Secretary to show that any of these conditions  
2 do exist?"

3 Senator Danforth. Let us suppose a hypothetical case  
4 where a person is clearly able to engage in substantial  
5 activity but is not working, and the Secretary isn't sure  
6 what the reason for the change in status is; the Secretary  
7 isn't clear exactly why. Maybe the person never should have  
8 been on disability; maybe the person has just gotten better.  
9 The Secretary is not sure of that. In that case, would the  
10 person continue to be eligible for disability insurance?

11 Ms. Weaver. Yes.

12 Mr. O'Shaunnessy. Well, we would not get to that  
13 "substantial gainful activity" test until we had followed  
14 the procedures set out.

15 Senator Danforth. So if the Secretary didn't know what  
16 happened, but if it was absolutely clear that the individual  
17 was as healthy as a horse, the individual would still be  
18 eligible for disability insurance?

19 Ms. Kuhl. Well, the question would be -- the person  
20 might be as healthy as a horse, but you still have the  
21 obligation to compare his condition to his prior condition.

22 Senator Danforth. Right. But if you don't know, if  
23 it is "Well, we don't really remember; our files aren't  
24 good," and maybe the person was malingering, maybe the person  
25 was temporarily ill, maybe the person has eaten health food,

1 if we don't know the reason for the improvement but this  
2 person is obviously healthy as a horse, we can't put our  
3 finger on the reason, therefore the person gets disability  
4 insurance?

5 Ms. Kuhl. But you have to determine whether there  
6 has been medical improvement without reference to the  
7 person's current condition. Is that right, Carolyn?

8 Ms. Weaver. I think it goes to page 3, which is to  
9 say that the evidence does not establish that his impairment  
10 is the same or worse than when he came on.

11 If the evidence does not establish that, which is the  
12 circumstance you are describing, then we would proceed  
13 directly to determine whether he could or could not work.

14 Okay?

15 It is only where the evidence shows that his condition  
16 has deteriorated or stayed the same that you would have to  
17 go through one of these other procedural protections.

18 People are trying to protect the person who has clearly  
19 either deteriorated in condition or remained the same. The  
20 person you described, we just don't know what he used to be  
21 like but you can tell he's healthy, he has not met the  
22 burden. The evidence in the case will not show that he is  
23 the same as or worse than when he came in, and you would  
24 proceed as on page 3 to determine his workability and  
25 terminate him, because he would have been found to --

1           Senator Danforth. So in that hypothetical case, where  
2 you can't put your finger on the reason for the improvement  
3 but it is clear that the person is able to work now, that  
4 person is off disability?

5           Ms. Weaver. As long as there is not contrary evidence  
6 that indicates he deteriorated, yes.

7           Senator Danforth. But what if you are not sure that  
8 the person -- maybe the person is better, maybe the person  
9 is worse, but the person is obviously very healthy.

10          Ms. Weaver. You are describing again a case where the  
11 weight of the evidence would not show that his condition is  
12 the same or worse. That is central to the burden of proof  
13 issue, and he would be terminated under this procedure.

14          Senator Danforth. Then let me again renew the question:  
15 In that case, do these 7 tests provide anything in addition  
16 to the substantial gainful activity test?

17          Ms. Weaver. For the individual who has shown no  
18 improvement in his medical condition, you must identify a  
19 change in his condition or an improvement before you can even  
20 ask whether he can do substantial gainful activity.

21          So if his condition is the same or worse than when he  
22 came on, even if you know he can now perform substantial  
23 gainful activity, before you could terminate him from the  
24 benefit rolls a judgment would have to be made. You would have  
25 to be made. You would have to pinpoint which of those

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1 exceptions was met: Had he benefitted from vocational  
2 therapy? Had it been fraudently obtained? Had it been  
3 an erroneous initial?

4 We would expect, given the construction of the  
5 medical improvement standard, that you should be able to  
6 identify one of those items.

7 Senator Danforth. Again, the hypothetical is: "We are  
8 not clear what has happened; we are not clear whether the  
9 person has been on a health program or not; we are not even  
10 entirely certain what the case was two or three years ago.  
11 Frankly, we don't have that good a memory; our records aren't  
12 that good; the person who worked on the case is retired and  
13 moved to Florida; we are not sure; we have an individual before  
14 us now who we think can engage in substantial gainful  
15 activity."

16 Ms. Deaver. It all turns on that original question of  
17 the evidence in the file pertaining to medical improvement.  
18 Okay?

19 If the evidence in the file demonstrates that his  
20 condition is the same or worse than originally, then if you  
21 cannot pinpoint another reason for his change in condition  
22 he would be allowed benefits. He would not go on and  
23 determine workability.

24 On the other hand, if the evidence in the file does not  
25 demonstrate that his condition is the same or worse, then

1 we would be to present law, present practice. You would go  
2 straight to a determination of workability.

3 The protections are really for those people whose  
4 medical conditions have deteriorated or remained the same.

5 Senator Long. I just want to get this straight. Now  
6 let's us just take a case where a person is not presently  
7 disabled -- you know, if they came in as a new applicant  
8 they couldn't meet the test, couldn't be on the rolls.

9 You can't demonstrate that the prior determination was  
10 fraudulent. You are in no position to do that. You can't  
11 demonstrate that there is substantial reason to believe that  
12 this finding is erroneous. You can't demonstrate that they  
13 benefitted from medical or vocational therapy. While they  
14 are in good shape, you can't demonstrate it. You can't  
15 pinpoint it. You can't prove any one of them.

16 And yet clearly that person is not qualified to be  
17 on the rolls as a disabled person. Would that person have  
18 to continue on those rolls?

19 Ms. Deaver. Only if the evidence in the files shows that  
20 his medical condition is the same or worse than when he came  
21 on.

22 Mr. Enoff. And that would be the burden of the claimant  
23 to show.

24 Ms. Deaver. Yes, and that would be his burden to show.

25 Senator Long. Well now, it would seem to me as though

1 if we have to buy that, it looks to me as though we've got  
2 a right to at least presume that he was qualified to start  
3 out with, because if I just take a case of a client I once  
4 represented -- here was this guy who couldn't get around.  
5 His back hurt him so bad he couldn't do anything. The  
6 doctor didn't seem to think so, the doctor next door who had  
7 examined him.

8 But he persisted. So I pursued this claim for him.  
9 And one day my client got on the elevator ahead of me --  
10 I went down to get a cup of coffee, and his elevator stopped  
11 on the way down a couple of times. So I was at the entrance  
12 of the building when he hit the street. Well, he pranced out  
13 of there like he was ready to play football that day. And  
14 I lost confidence in my case on that situation.

15 (Laughter)

16 Senator Long. If my client could run out into the  
17 street like he was ready to play a football game, a great  
18 big husky fellow like that, I didn't think I was going to win  
19 that lawsuit against good opposition.

20 Now, it turns out that a doctor had examined the man  
21 and found that when bending over he was in great pain; but  
22 when you sat him down in the same position, he didn't feel  
23 any pain. In fact, that's one of the tests a doctor would  
24 use, from his point of view, to find out whether he was  
25 telling the truth or not. So the doctor didn't think the

1 man was suffering from the pain that he claimed.

2 And if we have to go back and prove that some person  
3 was fraudulently on the rolls, or something of that sort,  
4 why it would seem to me that we are stuck. But if you say,  
5 "Well, look, back at this time it says that the man was  
6 disabled; he couldn't run, he couldn't stand up straight,  
7 it hurt him to do all these various things, but now we don't  
8 think so. Clearly he has improved." Now, do we have to  
9 bear the burden of proving anything more than that? Because  
10 if we do, I think that's not right.

11 Mr. O'Shaunnessy. Senator, according to these provisions  
12 we would then have to go into that second subset of items  
13 such as showing that the first one was fraudulently obtained,  
14 the first decision was fraudulently obtained, or there  
15 is substantial reason to believe that the prior determination  
16 was erroneous.

17 Senator Long. But "substantial reason." Not "reason  
18 to believe," but "substantial reason."

19 Now, I see you have an estimate on this item of  
20 \$2 billion -- \$2,240,000,000 -- for the medical-improvement  
21 test. I am told that that has mainly to do with this item D  
22 here "that there is demonstrated substantial reason to believe  
23 that the prior determination was erroneous." Is that correct?

24 Mr. Enoff. I am sure that you are correct, Senator, that  
25 a large portion of that -- I can't give you the exact amount

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1 although I could probably get it for you -- is substantial.

2 Yes.

3 Senator Long. Well now, if the person is not disabled  
4 now, why do you have to prove that there is "substantial  
5 reason" to believe that, or that the termination was  
6 fraudulent? Why isn't it adequate that either he has  
7 improved -- thanks to nature, thanks to God almighty, he  
8 has improved.

9 I believe miracles happen every day. It might happen  
10 right in this committee room for all we now, right now. So  
11 something has happened. The man is improved.

12 Mr. O'Shaunnessy. Senator, if the evidence shows that  
13 there has been medical improvement, then we would go to the  
14 next step in the process which is to look at substantial  
15 gainful activity.

16 This item we have been discussing was in the case where  
17 the individual could show that they had not improved.

18 Ms. Weaver. Unless his evidence in his file demonstrates  
19 that his condition is the same or worse than when he came on  
20 the rolls, we would basically go directly to a substantial  
21 gainful activity test as under present law.

22 Senator Long. Well now, if he can engage in  
23 substantially gainful activity, would you still remove the  
24 person from the rolls, whether you can prove just precisely  
25 how or not?

1 Ms. Deaver. Only if he doesn't begin by -- if the  
2 evidence shows that he is worse off than when he came on the  
3 rolls, then you would have to pinpoint one of those other  
4 reasons.

5 But you are describing somebody who would not have a  
6 record of evidence that demonstrated that he was worse off.

7 Senator Long. I know. That is what I am talking about.

8 Ms. Deaver. Okay. So you would be describing somebody  
9 on page 3 of Attachment Three, and he would be determined  
10 just as under present law. He is either better off, or  
11 we don't know. The evidence in the file does not demonstrate  
12 that he is worse off than when he came on the rolls, and  
13 you would go directly to present procedures of determining  
14 substantial gainful activity.

15 The Chairman. And if he can, he would be off.

16 Ms. Deaver. And he would be terminated. Yes.

17 Senator Danforth. What if the person has a doctor?  
18 What if the person comes in with his doctor, and the doctor  
19 says, "Look, I've treated this person for the last five years,  
20 and the person is in the same condition that he was in five  
21 years ago," period. That is my evidence.

22 Ms. Deaver. You would also look at what evidence was  
23 considered at the time that he was first put on the rolls.  
24 That evidence would also be considered.

25 Senator Danforth. He complained that his back hurt.

1 Perhaps he had whiplash.

2 Mr. Enoff. It wouldn't be just a statement that would  
3 be used; it would have to be findings from any kind of  
4 test that would be related to the impairment, Senator.

5 Ms. Deaver. And the Secretary has the right to secure  
6 additional information on the original condition and the  
7 present condition, and add evidence to the file in both  
8 cases.

9 The Chairman. All right. Let's move on to the other  
10 16. Are there any questions about the other 16 items?

11 (Laughter)

12 Senator Pryor. Mr. Chairman, may I ask a question at  
13 this point?

14 The Chairman. Senator Pryor?

15 Senator Pryor. What is the status under this proposal  
16 by SSA? What is the status of the individuals who have  
17 already been taken off of the rolls, let's say subsequent to  
18 the Belman legislation, to the Belman Amendment?

19 What do they have to do? Are they unique, in a unique  
20 situation? Do they have to refile their claims?

21 Mr. Enoff. I am not sure which proposal you are talking  
22 about, Senator Pryor.

23 Mr. O'Shaunnessy. Senator, we would hope to get into  
24 that matter on the discussion of the effective date.

25 The Chairman. The effective date is where that comes in,

1 David.

2 Senator Pryor. Well, all right.

3 The Chairman. We had a recommendation there, but it  
4 may not be the -- I hope we have the votes. Is that the  
5 next item?

6 Ms. Deaver. Do you want to go to that item?

7 The Chairman. I think that will be the next. We will  
8 do it right now.

9 Ms. Deaver. Referring to the back of Attachment Three  
10 is a detailed explanation of who the medical improvement  
11 standard would apply to, and that is the question of  
12 effective date.

13 The last two pages of Attachment Three.

14 (Pause)

15 The Chairman. I am sure we all have that -- the  
16 Effective Date of Medical Improvement Standard, right?  
17 Dated May 15th?

18 Ms. Deaver. Yes.

19 What this basically outlines is a proposal for exactly  
20 who would be redetermined or determined under the new  
21 medical-improvement standard.

22 As described, anybody reviewed in the next three years  
23 prior to the sunseting of the medical-improvement standard  
24 would be determined under this new rule, and then we outline  
25 exactly which of those pending appeals process cases or

1 court cases would be considered under the new federal  
2 medical-improvement standard.

3 Basically, the group included would be all of those  
4 people who are in the administrative appeals process; that  
5 is, pending an appeal, for example, to the Administrative  
6 Law Judge, or within the time period necessary to request  
7 an appeal.

8 All of those people would be redetermined under the  
9 medical-improvement standard.

10 In addition, all of those people who have filed  
11 individual court cases would be redetermined under the  
12 new medical-improvement standard. In effect, their cases  
13 would be remanded to the Secretary for redetermination.

14 In addition, all named litigants in class-action suits  
15 would be redetermined under this standard. They would be  
16 remanded back to the Secretary for redetermination.

17 In addition, all members of class-action suits which  
18 have already been certified -- that is, the judge has  
19 already determined the size and nature of the class -- all  
20 those people would be individually notified and provided  
21 60 days in which to request redetermination by the Secretary.

22 That is, this medical-improvement standard's line items,  
23 which of the people in outstanding court cases would be  
24 readjudicated under the standard, and the redetermination  
25 would be done by the Secretary under the federal standard.

1           The group who would not be covered by the medical-  
2 improvement standard would be the unnamed members of class  
3 action suits where the class has not yet been certified.

4           Senator Pryor. What number are you talking about?

5           Ms. Deaver. Well, since there are 20 outstanding, about  
6 20, pending class action suits where we do not yet know the  
7 certification of the class. Potentially there could be a  
8 nationwide class action suit certified, opening up all  
9 terminations since 1981. So we are looking at a number of,  
10 say, I believe 100-200,000 additional cases.

11          Senator Pryor. By the way, just a moment ago I mentioned  
12 the Belman Amendment, and I think that threw you off.

13          Ms. Deaver. Yes.

14          Senator Pryor. Of course that applies to the ALJ  
15 spectrum. But I guess my question would be those who have  
16 been taken off the rolls since the changes have been made --  
17 I guess in 1981. Would that be correct?

18          Ms. Deaver. In 1980. Presumably those people --  
19 anyone who has filed a suit or is properly before the court  
20 or appealing within the Department would be picked up under  
21 this new medical-improvement standard.

22          Senator Pryor. Would they have to be in a class-action  
23 suit in order to go back into court and have their case  
24 litigated?

25          Ms. Deaver. There are certainly people out there.

1 Unless there were a nationwide class-action suit  
2 certified, there would be a good number of people who got  
3 terminated, terminated at a couple of stages of appeal, and  
4 then just dropped out of the process.

5 Unless you were to have a nationwide class-action  
6 suit, those people would not be affected by any court  
7 action.

8 Senator Pryor. I am beginning now to wonder about the  
9 massive number of people who are going to be going back and  
10 seeking a readjudication of their cases.

11 I did a little check yesterday, and as of April the  
12 30th of this year 30 percent of all of the cases in the  
13 Western District of Arkansas in Federal Court are Social  
14 Security cases -- 30 percent, one-third of the caseload.

15 I am just wondering if the Administration has taken  
16 cognizance of this fact, as to what we are possibly getting  
17 ready to do to the court system here.

18 Ms. Deaver. No. In terms of the court system, the  
19 way this procedure is set up would be to effectively relieve  
20 the court of the obligation of continuing with these cases.  
21 These cases would be remanded back to the Secretary. The  
22 burden would then be the Secretary's to redetermine all of  
23 these cases.

24 Senator Pryor. They may get back into the District  
25 Court system, though.

1 Ms. Deaver. Yes.

2 Mr. O'Shaunnessy. That is correct. Carolyn has stated  
3 that, Senator.

4 Senator Moynihan. Could we hear that again, Carolyn?  
5 If we pass this bill, what then happens to this great set of  
6 cases that are before the courts now?

7 Ms. Deaver. All of the individuals that have pending  
8 individual suits or are named in class-actions, or who are  
9 covered by already certified class-action suits, would either  
10 be directly remanded to the Secretary for redetermination of  
11 eligibility, or they would be given 60 days to request  
12 a redetermination of eligibility. And that would be done  
13 by the Secretary.

14 Senator Moynihan. I take it nobody would be in court  
15 if they had not been denied eligibility.

16 Ms. Deaver. Yes.

17 Senator Moynihan. But then they come back.

18 Would you characterize this as -- this is the kind of  
19 determination proceeding which the litigants would regard  
20 as an improvement in the situation which had led them into  
21 the situation they are now in. That's pretty clear.

22 Ms. Deaver. This would be very favorable to many of  
23 these people, to be brought back into the Department for  
24 readjudication under a new --

25 Senator Moynihan. Under these new medical-improvement

1 standards.

2 Ms. Deaver: Yes. And we would also intend under  
3 this proposal that an individual who is remanded or given the  
4 right to be readjudicated, that they would be able to  
5 elect interim payments beginning with the month they are  
6 remanded back to the Secretary.

7 And if indeed the determination is made that they are  
8 eligible, they would be made whole for that period that they  
9 had failed to receive benefits.

10 Senator Moynihan. Right, this is my point, that they can  
11 make bets, if you like, that they are right, and that they  
12 are going to be put back into the program, and they can  
13 immediately begin resuming their payments, which is only  
14 just if indeed it turns out they are kept in the program and  
15 they need the program.

16 The Chairman. You can't lose.

17 Senator Moynihan. Well, you can lose, because if you  
18 lose you have to pay it back, right?

19 Mr. O'Shaunnessy. That is right.

20 Senator Moynihan. Oh, you can lose. You can lose a  
21 lot.

22 Senator Danforth. Mr. Chairman, let me ask: Is the  
23 basis of the cases that although the people are able to  
24 engage in a substantial gainful activity, still they should  
25 be on disability? Is that the basis of the case? Do they

1 concede? Do the litigants concede that they can perform  
2 substantial gainful activity?

3 Ms. Kuhl. The basis of the cases that I think we would  
4 be talking about remanding or taking care of in the context  
5 of this legislation would be cases where there was a claim  
6 that the Secretary should have applied some medical  
7 improvement type standard but did not apply some medical  
8 improvement type standard, so that if there was just an  
9 argument being made that the Secretary measured substantial  
10 gainful activity under the wrong standard or something  
11 unrelated to medical improvement, those cases I think would  
12 be unaffected by this.

13 Senator Danforth. So the theory of the cases, as I  
14 understand it, is that the litigants claim that while they  
15 can perform substantial gainful activity, still they should  
16 draw disability insurance because their condition is the  
17 same as it has been.

18 Ms. Deaver. That's right, that the Secretary should  
19 have considered whether they had medically improved.

20 The Chairman. Many were in good health and are still  
21 in good health, and they want their payments.

22 Ms. Deaver. That is correct, Senator.

23 Senator Danforth. And that is exactly what the bill  
24 is designed to do. The bill is designed to say, "You're  
25 right. You don't have to go to court anymore. You don't have

1 to go to work anymore. You can perform substantially  
2 gainful activity, but for our purposes that is irrelevant."

3 Mr. O'Shaunnessy. Senator, I might point out that the  
4 statement that the individuals would claim that they can  
5 perform substantial gainful activity is one that many of them  
6 may not have made. In fact, what they are asserting is that  
7 there should be a different standard applied solely with  
8 regard to medical improvement.

9 Senator Danforth. But that is the theory of the case.

10 Mr. O'Shaunnessy. Perhaps in some cases.

11 Senator Danforth. If the only theory of the case were  
12 substantial gainful activity, they would be in the soup,  
13 wouldn't they?

14 Mr. O'Shaunnessy. Yes, that is correct.

15 Senator Danforth. And the only cases that this would  
16 wipe out and therefore relieve the Western District of  
17 Arkansas of the case burden are those cases where the  
18 litigants are able to perform substantial gainful activity,  
19 however, there has been no improvement.

20 Mr. O'Shaunnessy. The nature of the cases vary quite  
21 considerably across the States, and in some of these cases  
22 I believe what you have said would be quite adequate. But  
23 there are other cases which have a different point to them.

24 Ms. Deaver. Yes.

25 Senator Danforth. I can't make out the cost page here,

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1 but what is the difference between "a substantial gainful  
2 activity" test standing alone on one hand, and this  
3 "improvement" test on the other hand? What is the dollar  
4 difference?

5 Ms. Deaver. The medical-improvement standard included  
6 in this proposal, the cost of that item is shown on the  
7 attachment to the cover sheet of costs.

8 The medical-improvement standard for OASDI costs would  
9 be \$2.24 billion, five-year cost. And the total cost  
10 including Medicare and administrative expenses would be  
11 line 1(a), total cost of \$2.78 billion. That is applying  
12 it to future reviews and also these cases that are in the  
13 courts or properly pending before the Secretary.

14 Senator Danforth. Then these differences here, the  
15 dollar amount, is the cost of disability insurance over a  
16 five-year period of time, to be paid for people who can  
17 engage in a substantially gainful activity, but you can't  
18 show that they have improved. Is that true?

19 Ms. Deaver. Well, you can't pinpoint it is somebody  
20 who has not improved, and you cannot pinpoint the reason.

21 Senator Danforth. In other words, this is the cost of  
22 paying disability insurance to people who can engage in a  
23 substantially gainful activity?

24 Ms. Deaver. These are people who would have been  
25 terminated under present procedures. It is the cost of

1 leaving them on the rolls, yes.

2 Senator Danforth. Am I right in the way that I put the  
3 question?

4 Mr. O'Shaunnessy. There is one step in there, Senator.  
5 They could be individuals who had been able to show there  
6 was no medical improvement, but the Secretary would have been  
7 unable in turn to show that these other conditions existed.

8 Senator Danforth. But that would have eventually come  
9 back in the figures anyhow, wouldn't it? So that these  
10 dollars here, \$2.7 billion over a five year period of time,  
11 is the cost of providing disability insurance to people who  
12 are not in fact disabled; is that correct?

13 Mr. O'Shaunnessy. As I said, Senator, I believe it  
14 would not be a totally accurate portrayal. There are other  
15 considerations in there, and we could try to sort them out.

16 Ms. Deaver. Basically what you are driving at is the  
17 fact that once you superimpose protections on the typical  
18 SGA test, -- that is, Can you perform substantial gainful  
19 activity? -- yes, people will be left on the rolls who,  
20 if they were adjudicated as though it were a new application,  
21 they would not be found eligible.

22 Senator Danforth. Well, am I close to being right in  
23 my statement?

24 Mr. O'Shaunnessy. Yes, Senator.

25 Senator Danforth. There may be a few exceptions, but

1 basically this is the cost.

2 What we are going to decide here is that we have enough  
3 money kicking around the coffers that we are going to pay  
4 over a 5-year period of time \$2.7 billion of disability  
5 insurance to people who aren't disabled.

6 The Chairman. That's correct.

7 Senator Danforth. Right.

8 Ms. Weaver. Who are not disabled under the meaning of  
9 the law as applied to new applicants, yes.

10 The Chairman. And I think if more Senators understood  
11 it, we wouldn't be here today. Because, you know, we have  
12 a little cadre out there trying to spend a few billion  
13 dollars.

14 Senator Danforth. Can anybody suggest a policy reason?  
15 Other than the politics of it, can anyone suggest a policy  
16 reason for paying disability insurance in the amount of  
17 \$2.7 billion to people who aren't disabled?

18 The Chairman. Well, We have a number of security judges  
19 out there. That's one reason.

20 Senator Danforth. But this is our decision.

21 Mr. O'Shaunnessy. Senator, I might point out that one  
22 has to consider the base line against which one is working.  
23 This number of \$2.78 billion assumes that the current program  
24 on the books is 100-percent implemented in all the States.  
25 That is not actually the case, as we all know, in the States,

1 and what we are looking at is an alternative which would  
2 provide for a uniform national program which we believe would  
3 maintain the policy priorities that we all consider  
4 important in the program.

5 Senator Danforth. I don't understand a word you said.

6 Senator Heinz. Let me ask a question:

7 If we do nothing, if we don't pass any legislation, will  
8 we be better or worse off than if we do pass this  
9 legislation-- substantially?

10 Mr. O'Shaunnessy. The first thing you would have,  
11 Senator, would be different standards being applied in  
12 different States. I don't have the number on how the  
13 current situation would continue. I am sure it would not  
14 show a \$2.7 billion increase by adopting this legislation  
15 over the current situation.

16 Senator Heinz. I am told that there are estimates that  
17 show that if we don't pass legislation, rather than being  
18 \$2.2 billion or \$2.7 billion worse off over the next five  
19 years, we could be \$5 billion or \$6 billion worse off over  
20 the next five years. Is that not correct?

21 Mr. O'Shaunnessy. I am not familiar with that figure,  
22 Senator, but I would say that the cost would vary with how  
23 one assumes that the States would implement the program.

24 Senator Moynihan. Would my friend from Pennsylvania  
25 yield, as I have to be on the floor in a moment? Could I

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1 just ask Mr. O'Shaunnessy a question?

2 It is our understanding that the Social Security  
3 Administration supports this proposal we have before us.

4 Mr. O'Shaunnessy. Yes, we do.

5 Senator Moynihan. Mr. Chairman, Mr. O'Shaunnessy said  
6 something not without relevance. The Social Security  
7 Administration supports the proposal that Carolyn and others  
8 have put together here. I think that is an important point.

9 The Chairman. Well, I do, too. But I hope we don't  
10 start to stretch it out. I can see amendments coming along.

11 Senator Moynihan. Well, we haven't made a change  
12 today, have we?

13 The Chairman. We haven't made a decision.

14 Senator Danforth. As I understand the argument for  
15 this, the argument is as follows:

16 We will recognize that people can still rip the  
17 government off and get paid disability insurance for not  
18 being disabled, but it will make it a little harder  
19 procedureally for them to do so. And that's the theory  
20 of the legislation. That is the savings that Senator Heinz  
21 pointed to.

22 I would like to hear any good argument, from Senator  
23 Moynihan or anybody else, of why it is good public policy  
24 to pay disability insurance to people who aren't disabled,  
25 even a penny.

1           Senaror Pryor. May I respond for just a moment to that?  
2 Not 100 percent, Jack, but I would like to say:

3           One, I think the \$2.7 billion figure is assuming the  
4 reinstatement of all of the X-number, hundreds of thousands,  
5 of disability recipients who had drawn disability payments  
6 prior to let's say 1980 or 1981. Is that not correct?

7           Mr. O'Shaunnessy. You use the term "hundreds of  
8 thousands." No, Senator, it assumes that people in the  
9 current administrative pipeline are brought back to be  
10 evaluated under this standard as well as those in the courts  
11 now, the individually-named litigants as well as certified  
12 class-action individuals who choose to do so.

13           Senator Pryor. We are not talking about a General  
14 Motors or Ford recall of automobiles that were defective  
15 and they come back and fix them up in all the shops and  
16 whatever and then send them back out. I think that point  
17 needs to be made.

18           These cases have to be readjudicated.

19           Mr. O'Shaunnessy. That is correct.

20           Senator Pryor. And if every case were readjudicated  
21 and we included the medical-improvement test that is now  
22 proposed, then at that moment, after the payments went out  
23 and assuming that every one of those individuals -- a lot  
24 of them are dead now, have committed suicide and whatever  
25 since all this process started three years ago -- we would

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1 then be seeing the \$2.7 billion.

2 Mr. O'Shaunnessy. This does not assume that every single  
3 individual making a claim would have their claim upheld;  
4 this is based on an actuarial assumption.

5 Senator Pryor. One other point.

6 There is another issue that has not been brought up,  
7 Senator Danforth, and that is, right now we are under a  
8 moratorium. We have not discussed this moratorium for the  
9 further adjudication of these cases.

10 What is the status of that moratorium now?

11 Mr. O'Shaunnessy. The moratorium has been in effect  
12 for approximately a month, and we are right now developing  
13 a ruling which will finalize all of the specifics of it.

14 Senator Pryor. Is that moratorium going to be instated  
15 on -- how long? How long will that go on?

16 Mr. O'Shaunnessy. Well, I would assume it would  
17 continue until we could get out regulations which would  
18 finalize the implementation of new legislation.

19 Senator Pryor. When? After the election, or what?

20 Mr. O'Shaunnessy. I have no idea, sir. As you know,  
21 the process of writing regulations takes time, both within  
22 an agency as well as in the review process, and it would  
23 also be sent out for review and comment, and that would also  
24 take some period of time.

25 The Chairman. As I understand, that moratorium is a

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1 result of a lot of pressure from around town here. They had  
2 a little vote in the House -- 411 to 1. Statesmanship.

3 You know, we can make changes in the Senate side, but  
4 I would hope --

5 I know the Administration supports this package, and  
6 I am very willing to support it, but I can recall in the  
7 Army, going before the Army Retirement Board. All of those  
8 people are out there drawing millions of dollars in Army  
9 retirement, and there is nothing wrong with them, except  
10 they couldn't play golf as well as they could before they  
11 came into the hospital. We ought to review that program,  
12 too.

13 But I am a little nervous about this same question  
14 everybody else has raised. If somebody has a disability,  
15 we ought to do everything we can if it is a serious disability.  
16 But a lot of these people don't have any disability; they  
17 just don't want to work. And that is true in the Army  
18 retirement program and the veterans, and every other program,  
19 if you are going to pay people \$7-800 a month for not working.

20 I hope we will still be able to review some of these  
21 cases, aren't we? We are not going to have our hands tied  
22 on that.

23 Mr. O'Shaunnessy. Yes, sir.

24 Senator Danforth. Mr. Chairman, I take it we are not  
25 going to decide this today, but I would like the

1 Administration or the staff, or whoever is putting figures  
2 together, to please perfect the figures; because, when I have  
3 been trying to pin people down they have quibbled.

4 Now, my question is this: It is my understanding that  
5 what the bill before us asks us to do is to pay disability  
6 insurance to people who aren't disabled. And how much is  
7 that going to cost over a five-year period of time? How much  
8 will it cost the government to pay disability insurance to  
9 people who are not disabled?

10 Ms. Deaver. All we can tell you is that this \$2.7  
11 billion would be associated with maintaining a certain number  
12 of people on the rolls.

13 As Senator Heinz is pointing out, a good number of  
14 these people may end up back on the rolls anyway through  
15 court action.

16 Senator Danforth. Maybe so, but you are coming up with  
17 cost estimates. And my understanding of this cost estimate,  
18 the total cost of the bill, is that this is a net cost.

19 Ms. Deaver. A net cost over what the courts may do?

20 Senator Danforth. A net cost over something.

21 In other words, what we in the Congress are doing is  
22 taking this out of the hands of the courts, if we act.

23 The Chairman. Right, because the courts are not  
24 accountable.

25 Senator Danforth. We are not saying that the courts can

1 make decisions anymore; we are not saying that the courts are  
2 Congress. We are saying that Congress is going to make a  
3 decision as to what to do about disability insurance.

4 Now, we have two approaches: One, we can say that  
5 the test is going to be substantial gainful activity. That  
6 is to say, if people are disabled they get paid.

7 There is a second possibility, and the second possi-  
8 bility is to say that we are also going to pay some people  
9 who aren't disabled. And that is the difference. That is  
10 what we are arguing about. That is what we are talking  
11 about: How easy will it be? Where is the burden of proof?  
12 Where is the burden of going forward? What procedures  
13 have to be followed for people to get into the disability  
14 insurance even though they are not disabled?

15 I want to find out the cost to the government of  
16 paying disability insurance to people who aren't disabled.  
17 And I take it that it is somewhere in the neighborhood of  
18 \$2.78 billion over a five-year period of time. But I would  
19 like that perfected.

20 Mr. O'Shaunnessy. Senator, we can provide additional  
21 figures.

22 The critical element here I believe is the base line  
23 one is working against.

24 Senator Danforth. Pick your base line.

25 Mr. O'Shaunnessy. All right.

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1           Senator Danforth. Pick your apple. But there is a  
2 cost, and as I understand it the difference is the  
3 substantial gainful employment test on the one hand and  
4 something other than the substantial gainful employment on  
5 the other.

6           Mr. Enoff. That would be the cost, Senator, if you  
7 assumed uniform implementation of the current standard  
8 without medical improvement.

9           The one thing I would add is that we are talking only  
10 about people currently on the rolls. It would not be for any  
11 new applicants for disability, but the people currently on  
12 the rolls it is a changed standard.

13           Senator Danforth. Could we not in the Congress,  
14 without reference to the courts, do two things? On one  
15 hand we could say that the test for reinstatement is  
16 substantial gainful employment -- period. On the other  
17 hand we could say -- Congress could say -- that the test  
18 is going to be something in addition to substantial  
19 gainful employment; we could make either of those choices,  
20 correct? And there is a cost differential between making  
21 that choice, correct?

22           Mr. Enoff. Correct.

23           Senator Danforth. And the cost differential is  
24 measured in dollars, and those dollars are the cost of paying  
25 disability insurance to people who are not in fact disabled,

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1 right?

2 Ms. Deaver. That is \$2.78 billion.

3 Senator Danforth. That is \$2.78?

4 Ms. Deaver. Yes.

5 Senator Danforth. Well, I think that is what you  
6 have been telling me, but there have been quibbles over it,  
7 and I don't want the quibbles, because I want to go to my  
8 constituents, if I am going to vote for this thing, and say,  
9 "Folks, I have just voted, at a time when the deficit is  
10 the biggest problem before the country, to pay \$2.78 billion  
11 of disability insurance to people who aren't disabled."  
12 And I have got to figure out some reason, I have to use  
13 my imagination to its limits to figure out some reason for  
14 doing that.

15 Ms. Weaver. Well, let me give you the best arguments  
16 the advocates of a medical-improvement standard would give.

17 Senator Danforth. But I want the dollars, too; I want  
18 you all to focus on the dollars. But go ahead.

19 Ms. Deaver. The substantial gainful activity test is  
20 not a simple test to run through. Everybody is different.  
21 We have over a million people applying for benefits a year,  
22 hundreds of thousands of people individually going through  
23 reviews performed by over 10,000 different State examiners.

24 The people who endorse a medical-improvement standard  
25 want to make sure that an individual who is granted benefits

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1 one time, if his condition hasn't changed, just because  
2 that SGA test is applied by a different person in a different  
3 way, possibly under a tighter adjudicative climate, that he  
4 is not willy-nilly found ineligible at a later date. That  
5 is basically what we are trying to get at, that an SGA test  
6 is not nearly as easy to perform and as uniformly done by  
7 people.

8 Senator Danforth. And therefore, we want a more  
9 complicated test.

10 Ms. Deaver. No, this proposal would provide protections  
11 for people whose conditions have not changed but whose case  
12 is looked at by a different man who slightly differently  
13 applies the SGA test and comes up with a different conclusion.

14 Senator Danforth. All right. I will think about that,  
15 but I also want the dollars, because I want to explain to  
16 my constituents what the cost of this would be.

17 Senator Heinz. Would the Senator Yield?

18 Senator Danforth. Go ahead.

19 Senator Heinz. I will try to answer his question a  
20 little bit.

21 The Senator says he would like numbers, and, as I  
22 think he understands, one of the factors here is that the  
23 courts have looked into the matter and are making decisions  
24 based on the law as it was written by Senator Long and others  
25 in 1979 or 1980. And if we do nothing, the cost will not

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1 be \$2.7 billion, it will be higher.

2 So the first reason for the Senator's constituents, I  
3 think, is that if we do nothing -- and maybe the Senator  
4 can think up some alternatives; this is not necessarily the  
5 only thing we can do. But if we do nothing it will cost  
6 the taxpayers more.

7 Secondly, I would say that I can't speak for what  
8 experience the Senator has had in his State of Missouri, but  
9 I can tell you that there have been a large number of  
10 flawed determinations against the interests of the  
11 beneficiary and in the interests of the government, which  
12 have resulted in ridiculous conclusions; that is to say,  
13 people who cannot in a million years work are being told  
14 that they can work, in spite of the fact that they can't.

15 This has been most obvious in the case of people with  
16 mental disabilities, where a very substantial number of the  
17 people who have gotten into the meat grinder with mental  
18 disabilities have been just willy-nilly determined as having  
19 the physical capacity to work, and the person who looks at  
20 them says, "Well, you look perfectly normal to me. What did  
21 you do yesterday?" "Well, I made myself a cup of coffee and  
22 played the piano for three minutes." "Fine, you can work."  
23 And nobody ever thinks as to whether this person had a  
24 problem in the first place and whether things are any dif-  
25 ferent.

1           And how I might suggest the Senator from Missouri looks  
2 at the issue is that there is a screen here to avoid a  
3 problem that we now have; namely, arbitrary and capricious  
4 results, because as Carolyn Weaver has said, and I hope she  
5 wasn't just role-playing, there are indeed real problems  
6 with the uniformity of application of these standards. It  
7 is no joke, it's for real.

8           In some areas of the country people have applied  
9 standards so severely that they make no sense at all.

10           A third problem you have is that when somebody who is  
11 52 years old and has been on the disability rolls for seven  
12 or eight years -- and there are a lot of those that we are  
13 talking about here; these are all old cases -- and they are  
14 determined as being able to work at age 59 or 60, that may  
15 be physically true, but they are functionally unable to work  
16 for one of two reasons: Either they really had marginal  
17 skills to begin with and whatever skills they had they lost  
18 in the intervening seven or eight years; or, as a practical  
19 matter, there is no one in the world who will hire a 59-year  
20 old male or female person when unemployment is still 7 or 8  
21 percent.

22           Now, that doesn't cover every single case. And I think,  
23 in fairness to the point of view of the Senator from  
24 Missouri, there will be some people who were, in spite of  
25 the other screen that has been established to catch people who

1 were wrongly put on the rolls in the first place, there  
2 will be some people who slip through the net who, frankly,  
3 we would all agree should be working rather than drawing  
4 disability benefits. There will be some of those.

5 And we ought to know right up front that that is going  
6 to happen. And the question is: Do you want more people  
7 being stricken from the rolls who shouldn't be stricken from  
8 the rolls, and having a relatively few number of people who  
9 can work still being on the rolls? Or, do you want -- you  
10 know, which way do you want to tilt? Do you want to throw  
11 a lot of people off the rolls who can't work in order to get  
12 those few who can? Or do you want to be a little more  
13 cautious and recognize that you just can't catch everybody  
14 but, in order not to throw lots of people off the rolls who  
15 can't work, you may have to accept a slightly larger number  
16 of people who can work?

17 One thing is sure, we all know, having been in  
18 government as long as any of us have, there is nothing neat  
19 or clean or simple or efficient about government. It is  
20 inherently inefficient. We pretend to our constituents that  
21 we can draw the line, that that person definitely can work,  
22 and that if we just apply the standard rigorously we are  
23 going to get all those welfare cheats.

24 Well, we all know that that isn't the way life works.

25 The only other comment I would make to my friend from

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1 Missouri is that when all is said and done, this is an  
2 insurance program. It is a program for which all of the  
3 beneficiaries who can't work -- and maybe a few who can,  
4 but all of them -- have paid money into this program. They  
5 have paid their money, their tax money. A portion of their  
6 compensation has gone directly from the employer to the  
7 Federal Government, to the Disability Trust Fund.

8 That is not an argument for administering the trust  
9 fund and the benefits paid from it in a sloppy way, but it  
10 is an argument for recognizing that we are not giving away  
11 to people something that they haven't paid for, either.

12 So I don't expect to change the mind or the conclusions  
13 that my friend from Missouri has arrived at, but he has a  
14 very firm point of view. I am sure it is rock-hard. It is  
15 as firm and strong as we know his character to be, and I  
16 wouldn't expect that my modest arguments would make any  
17 impact on him at all.

18 But I didn't want the record to stand empty and alone.

19 The Chairman. I think there is going to be a large  
20 record here before we've finished.

21 (Laughter)

22 The Chairman. But I wonder if we might quickly report  
23 out that nomination, and then maybe agree to come back at  
24 2:15, if that is satisfactory, because tomorrow is a bad day,  
25 and Thursday morning is open.

1 I think once we have the discussion we can start  
2 making decisions and find out where the votes are, and  
3 maybe make them rather quickly, depending on where the votes  
4 are.

5 But is there a nomination?

6 Mr. DeArment. There is one particular nomination, and  
7 we had the hearing the last time we met.

8 The Chairman. What is the man's name?

9 Mr. DeArment. His name is Joseph F. Dennin. He would  
10 be Assistant Secretary of Commerce to replace Alfred Kingan.

11 The Chairman. Has he talked to you now, Mike?

12 Mr. Stern. Right.

13 The Chairman. So there is no problem with that  
14 nomination?

15 Mr. DeArment. We are advised of none.

16 The Chairman. So I would hope we might be able to  
17 report that.

18 Senator Long, do you want to make a comment before  
19 Senator Heinz departs?

20 Senator Long. Yes.

21 Let me just say this: We have to decide here -- we  
22 in Congress must decide -- how liberal or how strict we want  
23 to be with this program.

24 Over in Holland they showed on "Sixty Minutes" a little  
25 thing called "Dutch Treat," and it showed how liberal the

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1 government of Holland is with their welfare and Social  
2 Security type programs.

3 They indicated that one worker in six in Holland is  
4 on the disability rolls. I asked the Minority Staff to  
5 check it out, and that's correct. It is about 16 percent,  
6 is it not, Mr. Stern?

7 Mr. Stern. Yes, sir.

8 Senator Long. All right. So in Holland they have got  
9 a great deal of human kindness in them, and they've got  
10 16 percent.

11 Now, by those standards you would think that we are  
12 being Scrooge himself; all we have got is 2 and 1/2 percent.  
13 We intended to put 1 percent on, and we've got about  
14 2 and 1/2.

15 And I am complaining about going up to 5 percent or  
16 10, or eventually to 15 percent.

17 Now, at some point we have to decide at what point do  
18 we tell people, "Look, now there are things you can do."  
19 And we will have a program to help them. It is deductible,  
20 but we ought to embellish the program, to help people, to  
21 help designate jobs that the handicapped people can do to  
22 try to put them into employment rather than have them on the  
23 rolls doing nothing.

24 It was said by Senator Heinz that this is an insurance  
25 program, but we are the ones who ought to specify what kind

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1 of insurance we want to write.

2 Now, I don't think you are going to find any insurance  
3 company on earth, unless you want to pay them a fantastic  
4 premium and you've got a good record to begin with. But just  
5 as far as insuring the rank and file of Americans, no  
6 insurance company would be foolish enough to insure people on  
7 the basis that they go on the rolls purely on the basis of  
8 their own self-serving statements that they are in pain. It  
9 will break anybody who tries to do business that way.

10 So we have to confront that, and we have to face up to  
11 the fact that there are going to be these cases where  
12 somebody is disabled and can't prove it.

13 And if that's the case, unfortunately it is going to be  
14 just like it is for any lawyer who knows what it is to lose  
15 a lawsuit when he is sure he is right. Sometimes there will  
16 be a case where the evidence just won't do the job, where  
17 the evidence that would stand the test of a fair trial or  
18 the test that we have in mind is not going to get the person  
19 on the rolls.

20 I can think of a case that came to my experience to  
21 illustrate the point. Here was a fellow who said he was  
22 entitled to much greater veterans benefits than he was  
23 getting.

24 I would like for Senator Danforth to hear this. The  
25 man said he was entitled to much greater benefits than he

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1 was receiving. And the doctors in the VA didn't think so.  
2 If you would read their opinions, you could see where they  
3 didn't think so; and if you would hear from him, he was  
4 outraged.

5 This guy was an elected official, a courthouse official  
6 in Louisiana. I told my staff, "Now, we've got to go ahead  
7 and support this fellow because our view ought to be that the  
8 constituent is always right."

9 Well, it turns out in due course that the man had a  
10 tumor on his brain, and in due course he died of a tumor  
11 on his brain.

12 Now, when it became apparent that that was what his  
13 condition was, the VA did recommend the higher disability.  
14 But I can't fault those doctors in the VA, that until there  
15 was medical evidence that that man was suffering from  
16 something that was disabling, that he shouldn't be entitled  
17 to the disability he was claiming. Yes, he had it, but  
18 the evidence was not there to prove it.

19 And look at a great number of your cases. A huge number  
20 of these cases are going to be in there with people who say  
21 they've got a back ache, and you can't prove if they have  
22 or have not. The question is, do we take their word for it?

23 Let me tell you, if we are going to take all their  
24 words for it, it is going to be the taxpayer with the real  
25 back ache, because he is not going to be able to carry all

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1 that burden, and that's what I think we have to keep in mind.

2 We have to draw a line somewhere. How much of this  
3 can you prove? And if they can't prove it by some standard  
4 other than their own self-serving statement, then we are  
5 going to have to say No. If you don't say it now, you will  
6 have to sooner or later, because I have friends -- at least  
7 they are friends now, until I identify who the people are --  
8 but I have friends who are on those rolls who are not  
9 qualified for a moment. And their buddies know they are not  
10 qualified for it; it is common knowledge. And in due course  
11 it gets around the public, and there are a lot more people  
12 who will rise up against us because we are making them pay  
13 money to put millions of people on those rolls who don't  
14 belong there. And there will be people who will support us  
15 because they got the benefit that they were not rightfully  
16 entitled to expect.

17 So, we can't be winners on this. With some people we  
18 will be losers, and in the main and I think in the long run  
19 if the taxpayers see we are running a tight program, they  
20 will approve us for doing this thing, and I think the others  
21 will come to accept it.

22 So far I have faced a lot of these people and told them  
23 I am not going to vote "just to put you on those rolls based  
24 on just your own statement."

25 If we will stand on that line, in the long run a lot

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1 more people will accept that than accept the concept of  
2 having it at 15 percent. Fifteen percent over there on the  
3 rolls. Or is it 16?

4 Mr. Stern. Sixteen.

5 Senator Long. Sixteen -- 16 percent. If we have the  
6 courage to put the brakes on the program sooner, I think  
7 the public will bless us for doing it.

8 Thank you, Mr. Chairman.

9 Senator Danforth. Thank you.

10 Well, Senator Long, I get from my constituents all the  
11 time: "Do something about the deficit. Do something about  
12 the budget." And if we are going to be paying disability  
13 insurance to people who aren't disabled, just because we want  
14 to grandfather them in, how is that doing anything about the  
15 budget?

16 Senator Dole said before he left that the committee  
17 will resume at 2:15 this afternoon, so we will be in recess  
18 until that time.

19 (Whereupon, at 12:12 p.m., the session was recessed.)

20 (Continued on next page)

21

22

23

24

25

AFTER RECESS

(2:55 p.m.)

1  
2  
3 Senator Danforth. Carolyn, would you like to begin  
4 wherever we left off this morning -- wherever that was.

5 Ms. Weaver. Probably the easiest way to proceed would  
6 be to go back to Attachment 1, which is the long summary  
7 of the Dole package, and simply continue with item number 2.

8 Senator Danforth. Go ahead.

9 Ms. Weaver. Item number 2 pertains to the continuation  
10 of the provision which recently expired which allows  
11 terminated disability beneficiaries to elect to receive  
12 payments pending appeal to the Administrative Law Judge.

13 That provision expired on December 7, and would be  
14 extended for two years under this legislation, or until  
15 June 1, 1986.

16 Shall I proceed to item number 3?

17 Senator Danforth. Go ahead.

18 Ms. Weaver. Item number 3 pertains to administrative  
19 procedure and uniform standards in particular that the  
20 Social Security Administration be made subject to the  
21 rule-making requirements of the Administrative Procedures  
22 Act. Presently, it abides by the provisions of the APA  
23 on a voluntary basis.

24 This would simply provide that the exclusion for SSA  
25 now included in the provisions of ATA would be eliminated

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1 and they would be brought under the provisions of the  
2 Administrative Procedure Act.

3 And I might note that the Administration has  
4 recommended a preferred position there which would state  
5 that basically SSA would have to abide by the provisions  
6 of the APA but that any judicial review of regulations  
7 would be on a post-implementation rather than pre-implemen-  
8 tation basis.

9 Senator Danforth. Let me ask you something. I don't  
10 know if this is appropriate to this section, but it is well  
11 known that a number of people who are on disability were  
12 terminated. What was the cause of that?

13 Was that a change in the criteria used for disability  
14 determinations?

15 Ms. Weaver. I think part of the problem -- and this  
16 is what this is getting at -- is that people who were  
17 terminated by the State agencies were, in turn, appealing  
18 to the Administrative Law Judges and being allowed.

19 And part of the concern and explanation for that is  
20 that the State agencies were not operating under the same  
21 standards necessarily as were being applied by the ALJs.

22 Senator Danforth. This would remedy that?

23 Ms. Weaver. This is an effort to remedy that.

24 Number one, the guidelines SSA would put out with  
25 regard to basic eligibility questions would have to go

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1 through the public notice and comment rule-making provisions  
2 so that people would clearly understand the changes taking  
3 place, and number two, regulations are binding on both the  
4 ALJs and the State agencies.

5 So, there would not be a situation in which factors  
6 that affect eligibility would be issued in some informal  
7 mechanism that was only binding on the State agencies.

8 Senator Danforth. So, the basic guideline is whether  
9 the individual is able to undertake a substantial --

10 Ms. Weaver. Substantial gainful activity.

11 Senator Danforth. Substantial gainful activity. What  
12 does this do -- define it?

13 Ms. Weaver. This would state that anything that SSA  
14 must issue in the way of an interpretive rule or substantive  
15 rules actually having to do with basic disability insurance  
16 eligibility would have to be issued as regulations under  
17 the provisions of the APA.

18 Now, there are exceptions for good cause and exceptions  
19 for those matters that are interpretive rules as opposed  
20 to substantive rules.

21 Senator Danforth. Have there been changes in criteria  
22 in the last two years?

23 Ms. Weaver. That did not go through the public notice  
24 and comment provision?

25 Senator Danforth. That has gone through whatever.

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1 Have there been changes?

2 Ms. Weaver. Yes. There have been. The major changes  
3 in eligibility criteria in 1979, and one example that is  
4 frequently cited is that of a change that was made without  
5 going through the public notice and comment provisions.

6 I believe -- correct me if I am wrong -- are the  
7 examples of severe and nonsevere impairments. Is that  
8 correct?

9 Mr. O'Shaunnessy. Yes, that is correct.

10 Ms. Weaver. One of the first cuts made in determining  
11 whether somebody is eligible for benefits is whether or  
12 not their impairment is severe. And if an individual --

13 Senator Moynihan. And what would that test be?

14 Ms. Weaver. And that the basic illustrations of  
15 what was considered severe and nonsevere was not issued  
16 through the regulatory mechanism, and there has been some  
17 concern that part of the terminations were resulting from  
18 these types of tightenings that went on without going through  
19 the provisions of APA.

20 Senator Danforth. What will this do, in short, to  
21 remedy this?

22 Ms. Weaver. In short, it would ensure that the  
23 protections in the APA which state that substantive rules  
24 must be directed through the public notice and comment  
25 procedures would apply to the social Security Administration.

1           It would not be done on an informal basis and not on  
2 a voluntary basis, but --

3           Senator Moynihan. Carolyn, could I ask you?

4           Ms. Weaver. Yes.

5           Senator Moynihan. Is it not at least our purpose  
6 here that a court reviewing a decision would at least start  
7 out knowing that the decision was made in accordance with  
8 rules that had been published and that there had been  
9 notification and comment period.

10           The regularities of Federal administrative procedure  
11 had been followed. Perhaps Ms. Kuhl would want to comment.

12           Ms. Kuhl. Is the question whether these regulations  
13 would be given a presumption of a court --

14           Senator Moynihan. Yes. It would appear less  
15 arbitrary or singular about them when they conform with  
16 the regular rule-making procedures of the Government.

17           Ms. Kuhl. Well, the regulations issued by the  
18 Secretary are entitled to deference by the courts once  
19 they have been issued.

20           Frankly, whether they have been issued through notice  
21 and comment procedures or whether they have been issued  
22 in some other manner according to law.

23           Senator Danforth. Okay. Do you want to go on to  
24 four?

25           Ms. Weaver. Item four pertains to placing a moratorium

1 on all mental impairment reviews, pending revision of the  
2 eligibility criteria.

3 This proposal originated prior to the time that the  
4 Secretary had announced the temporary nationwide moratorium,  
5 and all that was in place was an administrative initiative  
6 that placed a temporary moratorium on functional psychotic  
7 disorder -- people with those impairments.

8 This expands the moratorium to ensure that there are  
9 no eligibility reviews pertaining to people with mental  
10 impairments until revised regs have been put out that  
11 clarify the eligibility criteria.

12 Senator Moynihan. That should be done under section  
13 three.

14 Ms. Weaver. Yes, and actually we would expect --  
15 Yes, and we would also require that these be issued promptly  
16 because these revisions have been underway for some time.

17 Senator Danforth. Okay. How about five?

18 Ms. Weaver. Item five would require that in any  
19 mental impairment cases in which a decision unfavorable to  
20 the claimant or beneficiary is made, the Secretary would  
21 have to make every reasonable effort to ensure that a  
22 qualified psychiatrist or psychologist sign off or complete  
23 the medical portion of those forms in the vocational  
24 assessments.

25 Presently, the procedure would be that a physician

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1 and a State examiner sign those forms.

2 This would require, number one, the specialization of  
3 the doctor with regard to mental impairment cases, but the  
4 Secretary would be required to make every reasonable effort.

5 Senator Moynihan. Is a psychologist a medical doctor?  
6 No, a psychiatrist is, of course, but a psychologist is not.  
7 Or are they?

8 Mr. O'Shaunnessy. Presumably, it would be a  
9 psychiatrist in the first instance, and only if you could  
10 not find a psychiatrist would you then refer to the opinion  
11 of a psychologist.

12 Senator Moynihan. And that would be a licensed  
13 professional?

14 Mr. O'Shaunnessy. Yes. We assume so, yes.

15 Senator Heinz. Mr. Chairman?

16 Senator Danforth. Senator Heinz?

17 Senator Heinz. Thank you, Mr. Chairman. Carolyn,  
18 or SSA, the one concern I have is over the meaning of the  
19 term "every reasonable effort."

20 What is the standard now?

21 Mr. O'Shaunnessy. I'm sorry -- that the physician sign  
22 off on the form. Carolyn had stated that. And this would  
23 require a psychiatrist or psychologist.

24 I think what it would mean is that we would increase  
25 our efforts to have States find those psychiatrists and

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1 psychologists where they are not presently available.

2 Senator Heinz. Is there any concern about the -- in  
3 general -- availability of psychiatrists, for example?

4 Mr. O'Shaunnessy. Not in general. No. There have  
5 been specific instances where a State has had a problem  
6 getting a psychiatrist or psychologist to do this work.

7 Senator Heinz. Is it correct that there are  
8 approximately 28,000 psychiatrists who are APA members and  
9 an estimated 34,000 psychologists who APA -- as in  
10 psychological -- association members?

11 Is that roughly right?

12 Mr. O'Shaunnessy. I couldn't quibble with your  
13 figures. I would assume they are right. That sounds  
14 reasonable.

15 Senator Heinz. Is the-- Do you generally concur  
16 with the GAO study that has found that there are about  
17 160 DDS psychiatrists employed either full-time or part-time  
18 and that the additional hires necessary to eliminate the  
19 deficiency in having enough expertise would involve fewer  
20 than 200 psychiatrists or psychologists. Do you generally  
21 agree with their finding there?

22 Mr. O'Shaunnessy. I am not familiar with that finding,  
23 Senator. Sorry.

24 Senator Heinz. Would you look it over and let us know?

25 Mr. O'Shaunnessy. Sure.

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Senator Heinz. The only concern I have about every reasonable effort is that I don't know in the real world what that means. And here is the real world situation that I am worried about.

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The States, as I understand it, set the amount that they will pay for an examination. And in many States, they don't pay very much at all.

9

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11

And if they make every effort, but they are paying \$5.00 an examination and they can't get anybody, is that reasonable?

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Mr. O'Shaunnessy. No, that is not reasonable, and there have been problems with fee schedules. We have been working, Senator, with the American Psychiatric Association and the American Psychological Association to try and deal with these particular areas where there is either a shortage or a problem with getting people in this fee schedule.

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Senator Heinz. What would you think about the notion of saying something like every reasonable effort would be deemed to have-- Every reasonable effort would be deemed to have been made where it has been made, provided that the Secretary can show that there is no prospect of obtaining the required services of a qualified professional -- either a psychologist or a psychiatrist -- at usual, customary, and prevailing rates.

1           Is there any problem in effect with defining some  
2 standards so that people don't pay an unrealistically low  
3 amount?

4           If someone is going to go out and make every reasonable  
5 effort, it seems to me the test of what is reasonable is  
6 that they should pay some kind of usual or customary or  
7 prevailing rate, and I choose those words --

8           Senator Moynihan. I wonder if we put that in report  
9 language -- when we say reasonable we are referring to --

10          Senator Heinz. But just from a policy standpoint, does  
11 that cause any difficulties?

12          Mr. O'Shaunnessy. Well, certainly that is something  
13 that we would want to look at in terms of the impact. We  
14 may not be able to assess it right at this moment. It does  
15 sound as if it would be something that could be worked on  
16 in connection with reporting.

17          Senator Heinz. In Elco, Nevada, there may not be  
18 a psychiatrist, and then you have got to make do with what  
19 you have got. You understand that it not the problem.

20          Senator Moynihan. You are saying that the State says  
21 they will pay \$15.00.

22          Senator Heinz. Yes, for a consultation.

23          Carolyn, do you see any problem with working out report  
24 language on that?

25          Ms. Weaver. No.

1 Senator Heinz. Okay. Thank you.

2 Senator Danforth. Okay. Now, for six.

3 Ms. Weaver. Item six pertains to compliance with  
4 court orders. And under the provision, which is basically  
5 the same as that contained in S. 476, the Secretary would  
6 be required to report to Congress and publish in the Federal  
7 Register a statement of the Secretary's decision in each  
8 case in which she acquiesces to or does not acquiesce to  
9 a U.S. Court of Appeals decision.

10 And she would be required to explain the specific facts  
11 of the case. And that report would be due to Congress  
12 within 90 days after the issuance of the court decision.

13 This is item number six on page 7.

14 Senator Moynihan. There is more than one appeals  
15 court, and the Secretary has to ask whether she should  
16 make a nationwide standard on the basis of one court decision  
17 which might be different from another court's decision.

18 And I gather that when the Supreme Court has ruled  
19 on something that is one matter, but otherwise --

20 Senator Danforth. All right. Number seven.

21 Ms. Weaver. Item number seven deals with the evaluation  
22 of multiple impairments. In particular, the proposal would  
23 ensure that in determining the medical severity of an  
24 individual's impairment, the Secretary would be required  
25 to consider the combined effects of impairments even if none

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1 are individually severe.

2 The concern is that the regulations now in effect may  
3 put State examiners in the position of being able to  
4 observe the rare case in which an individual has a series  
5 of nonsevere impairments where there is potentially an  
6 accumulatively severe impact and not be able to continue to  
7 assess his disability.

8 This would ensure that if there is a cumulatively severe  
9 impact of a series of nonsevere impairments, it would have  
10 to be considered.

11 And this would presumably be coupled with committee  
12 report language that ensures that this is still dealing with  
13 the basic medical severity test and isn't altering the  
14 sequential evaluation process in any way.

15 Senator Heinz. Carolyn, in that connection, do I  
16 understand you correctly that multiple impairments would  
17 nonetheless be considered every step in the evaluation --  
18 in the sequential evaluation -- that you just described?

19 Ms. Weaver. My understanding is that multiple  
20 impairments are taken into account at later stages of the  
21 sequence. The critical point is that first test of severe  
22 or nonsevere. And this would be adding it to that original  
23 step.

24 You wouldn't be dropped out later in the process because  
25 of failure to take account of multiple impairments.

1 Senator Heinz. Can we make that clear?

2 Ms. Weaver. Sure.

3 Senator Heinz. Thank you.

4 Senator Danforth. Okay. Number eight?

5 Ms. Weaver. Item number eight pertains to pain, and  
6 under the proposed change, there would be a study required  
7 of the pain, and in particular, this would be folded into  
8 item number 13, which the next social security advisory  
9 council is directed to study a variety of issues surrounding  
10 the medical and vocational aspects of disability.

11 And with regard to pain, the question would be the  
12 use of subjective evidence of pain in finding which  
13 demonstrate pain in the evaluation of disability.

14 Senator Danforth. The treatment would be identical to  
15 what it is now, which is that pain unless there is some  
16 demonstrable cause for it, is not sufficient --

17 Ms. Weaver. The statement of how pain is to be  
18 evaluated or considered in a disability determination is  
19 laid out in the regulations and has been since 1980, and  
20 that is correct. Committee report language would presumably  
21 stress that the committee would expect the present  
22 regulations to be applied in a consistent nationally  
23 uniform manner until such changes may be made in the  
24 statutes.

25 The Chairman. As I understand it, Senator Long may

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1 have an amendment in that area. Is that correct?

2 Mr. Stern. Yes, sir. His amendment would actually  
3 put enough language in the bill itself saying that in the  
4 interim the pain would have to be collaborated by a medical  
5 --

6 Senator Dole. While we are waiting for the studies  
7 to be completed -- is that correct?

8 Mr. Stern. That is right.

9 Senator Moynihan. Could I just ask a little bit about  
10 this? You know, there is beginning to be a physiology of  
11 pain research field, and it is at least a generation old,  
12 but nobody is going to be able to reach any hard medical  
13 conclusions for a very long while.

14 And yet, there are a very considerable number of  
15 excruciating maladies about which physicians don't know  
16 anything more than that certain kinds of steroids or  
17 certain kinds of treatment makes it go away.

18 And they almost define the disease as that which is  
19 cured by prednisone. And how do you deal with that?

20 They don't know what it is. What they know is what  
21 the cure is, or whether or not they can moderate it.

22 Mr. Enoff. Senator, as one of the initiatives that  
23 we began with the Secretary's top-to-bottom review of our  
24 listings and our regulations or disability process, we  
25 have a group of experts who are working on the pain area

1 right now. As Carolyn indicated, we now use the current  
2 definition in the regulations which is the only thing that  
3 we have.

4 But we do continue to seek out this expert advice in  
5 that area.

6 Senator Moynihan. All right, but you do recognize that  
7 there are genuine medical disabilities which medicine does  
8 not understand. All they understand is that they have  
9 found some things that can alleviate them.

10 They almost define it backwards. This is whatever it  
11 is that goes away a little bit if you do this. They just  
12 don't know.

13 The Chairman. As I understand it, there would be  
14 some advisory council that would make some determination.  
15 Is that correct?

16 Ms. Weaver. Yes. The next Social Security Advisory  
17 Council, which is scheduled to report December 1986, would  
18 be directed to make an evaluation of pain as well as a  
19 variety of other disability matters.

20 Senator Moynihan. So, we can be confident that there  
21 will be a good faith effort to inquire -- is there a person  
22 in this room who has never had a splitting headache? It  
23 cannot be demonstrated, and yet two aspirin make it go away.

24 Is pain a big problem in your adjudication? In the  
25 administrative process?

1           Mr. Enoff. The allegation of pain is often something  
2 that comes up in the appeals process and has begun to be  
3 addressed in some of the court cases, and therefore, we  
4 think that the study is a good idea.

5           The Chairman. I guess you have a court case to contend  
6 with, too, don't you?

7           Mr. O'Shaunnessy. Yes, the Polanski case that Senator  
8 Long was referring to.

9           Senator Long. Is that the eighth circuit?

10          Mr. O'Shaunnessy. Yes.

11          Mr. Humphreys. It is a District Court decision at  
12 this time.

13          Senator Heinz. There is also an Eighth Circuit Court  
14 decision as well?

15          Mr. O'Shaunnessy. No.

16          Senator Heinz. Oh, it is the District Court in the  
17 Eighth Circuit?

18          Mr. O'Shaunnessy. In the Eighth Circuit.

19          Senator Heinz. Just to understand what we are saying  
20 in the legislation, vis-a-vis Section 6 compliance with  
21 court orders. I assume that, to the extent there was  
22 nonacquiescence it would be subject to the same reporting  
23 requirements as stipulated in the Item 6?

24          Ms. Weaver. For decisions rendered after enactment.  
25 Yes.

1           The Chairman. Is there going to be any objection to  
2           Senator Long's? I guess he just codifies. Do you have  
3           a copy of his amendment, Mike, or did you explain what he  
4           hopes to do on that?

5           Mr. Stern. The actual language is at the bottom of  
6           this page that is being handed out.

7           (Pause)

8           The Chairman. That would be the individual statement  
9           as to pain? Could you give us an explanation of that?

10          Mr. Stern. The purpose of this is to put in the  
11          statute what is the Social Security Administration's  
12          present practice and regulation, namely that an individual's  
13          statement about pain itself would have to be corroborated  
14          by some kind of objective medical evidence in order to  
15          be considered in determining a person's disability.

16          Senator Danforth. I thought that was the present law.

17          Mr. Stern. Well, yes, it is supposed to be. However,  
18          some court cases have thrown that into doubt. What Senator  
19          Long was quoting as being Eighth Circuit law seems to hold  
20          that the Secretary is wrong in requiring this kind of  
21          medical collaboration in order to use this as evidence.

22          Senator Moynihan. Mr. Chairman, can we get some  
23          expert testimony? We have got some very fine officials  
24          of the Social Security Administration.

25          The Chairman. I think that is fine, but I think what

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1 was suggested was that we put this language in -- report  
2 language. And all Senator Long was saying was let's put  
3 it in the statute.

4 Senator Heinz. Mr. Chairman, just so that I understand.  
5 Why do we need to put it in the statute?

6 Mr. Stern. Because there have been several court  
7 cases in which judges have excoriated the Secretary for  
8 requiring anything other than an individual's subjective  
9 determination of his own pain.

10 The Chairman. It is quite difficult to ignore  
11 statutory language, moreso than report language, I assume.

12 Senator Heinz. But what policy do we want to have?

13 The Chairman. We want the quadrennial commission to  
14 give us some guidelines.

15 Ms. Weaver. That is correct, and this is the definition  
16 of pain or the evaluation of pain was included in the  
17 original Cohen-Levin Bill as introduced. It has been  
18 subsequently modified in more recent amendments, but I  
19 think the major concern which originally led to the  
20 provision being included in the bill was the concern that  
21 State examiners didn't properly know how to evaluate pain  
22 and that perhaps the Social Security Administration had  
23 understated the use of pain in an evaluation.

24 The concern was not that there was a growing desire  
25 to start taking account of subjective elements of pain,

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1 but to properly account for the fact that these regulations  
2 require an underlying medical condition and that pain is  
3 evaluated in that way.

4 A positive statement about how pain is to be evaluated.

5 Senator Moynihan. Could I say what my concern is?  
6 I want to hear Mr. O'Shaunnessy. I do not know the answer.

7 When it is required that there be objective medical  
8 science in finding which shows the existence of a medical  
9 condition which could reasonably account for it, what does  
10 the medical profession say to you about that on that subject?

11 Mr. O'Shaunnessy. Okay. What we are seeking, Senator,  
12 is to specifically get the medical community's insights into  
13 that subject through a systematic review in the quadrennial  
14 report. In the meantime, however, in order to run the  
15 program in such a way that we can provide benefits to the  
16 disabled but not to those who would otherwise not be  
17 disabled, we do require that there has to be some medical  
18 finding of a medical problem of which pain is the symptom.

19 So, what we are seeking is to continue the current  
20 approach to --

21 The Chairman. Until you have that report.

22 Mr. O'Shaunnessy. Until we get the expert report, or  
23 the expert advice.

24 Senator Moynihan. Mr. Chairman, why haven't we got  
25 someone from the National Institutes of Health here who can

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19  
1 speak to this? I mean, is this something that the physician  
2 state-of-the-art is ready for? They say we can't do it.

3 Mr. Enoff. Senator, as I was saying before, we have  
4 the experts, including people from the National Institutes  
5 of Health, working with us now. We have not been able to  
6 get a statement thus far that goes beyond what we have here  
7 in terms of anything that the medical community is willing  
8 to sign onto, and we continue to work with the experts in  
9 the pain area.

10 Senator Moynihan. What is it that you have that you  
11 have the medical profession --

12 Mr. Enoff. No. What we have now -- our current  
13 regulation as is proposed in this amendment -- is that there  
14 be some medical signs and findings that are established by  
15 acceptable clinical or laboratory diagnostic techniques  
16 that show the existence of a condition that would reasonably  
17 be expected to produce pain.

18 The Chairman. Carolyn?

19 Ms. Weaver. I think the point to be stressed here is  
20 that this is currently a part of regulations and therefore  
21 it should be expected to be applied to people in a uniform  
22 manner in these disability determinations. And the concern  
23 is that as long as it is in the regs and pending some expert  
24 advice that we need a new definition of pain.

25 By putting it in the statute, pending the study, you

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1 at least ensure that people are treated evenhandedly under  
2 the law, as would be expected under a regulation.

3 Senator Heinz. Mr. Chairman?

4 Senator Moynihan. What about the Polanski decision?  
5 Does this reverse the Polanski decision?

6 Mr. O'Shaunnessy. Yes, we are presently preparing an  
7 appeal on that case.

8 The Chairman. Well, somebody indicated that without  
9 some specific language, we are talking about \$.5 million  
10 additional costs over a period of three years.

11 Mr. Humphreys. An estimate was made by the Social  
12 Security Actuaries of a legislative proposal that was  
13 similar to the Polanski decision, and that estimate was  
14 that by 1988 a pain standard of that type would be costing  
15 \$.5 billion a year.

16 The Chairman. Oh, a year.

17 Senator Heinz. Mr. Chairman? It seems to me that the  
18 statement in the amendment is reasonable as far as it goes,  
19 but there is one case that I suspect may not be covered.

20 It is my understanding that there are instances where  
21 the existence of debilitating pain can in fact be  
22 demonstrated by doctors, by qualified medical people, without  
23 the existence of debilitating pain sufficient to disqualify  
24 you from being able to work can be objectively determined.

25 But that there are cases where the so-called underlying

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1 cause of that pain cannot be determined.

2 Now, my question is: Is it our policy to exclude those  
3 cases where there is objective medical evidence of pain  
4 but where the underlying cause cannot be determined.

5 What are we trying to do? What is our policy goal?  
6 Do we want to cut those people out or leave them in the  
7 program?

8 Senator Moynihan. While they are conferring, may I  
9 state to Senator Heinz that one does not require an  
10 extensive acquaintance among physicians to know of the  
11 rather increasing and happily increasing category of  
12 diagnoses which simply defines a disease in terms of that  
13 which alleviates the pain, which it evidently causes.

14 The advent of steroids led to a whole range of  
15 maladies of which there is some vague notion of what it  
16 is, but not a specific notion of what seems to alleviate it.

17 Did you say what is that physical condition? I don't  
18 know. And as I say, they define it backwards. This is  
19 the disease that is cured by this treatment or alleviated  
20 by this treatment -- but the term cure, they don't use it.  
21 They don't know.

22 I would just like to hear some medical doctors talk  
23 on this.

24 Senator Danforth. May I ask a question? Let's suppose  
25 that --

1 Senator Heinz. Senator, is there going to be an answer  
2 to my question?

3 Mr. Enoff. Yes.

4 Senator Heinz. If you don't mind.

5 Mr. Enoff. In answer to your question, Senator, we  
6 would not have any degree of certainty that the experts that  
7 we have talked to would say that the allegation of pain  
8 itself was a disabling impairment.

9 However, I would point out that in our experience --  
10 and I have consulted with our chief of disability here --  
11 that there are not any numbers of cases that we are aware  
12 of where the impairment that is alleged is just pain.

13 So, I don't want to say that that might not be possible,  
14 but we are not aware of any --

15 Senator Heinz. That there are no cases or that there  
16 are --

17 Mr. Enoff. I am not aware of any significant number  
18 of cases. I don't want to say there has never been a case  
19 because I don't know about every case, but there is no  
20 significant number.

21 Senator Heinz. And I can't speak authoritatively on  
22 this either. I guess my question is: Is it not the case  
23 that one can now clinically determine the existence of pain?

24 Mr. Enoff. I think probability, but I am not aware  
25 that the experts are willing to say that pain as an

1 impairment exists.

2 The other point that I think may -- I don't know if  
3 this relates to your question -- you can decide -- and that  
4 is with the new mental listings, there is provision for  
5 recognizing psychogenic pain.

6 And that would mean that would be pain that doesn't  
7 have a physical tie-in but is corroborated by a psychiatrist.

8 Senator Moynihan. Would you just go through that once  
9 more?

10 Mr. O'Shaunnessy. We will defer on this matter to  
11 Miss Pat Owen, who is the head of the Social Security  
12 disability program.

13 Senator Moynihan. Oh, good.

14 Ms. Owen. The issue of psychogenic pain, which Mr.  
15 Enoff was just mentioning, --

16 Senator Moynihan. Would you define that?

17 Ms. Owen. Psychogenic pain is a kind of pain for  
18 which there is no physical cause that can be identified,  
19 but psychiatrists --

20 Senator Moynihan. Could we say no physical cause has  
21 been?

22 Ms. Owen. That is right. Has been.

23 Senator Moynihan. We don't know what can be.

24 Ms. Owen. Right. And it is a very specific type of  
25 impairment that has mental impairment causes or roots, and

1 that is in the new listings of impairments -- mental listings  
2 of impairments -- of the American Psychiatric Association  
3 and SSA together, with several other groups -- American  
4 Psychological Association.

5 One of the new listings in that mental impairment  
6 listing is psychogenic pain, and it provides for the  
7 treatment of those kinds of impairments.

8 Now, when you get to other types of impairments --  
9 Senator Moynihan. Are there symptoms of psychogenic  
10 pain, or is that the pain for which there is no symptom?

11 Ms. Owen. That is pretty much it -- that there are no  
12 symptoms. I mean, there are no impairment --

13 Senator Moynihan. So, that would not be this -- this  
14 language would not preclude this. It would incorporate  
15 your present practice.

16 Ms. Owen. Right. And what we think is that that is  
17 a good model -- the way that we got with the experts and  
18 the experts gave us advice in that particular category.

19 You do find that there are a lot of people who deal  
20 with pain, but they deal with pain in living with pain  
21 and treating pain, but the actual root causes of pain,  
22 you don't find very much literature on that to use in a  
23 national program such as the one that we have.

24 And as Mr. Enoff pointed out, we have a group of people  
25 working -- two different work groups -- one in the muscular

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1 skeletal area, which is the other area -- the back pain and  
2 the arthritic pain where pain comes up as a major factor --  
3 and there is a lot of discussion between the experts there  
4 as to how you go about proving the existence of pain in  
5 those areas.

6 As Lou pointed out, we really are trying to establish  
7 the best use of pain within the program, but it is very  
8 hard to get people to give us the expert advice that you  
9 are looking for, Senator, or agreement on that.

10 Senator Danforth. There are people who suffer  
11 excruciating, incapacitating headaches, and to look at  
12 these people, you would never know that there was anything  
13 wrong with them except they wince.

14 Would they be eligible for disability?

15 Ms. Owen. Again, the way the regs are currently set  
16 up now, there would have to be some objective evidence  
17 that shows a medical or physical impairment.

18 Senator Danforth. Well, if the person went to the  
19 doctor and said, "I have severe migraine headaches or other  
20 kinds of headaches." And the doctor's diagnosis would be  
21 based solely on what the person told them.

22 That is, he would say I have headaches and they are  
23 very severe and they come at the following intervals and  
24 they are located in the following part of my head. And  
25 that is all the doctor would have to work with. So, the

1 doctor could make a diagnosis on that basis.

2 Ms. Owen. I can't tell you that there would not be  
3 cases where you could not under the current rule establish  
4 that there is a mental or physical impairment, but --

5 Senator Danforth. Would that person be eligible?

6 Ms. Owen. I think, as it stands, you would have to  
7 look at a lot of other things, too. There is a possibility  
8 he would not be eligible, but you would have to consider  
9 all the things of not being able to work.

10 There are other demonstrations like wasting and fatigue  
11 and things of that sort that show up in pain areas. It  
12 is very hard for me to just talk in general here.

13 In specific cases, I suppose there could be a case  
14 that would not be allowed and the person had severe pain.

15 Senator Danforth. Well, Thomas Jefferson was  
16 incapacitated by very severe headaches, and no other  
17 apparent -- as far as I know -- physical symptoms, but when  
18 he was smitten with headaches, that was that.

19 Ms. Owen. He was substantially gainfully employed  
20 most of the time, too. And I am not saying that to be --

21 You would have to have the combination. I think if  
22 you had a situation where a person had worked and had a  
23 work history, and then all of a sudden did not work any more  
24 and had the complaint of severe head pain, and there was  
25 other subjective evidence, I think we would have to treat

1 that case on an individual basis.

2 Just because we have these rules that we follow all  
3 the time, there is no reason that there are not some  
4 exceptions to the rules in certain cases.

5 The Chairman. You don't have any problem with the  
6 language? Or do you have a problem with the language?

7 Ms. Owen. No.

8 Mr. O'Shaunnessy. No, we do not.

9 Senator Moynihan. Mr. Chairman, I don't want to press  
10 this, but there are only four of us here, and I am uneasy.

11 Thomas Jefferson had migraine headaches, and when he  
12 did, he used to often go to bed for three weeks.

13 The Chairman. Now they have biofeedback.

14 Senator Moynihan. And he could not function as the  
15 Secretary of State.

16 Dr. Freud had cancer of the jaw in his later years.  
17 And he chose as a matter of decision. He was Sigmund  
18 Freud and he would not take opiates. He preferred to be  
19 in excruciating pain so he could write.

20 Now, that was Sigmund Freud, and he had a specific  
21 capacity to endure pain. There are studies of anestheticity  
22 in pain, and degrees of sensitivity to it.

23 Gosh I am hesitant to put this in this statute.

24 The Chairman. Well, we don't have to do that now.  
25 I thought if there was no objection we would do that.

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1           Otherwise, we will just vote on it tomorrow.

2           Senator Heinz. Mr. Chairman, may I make just an  
3 observation here? One of the things that the committee is  
4 considering is sunseting the medical improvement standard  
5 after three years. I don't know if we are going to decide  
6 to do that or not.

7           As far as I know, we didn't make a decision one way  
8 or the other on that specific element. Maybe we did and  
9 I missed it. But if we do decide to sunset that, we  
10 should probably decide to sunset this as well.

11          The Chairman. I discussed that with Carolyn yesterday.  
12 When will the report be available from the commission?

13          Mr. O'Shaunnessy. 1986.

14          Senator Moynihan. You are not going to get a report  
15 that settles this. You are just going to get a report  
16 that is going to tell you what the state of --

17          The Chairman. Right. So, I need some time. But 1986.

18          Mr. O'Shaunnessy. That is right.

19          The Chairman. When? June? July?

20          Ms. Weaver. December 1986.

21          The Chairman. Oh, December 1986. Okay. Let's go  
22 onto something else, less painful, if we can do that.

23          We are going to have difficulty tomorrow morning  
24 because we have the President of Mexico in a joint meeting  
25 at 11:00. What about tomorrow afternoon?

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1 Mr. DeArment. We don't have anything in the committee.

2 The Chairman. Maybe we can meet tomorrow afternoon  
3 at 2:00 and then again on Thursday morning.

4 I think we will go ahead and let everybody who has a  
5 real interest be here for the explanation. Now, you are  
6 up to number eight? Is that it?

7 Ms. Weaver. We are now to item nine, on page 10.

8 The Chairman. Okay.

9 Ms. Weaver. Item nine involves pretermination notices  
10 and the right to personal appearance. Under the proposal  
11 a five State demonstration project would be required where  
12 face-to-face contact in effect takes place before the  
13 State agency denial decision is made.

14 Presently, under amendments enacted in 1983, the face-  
15 to-face reconsideration hearing takes place after the State  
16 has made a denial decision.

17 This would on a demonstration-project basis apply that  
18 prior to the eligibility determination, the final denial  
19 decision being made by the State agency.

20 In addition, the Secretary would be required to notify  
21 any individuals undergoing ineligibility review that such  
22 review is taking place and that they would have the right  
23 to provide medical evidence. That is basically a part of  
24 the operating procedures now.

25 The Chairman. That is in H.R. 3755 and also in S. 476.

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1 Is that correct?

2 Ms. Weaver. This provision is in S. 476 and in the  
3 House bill, it would be mandated on a broader basis.

4 The Chairman. Okay. Next?

5 Ms. Weaver. Item 10 would require the Secretary to  
6 make every reasonable effort to obtain necessary medical  
7 evidence from a treating physician prior to seeking a  
8 consultative examination, that is a medical examination  
9 purchased by the State agency.

10 In addition, the Secretary would be required to develop  
11 medical evidence over the preceeding 12 months, which is  
12 basically what the Administration is doing under present  
13 policy, at least the second provision is.

14 The Chairman. Now, is that in either 476 or --

15 Ms. Weaver. That is the same as S. 476, and the House  
16 bill has a more limited provision that would simply require  
17 the Secretary to issue regulations on consultative  
18 examinations.

19 The Chairman. Okay. Vocational rehabilitation?

20 Ms. Weaver. Vocational rehabilitation -- that provision  
21 would expand reimbursement for vocational rehabilitation  
22 services provided to certain individuals. Particularly  
23 under the 1981 law, individuals who returned to work for  
24 nine months -- the agency receives reimbursement for.

25 This would expand VR reimbursement to individuals who

1 are in a VR program and medically recover while in that  
2 program and would allow reimbursement to take place in  
3 those cases as well.

4 That is similar to the House provision and similar to  
5 S. 476, but doesn't go quite as far.

6 The Chairman. Number 12.

7 Ms. Weaver. Special SSI payments. This is basically  
8 the provision that was approved by the Senate by, I believe,  
9 a unanimous vote on November 17th, which would extend  
10 Section 1619 of the Social Security Act for three years.

11 It is the provision in the act which allows severely  
12 impaired SSI recipients to receive the SSI payment in  
13 Medicaid despite earnings above the level which would  
14 demonstrate SGA.

15 That expired on December 31. It is being continued  
16 on an administrative basis right now, and this would be  
17 a three-year extension of that program.

18 The Chairman. We extended that last session, but the  
19 House never acted. Is that correct?

20 Ms. Weaver. That is correct.

21 Page 14, item 13 is the Advisory Council, and basically  
22 directs the next quadrennial Social Security Advisory  
23 Council to look at issues not only surrounding pain but  
24 alternative approaches to work evaluation for SSI recipients,  
25 the effectiveness of vocational rehabilitation programs for

1 SSI recipients, and also the question of using specialized  
2 medical professionals in the disability determination, which  
3 is the issue raised by the qualified psychiatrist and  
4 psychologist.

5 And they would be authorized to convene special task  
6 forces of experts.

7 Senator Heinz. Mr. Chairman? Since they are supposed  
8 to report by December 31, 1986 -- is that correct, Carolyn?

9 Ms. Weaver. Yes.

10 Senator Heinz. Might it not be appropriate to require  
11 that they be appointed by June of 1985 so that they have  
12 a full 18 months to do their work?

13 The Chairman. Not later than that.

14 Senator Heinz. Not later than June 1st.

15 Senator Moynihan. Mr. Chairman, on a related subject,  
16 if I could point out to the committee that the two public  
17 members of Social Security Board of Trustees, which we  
18 provided to be appointed in the legislation adopted last  
19 year -- are still not appointed.

20 The Chairman. Do you have any comment on that?

21 Mr. O'Shaunnessy. No.

22 The Chairman. Will you have any?

23 Mr. O'Shaunnessy. Yes, we will look into it.

24 The Chairman. Soon.

25 Mr. O'Shaunnessy. Soon.

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1 The Chairman. Tomorrow. Okay?

2 Ms. Weaver. Item 14 is basically a provision that was  
3 include in S. 476 which would require the Secretary to  
4 issue regulations establishing the standards to be used  
5 in determining the frequency of periodic eligibility reviews.

6 Some of the questions outstanding are: How frequently  
7 will people be reviewed, if more frequently than three  
8 years in the second round of reviews. And for example, the  
9 frequency of reviews for people who are so-called permanently  
10 impaired who are not exempt from reviews but would be  
11 reviewed more slowly.

12 Senator Heinz. Mr. Chairman, a question on that.  
13 Right now, we are supposedly in a three-year cycle, which  
14 starts counting from the moment the person's number comes  
15 up in the redetermination lottery or whatever it is.

16 The appeals process can be very lengthy, and I know  
17 of several of my constituents who went through the appeals  
18 process, were reinstated, and very shortly after they were  
19 reinstated, they were notified that because it had taken  
20 them two years -- they were notified that in a few months  
21 they were going to be up for redetermination, which doesn't  
22 sound quite like that is the way it ought to work.

23 It seems to me that the result is you are having a  
24 redetermination maybe within 12 months of an adjudication.  
25 Is that really what we want to do?

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1 Mr. Enoff. If I might, Senator Heinz, there were a  
2 number of those situations that your staff brought to our  
3 attention, and they were just mistakes in terms of the  
4 rescheduling of those.

5 Now, it is the case that sometimes they --

6 Senator Heinz. Well, you are consistent. You made  
7 a lot of them.

8 Mr. O'Shaunnessy. Senator, presumably that would be  
9 addressed in these regulations which would be up for review  
10 and comment.

11 Senator Heinz. What is the policy in the regs?

12 Mr. O'Shaunnessy. That is what is yet to be developed,  
13 and presumably we would have to set forth a minimum period  
14 between reviews as well as a maximum period.

15 Senator Heinz. All right, but it really has been a  
16 problem, and I hope you will deal with it. It has got to  
17 be a waste of everybody's time and effort and money.

18 The Chairman. I think that wasn't the intent -- where  
19 you finish one review in 34 months and then get punched up  
20 again for review.

21 Senator Heinz. Now, that is all right, but that is  
22 not what is happening.

23 The Chairman. I know.

24 Ms. Weaver. That is presumably one of the items that  
25 should be addressed by the Secretary in these regulations.

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1 The Chairman. Number 15.

2 Ms. Weaver. Item number 15 --

3 The Chairman. Is this Senator Bentsen's?

4 Ms. Weaver. Yes, it is. It would require the  
5 institution of a mechanism for monitoring representative  
6 payees.

7 Under the Social Security Act, representative payees  
8 may be appointed to beneficiaries when it is in their best  
9 interest. Under the SSI program, they must be appointed if  
10 there is a drug or alcohol addiction involved, but basically  
11 there are no requirements or restrictions placed on the  
12 selection or monitoring of those payees, once the decision  
13 has been made to appoint a representative payee.

14 Under the proposal, basically a system would be that  
15 the Secretary would be required to set up a system of,  
16 number one, checking on the qualifications of the  
17 representative payee within 45 days of the certification  
18 of that individual, and secondly, to set up a system of  
19 annual accounting for those representative payees which  
20 are not either a parent or a spouse living in the same  
21 household with the individual.

22 And in addition, the penalties would be increased for  
23 misuse of benefits.

24 There are approximately five million people under the  
25 SSI and Social Security Program who have appointed

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1 representative payees, and this provision would basically  
2 exclude about 4 million of those who are children living  
3 with their parents, for example, or individuals living with  
4 their spouses, from the annual reporting requirement, and  
5 thus limit the population which this is applied to.

6 Senator Heinz. Mr. Chairman, I don't have a question  
7 on this. May I just backtrack a bit to be clear on one  
8 thing?

9 Carolyn, back to number 14 -- frequency of periodic  
10 reviews. When we say the proposed change is to require  
11 the Secretary to issue regulations, does that mean that  
12 the Secretary will no longer be bound by the three-year  
13 review requirement?

14 Ms. Weaver. No.

15 Senator Heinz. It does not mean that she will no  
16 longer be --

17 Ms. Weaver. No.

18 Senator Heinz. She will, in fact, continue to be  
19 bound by the three-year requirement?

20 Ms. Weaver. Yes.

21 Senator Heinz. Why, if it takes a year and a half or  
22 two years to go through the appeals process, why won't  
23 that person by statute be required to be reviewed just a  
24 few months later?

25 Mr. Enoff. The person will be reviewed after the

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37  
1 determination was made. The final determination would be  
2 made -- you are talking about the ALJ level -- I would assume  
3 that is the determination.

4 Unless the person were diaried for other reasons --  
5 in what we call a medical diaried case.

6 Senator Heinz. I seem to recall having asked this  
7 question previously, and my understanding was that -- and  
8 maybe my recall is incorrect -- that the clock always struck  
9 at the same hour -- that the question was not when the  
10 determination was made, but when the process of  
11 redetermination started.

12 Is the statute-- Does the statute allow you, as it  
13 is written, to do what you just said?

14 Ms. Weaver. The statute simply requires that somebody  
15 be redetermined at least once every three years for their  
16 continuing eligibility, assuming they are not in the  
17 permanently impaired category.

18 Let me have Pat Owens clarify your point about the  
19 frequency relative to the appeals process.

20 Ms. Owens. Senator, it is three years at the end of  
21 the review process, and the review process does not end  
22 until the appeal process is completed.

23 If a person is in the appeal process, then when that  
24 appeal is over -- say it is an ALJ decision -- the diary  
25 is entered into the system from that date -- for three

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1 years from that date.

2 Now, we had some startup problems in the beginning  
3 with the system. We did not have a backup system in order  
4 to enter all those diaries, and we were getting some of  
5 those cases out earlier than we should have.

6 Senator Heinz. Yes.

7 Ms. Owens. And I think we have corrected that now,  
8 except in the case when the ALJ themselves believe that  
9 there is going to be a medical improvement in the case,  
10 they will ask us to put a diary on the case and look at  
11 it.

12 Senator Heinz. What you want to do sounds fine. I  
13 just wanted to make sure there wasn't a Catch 22 here that  
14 would preclude you from doing it.

15 Ms. Owens. Let me add just one more thing. We are  
16 looking now at the cases as they go out -- of course, with  
17 the moratorium, we are not sending the cases out. But we  
18 were beginning to look at periodics as they went out the  
19 door to be sure they had not been subjected to too quick  
20 a follow-up review.

21 So, we had a double-check on that after you had pointed  
22 out to us some of the situations that you had found.

23 Senator Heinz. Thank you very much.

24 (Continued on next page)

25

1 The Chairman. Anything else?

2 Ms. Weaver. Two more provisions.

3 Item number 16 is a fail-safe financing provision which  
4 would basically state that whenever the disability insurance  
5 trust fund is expected to drop below 20 percent of annual  
6 out-go the secretary would make that announcement to  
7 Congress by July 1. And if Congress fails to take action to  
8 restore the financing of the DI Trust Fund, then the cost of  
9 living adjustment paid to disability beneficiaries the  
10 following January would be scaled back accordingly as  
11 necessary to keep the reserves from falling below 20  
12 percent.

13 Should it become necessary to go further than scaling  
14 back the cost of living adjustment to current beneficiaries,  
15 then the increase in the benefit formula used for determining  
16 new benefit awards would be also scaled back, as required to  
17 keep the reserves from falling below 20 percent.

18 The Chairman. Congress is notified by July 1. Then  
19 how much time would we have to act?

20 Ms. Weaver. The next cost of living adjustment would  
21 go into effect January 3rd, and presumably the Social  
22 Security Administration would have to begin processing a  
23 lower cost of living adjustment at least a couple of months  
24 early.

25 Senator Moynihan. Do we anticipate, Mr. Chairman, under

1 this provision actual reductions in payments? Does it only  
2 affect the cost of living increase?

3 Ms. Weaver. That's correct. Or the increase from year  
4 to year in the new awards benefit formula. But actual  
5 benefit levels would not be affected under this proposal.

6 Senator Danforth. Mr. Chairman, as I understand it,  
7 this is price indexed; not wage indexed.

8 Ms. Weaver. The cost of living adjustment paid to  
9 current beneficiaries is price indexed, and the benefit  
10 formula used for determining new awards for both retirement  
11 benefits and disability benefits is wage indexed.

12 Senator Danforth. I'm not sure I'm with that. The  
13 annual adjustment is price indexed.

14 Ms. Weaver. Yes.

15 Senator Danforth. What is wage indexed?

16 Ms. Weaver. The benefit formula used for actually  
17 calculating the benefit for somebody newly entitled to  
18 benefits is increased each year by the gross of wages in the  
19 economy rather than prices.

20 Senator Danforth. Does this make sense to have this  
21 price indexed? I mean it's a substitute for salaries,  
22 isn't it?

23 Ms. Weaver. This is cost of living adjusted in the same  
24 spirit that all social security payments are. All of them  
25 are fully adjusted for the increase in the cost of living.

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1 Disability, cash and retirement cash benefits. And this  
2 would simply involve the trimming back of the cash benefit,  
3 disability cash benefit, increase should trust funds fall  
4 below 20 percent of annual out-go.

5 Senator Moynihan. Mr. Chairman, the provision we have  
6 in the present law is 15 percent. Is that right?

7 Ms. Weaver. It's a different trigger, as you say. But  
8 also then it triggers on a different process, which is the  
9 lower of the increase in wages or prices.

10 Senator Moynihan. Yes.

11 Ms. Weaver. This would be rather than tieing back into  
12 that a separate treatment for the disability insurance trust  
13 fund that would be unrelated to the relative degree of wage  
14 and price gross, which is the trimming of the price increase  
15 in benefits.

16 Senator Moynihan. This pays nothing out in addition  
17 to whatever to keep above 20 percent unless -- it could be  
18 above 20 percent anyway. But if you are at 20 percent, you  
19 just don't take any additional.

20 Ms. Weaver. You make as much as can be paid and then  
21 keep the reserves at 20 percent. And according to the --

22 Senator Moynihan. If that happens to be zero, that's  
23 what it is.

24 Ms. Weaver. Yes. That's correct.

25 According to the actuaries, their intermediate

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1 assumptions for the 1984 board of trustees' report would  
2 indicate that this type of package would not cause this to  
3 trigger on, assuming that all of their assumptions are true  
4 and accurate.

5 Senator Moynihan. That means they go down to 23  
6 percent, was it, and then do we anticipate they go up again,  
7 the ratio goes up again?

8 Ms. Weaver. Something on that order, yes.

9 The Chairman. I have a 4:00 meeting. If I could be  
10 excused, maybe Senator Danforth could take over.

11 I wanted to indicate that after having gone through the  
12 provisions -- I assume there may be some amendments. We  
13 would like to deal with those tomorrow. Senator Baker  
14 indicated again that unless we can find agreement on some of  
15 these issues, he is going to be hard pressed to finish what  
16 he would like to finish before the Memorial Day recess. And  
17 this was on his schedule a week from today.

18 So, hopefully, those who have an interest in this -- and  
19 we have -- in getting it done, we can reconcile our  
20 differences where we can in the committee and go to the  
21 floor and pass it very quickly and go to conference.

22 Senator Long. I don't see any reason we can't do that.  
23 At least the committee's part of it. We may not be  
24 unanimous, but I don't see why we can't make a majority  
25 decision on it.

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1           The Chairman. I think we are fairly close. I had  
2 hoped we might be able to do it tomorrow. If not,  
3 Thursday morning.

4           Senator Heinz. I think we are pretty close, Mr.  
5 Chairman.

6           The Chairman. I just wanted to pass on what Senator  
7 Baker passed on today at the meeting.

8           Ms. Weaver. Do you want the final proposal in this  
9 package?

10          The Chairman. Yes. I'm going to have to leave, but  
11 Senator Danforth will be here and Senator Long.

12          Ms. Weaver. The final item, item number 17 on Page 18,  
13 would simply tighten the requirements now in present law  
14 with regard to federal monitoring of state disability  
15 determinations.

16          Presently, the disability insurance program is  
17 administered by the states on a voluntary and fully reim-  
18 bursed basis so that while determinations are made by the  
19 states, all benefit costs and all administrative costs are  
20 covered by the federal government.

21          Under the law if the state goes out of compliance, it  
22 has failed substantially to comply with federal law and  
23 guidelines in the way they determine disability, a series  
24 of procedural steps must be taken by the secretary to begin  
25 the process of federalizing disability determinations in

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1 that state.

2 There is concern because of the number of states which  
3 have failed to comply with the law over the past year that  
4 those procedures are too loose. That is, that the process  
5 of beginning to federalize -- there are too many procedural  
6 hoops. And they are outlined under the present law  
7 description.

8 This would basically put in time certain. That is,  
9 within six months of the secretary's finding, making a  
10 finding that a state is failing to make the disability  
11 determinations in accordance with federal law and standards,  
12 the secretary would have had to federalize disability  
13 determinations in that state.

14 It's basically putting in a time schedule for the events,  
15 given the procedural steps that are still in the law.

16 Senator Heins. Mr. Chairman, is there any problem  
17 with a state getting between the devil and the deep blue  
18 sea? That is, between HHS and the courts? The courts view  
19 it this way in those states, and HHS says, no, you do it that  
20 way. What happens?

21 Mr. O'Shaunnessy. There would be a hearing in which  
22 the state would have to come before the department and make  
23 its case as to why it could not be carrying out its  
24 obligations.

25 Presumably, without prejudging any particular case, the

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1 fact that a court had gotten involved is a significant  
2 factor. It would be considered at that point.

3 Senator Moynihan. I wonder if I could ask a question.  
4 There are such cases in which the Social Security Adminis-  
5 tration -- we would be insisting that it be administrated.  
6 I mean the funds paid to pay for this for a long while has  
7 been filled with federal just concern that the Social  
8 Security Administration is in contempt of this court. And  
9 reports from the Justice Department. I know Ms. O'Toole has  
10 done her best, but there are persons in the Department of  
11 Justice who think it is.

12 And right now I know some of them just won't obey.  
13 They have imposed a moratorium on the administration. How  
14 many states have just refused to any longer do what they have  
15 been directed to do?

16 Ms. Weaver. That's 10 states.

17 Senator Moynihan. Ten states. That's a fairly large  
18 statement when 10 states say no.

19 Now what have got ourselves into in this?

20 Ms. Weaver. I would say in this proposal per se we have  
21 not changed the basic procedures in terms of --

22 Senator Moynihan. You haven't?

23 Ms. Weaver. No. It's just putting into place a time  
24 schedule. The secretary, under present law, may not make  
25 federal assumption of the disability determination process

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1 earlier than six months before a set of steps have been taken.  
2 This would simply state that within six months of taking  
3 those steps, and making of findings, you must federalize.

4 Senator Moynihan. On that matter we went through  
5 earlier a bit quickly in which we said that where there is a  
6 court order, and the secretary decides not to make it  
7 general, that he/she has to report to us, how does the  
8 Justice Department think about that?

9 It cannot be the first time in the history of the United  
10 States where there was a problem of a court of appeals having  
11 laid down a rule. What is the practice?

12 Senator Danforth. What practice?

13 Senator Moynihan. I mean when a federal agency finds  
14 itself with a court of appeals decision on a particular  
15 subject, has it been the practice just to assume that it's  
16 the law until it is resolved otherwise?

17 Mr. O'Shaunnessy. We can turn to Ms. Kuhl from the  
18 Justice Department. What would happen here is the  
19 Department of Health and Human Services would make a  
20 recommendation to the Department of Justice which would then  
21 look over that recommendation and come up with a finding.

22 Carolyn?

23 Ms. Kuhl. I'm not sure what you just said. But let  
24 me try and address the general problem here in kind of a  
25 way that gives you some perspective on it.

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1           We have a regional court system. We have a nationwide  
2 system of benefits.

3           Senator Moynihan. Right.

4           Ms. Kuhl. The Solicitor General recently sent a  
5 letter to Chairman Dole about this problem. That Social  
6 Security, at least the statute says, the responsibility to  
7 uniformly administer a nationwide benefit system. And yet  
8 you have the problem of court decisions.

9           Our concern in the Justice Department, the Solicitor  
10 General's concern is that we not be precluded from  
11 attempting to achieve some uniformity in the courts by asking  
12 where appropriate for a court to reconsider an earlier court  
13 decision.

14           For example, if we have an adverse decision -- a  
15 statute is passed. The statute needs to be interpreted  
16 earlier on. The Ninth Circuit, say, rules adversely to the  
17 secretary on a particular issue of law. Later on, the  
18 First and the Third Circuits rule in a different fashion on  
19 the same issue of law.

20           We feel that we need the leeway to go back and say to  
21 the Ninth Circuit, look, here is some further learning on  
22 this subject; you should reconsider your prior ruling.

23           Senator Long. Mr. Chairman, might I just react to that?  
24 I have here a law review article. And the significance, from  
25 my point of view, of this law review article is that part of

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1 what I am going to read to you is quoted in this case that  
2 I discussed this morning, the Polasky decision.

3 Now let me just read what this judge wrote. Now,  
4 imagine, this appellate court judge wants to make our laws.  
5 And let me just read this.

6 He says "The Social Security Administration has  
7 responded to the increase in applications by hiring more  
8 legal personnel, administrative law judges, law students  
9 and law clerks to assist with the reviewing process. The  
10 government through the Secretary" -- now get this. "The  
11 government through the Secretary" -- it means the entire  
12 federal government -- "has also responded with changes in the  
13 laws."

14 Now that is what we in Congress did. That's the laws  
15 that we ourselves have passed to try to maintain control over  
16 the program and to try to keep this program within bounds.

17 Now I will read on. "The government through the  
18 secretary has also responded with changes in the laws,  
19 more restrictive regulations and stepped up programs to  
20 remove persons who allegedly are not disabled from the  
21 eligibility rolls. The effect of the government's action  
22 has been to deny benefits to persons who would have been  
23 declared eligible a few short years ago.

24 "This restrictive approach to the disability program  
25 is ill-conceived." Now who is saying that? That is this

1 judge writing this law review articles. And now I start  
2 reading the part which was quoted in this Polasky decision.

3 "Congress enacted the Social Security Disability  
4 Insurance program in order to provide benefits to individuals  
5 who became disabled and could no longer engage in any  
6 substantially gainful activity by reason of medically  
7 determined physical or mental impairment."

8 Now this is this judge writing again in this law review  
9 article. "The program is intended to aid workers who after  
10 having contributed to the nation's work force are unable to  
11 continue to do so because of a disability. The underlying  
12 purpose of this program is to ease the economic dislocations  
13 and hardships that often accompany disability.

14 "The act is a remedial one which should be broadly  
15 construed and liberally applied to effectuate its humanitarian  
16 goals." Now who was saying that? This court of appeals  
17 judge who would, if he could, make the law for us.

18 I was one of those who helped to write the law and we  
19 didn't intend that the test of disability be broadly  
20 construed and liberally applied. We thought we couldn't  
21 afford anything like that.

22 Now let's read on. "Thus, when a provision of the  
23 Social Security law can reasonably be construed in favor of  
24 one seeking benefits, it should be so construed."

25 Now this is interesting. This judge in this Polasky

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1 decision, he leaves out this first sentence and the last  
2 two sentences of the paragraph. He leaves out the  
3 statement: "This restrictive approach of the disability  
4 program is ill-conceived."

5 Congress knew what they were doing at the time we  
6 passed that. He just doesn't agree with it. And, therefore,  
7 he wants to cite the secretary for contempt because she  
8 obeys the law that we passed.

9 And then this final part. This paragraph was quoted,  
10 and you read it and you gain the impression from the Polasky  
11 decision that he is quoting the whole paragraph. He is  
12 leaving out the first and last sentences.

13 And then this: "Thus, when a provision of the Social  
14 Security Act can reasonably be construed in favor of one  
15 seeking benefits, it should be so construed." Now I tell  
16 you if you are going to do that, you had better put about a  
17 10 percent additional tax on Social Security to pay for all  
18 this because you sure can't pay for it with what you have got  
19 now. What is it now? Is it about a 2-1/2 percent tax for  
20 Social Security, Mike?

21 Mr. Stern. The disability insurance share of it is  
22 about half a percent on employers and employees each. So  
23 it is 1 percent now.

24 Senator Long. A total of 1 percent right now?

25 Mr. Stern. Right. It's actually down from what it

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1 had been, say, in 1983. Then it was 1.3 percent.

2 Senator Long. One point three in 1983?

3 Mr. Stern. Right. And now it has been reduced. It is  
4 1 percent. And it would ultimately be scheduled to go up to  
5 1.42 percent, combined employer and employee. Ultimately  
6 meaning after 2000.

7 Senator Long. Well, in any event, you sure had better  
8 plan to increase it, double it or treble it because we have  
9 got a world of people out there who have a handicap. I was  
10 reading yesterday that said among the whites that 22 percent  
11 of white males are not in the work force. I'm talking about  
12 not just those unemployed. I'm talking about those that for  
13 one reason or another falls between the cracks.

14 And for the blacks it would be 44 percent according to  
15 this article. Now there is a world of people out there who  
16 would like to take the early retirement by way of disability  
17 if they could qualify for it.

18 I will support a program -- and I wish the department  
19 would come up with one -- to help us provide employment  
20 opportunities for people who are handicapped. And maybe  
21 we can get business to cooperate in helping us to do this  
22 thing.

23 But when you look at all the inspiring examples there  
24 are around this country of people who have suffered severely  
25 handicapping situations and have proceeded to perform no

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1 less than Franklin D. Roosevelt or -- in New Orleans we have  
2 a veteran there who doesn't have arms or legs and who is  
3 still making a living as a lawyer.

4 And when you have that type of thing, it seems to me  
5 that we just can't afford to put people who are potentially  
6 useful on those disability rolls.

7 Senator Danforth. Senator Dole, before he left, asked  
8 if there were any points that we could agree on that are  
9 non-controversial. And I wonder if we could look at the  
10 cover of attachment 1 where it lists the 17 items.

11 Number 6 and 7, as listed, as the reverse of what is  
12 actually in the folders. Six is compliance with court  
13 costs, and 7, multiple impairments.

14 Senator Moynihan. Mr. Chairman, could I suggest that as  
15 far as I am aware we have disagreement on 7 and 8.

16 Senator Heinz. I beg your pardon?

17 Senator Moynihan. I'm only aware of disagreement on  
18 7 and 8.

19 Senator Danforth. Seven meaning multiple impairments?

20 Senator Moynihan. Seven meaning pain, and eight  
21 meaning compliance with court orders. Six is compliance  
22 with court orders and pain.

23 Senator Danforth. Six and eight.

24 Senator Moynihan. Six and eight.

25 Senator Danforth. Anybody else have a candidate for

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1 controversy?

2 Senator Heinz. I think 1, 6 and 8 are the main ones.

3 Senator Moynihan. I would also like to say that the  
4 whole question of -- medical improvement -- compliance with  
5 court order.

6 Senator Danforth. Then can we agree to the others?

7 Mr. O'Shaunnessy. Senator, you haven't asked the  
8 administration's position on one item here that I would  
9 like to point out, and that's the fail-safe financing.

10 Senator Danforth. Yes.

11 Mr. O'Shaunnessy. That's provision number 17. We would  
12 have great difficulty with that.

13 Senator Moynihan. Why?

14 Mr. O'Shaunnessy. Carolyn indicated that she did not  
15 feel it would provide for the reduction of benefits, but  
16 unless I am misreading it, I believe in the third stage it  
17 would.

18 Ms. Weaver. He is misreading it. There are only  
19 two stages -- a scaling back of the cost of living adjust-  
20 ment, and the wage adjustment.

21 Senator Danforth. Well, let's agree to everything  
22 except medical improvement, compliance with court orders and  
23 pain.

24 Senator Moynihan. Well, if the administration has  
25 difficulty with the fail-safe then --

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1 Senator Danforth. All right. We will include that.  
2 Then we will agree on everything except those four items.

3 Now I would like to ask one question before we break  
4 because I honestly don't understand the answer to it.

5 As I understand it, some people were put on disability a  
6 few years ago, and there is now an effort to take them off  
7 disability, and that is what brings us here. That is the  
8 controversy.

9 I would like to ask what is the difference. Is it a  
10 difference in standards? Is it a difference in personnel?  
11 Why is this the case?

12 When I was asking the questions this morning as to what  
13 is happening, it was my understanding that there are some  
14 people who are disabled and they are in category A and other  
15 people are not disabled, and they are category B. Why give  
16 benefits to people in category B?

17 I am told that the difference isn't clear, isn't that  
18 clear. And that there is a grey area between who is disabled  
19 and who is not disabled.

20 And what I would like to find out is what has happened,  
21 why is this the case? Is it a difference in standards? Is  
22 it a difference in personnel? What has happened to these  
23 people to put them on disability one year and off disability  
24 the next year.

25 Ms. Weaver. There are a number of issues. Number one,

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1 some of those people would have been erroneously allowed.  
2 That was part of what prompted the 1980 amendments. It was  
3 simply believing that the standards in effect in the 1970s,  
4 for example, were improperly applied by particular  
5 examiners who allowed people who did not belong on the rolls.

6 In addition, there would be poorly developed cases that  
7 fall into the erroneous category in a sense. There are the  
8 grey areas in terms of one person looks at a case and he  
9 appears to be disabled or not disabled and another individuals  
10 looks at that case and finds them the opposite. That's  
11 another problem.

12 Part of it is there is a concern that there may have  
13 been different standards applied between then and now in the  
14 sense that possibly the way in which severe and non-severe  
15 impairments were considered in the sequential evaluation  
16 process. The emphasis on severity may have changed.

17 Certainly some people have improved, but in terms of  
18 the grey areas. Certainly, some people have improved whether  
19 due to vocational or medical improvements.

20 But, certainly, a good number of people where either  
21 erroneously allowed or you had a situation in which different  
22 people looked at the same complex case and make a different  
23 judgment.

24 Senator Danforth. We are talking about \$2.7 billion over  
25 a three year period of time, five year period of time. Is it

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1 fair to say that that \$2.7 billion would go mainly to people  
2 in the grey areas? Are we talking about grey area cases or  
3 are we talking about people who are clearly not disabled  
4 who would be receiving that \$2.7 billion?

5 Ms. Weaver. We would certainly expect it's a grey  
6 area situation. It is people, for example, where the cases  
7 of their deterioration in their condition or the fact that  
8 it is the same is not clear. The evidence in the record  
9 does not make a clear case of that.

10 Senator Moynihan. I wonder if I could help on this. I  
11 think I can. And if not, my friends can help me because I  
12 am wrong on something very important.

13 Whether it's the administrative feel of the moment or  
14 what, there is a pattern where almost half the cases being  
15 reviewed are being withdrawn, the disability benefits. And  
16 then of those appealed, about half, the disallowance is  
17 disallowed. They are put back on. Isn't that about right?

18 Ms. Weaver. About 60 percent are allowed by the  
19 administrative law judge who appealed to them.

20 Senator Moynihan. Right. About 60 percent of the  
21 appeals are a success.

22 Now if I understand it, the SSA five year estimate of  
23 \$2.78 billion for our new standards includes as new costs  
24 the restored benefits. Whereas, the Congressional Budget  
25 Office says the new costs are \$600 million. Have I got that

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1 right?

2 Mr. O'Shaunnessy. Yes. It's a question of really what  
3 the baseline is. And the SSA assumption is that people are  
4 taken off the rolls and stay off. And the CBO assumption,  
5 as we understand it, would actually say that not that many  
6 people being taken off the rolls, and therefore the incremen-  
7 tal cost is less.

8 Senator Moynihan. Do you follow that, sir?

9 Senator Danforth. I follow your point. I didn't  
10 follow his.

11 Mr. O'Shaunnessy. It's a question of how you would  
12 define the current situation, I believe. And then evaluate  
13 the costs relative to the current situation.

14 The figures that are contained here assume that the  
15 program, as it is currently in the law as well as in  
16 regulations, and, in fact, with regard to substantial  
17 gainful activity is fully effective. And by changing to the  
18 approach that is contained here, this would be the incremental  
19 cost.

20 Senator Moynihan. But you grant that the present  
21 program isn't fully effective.

22 Mr. O'Shaunnessy. Yes. I'm not necessary agreeing  
23 that the CBO estimate is correct.

24 Senator Moynihan. Sixty percent of the appeals, they  
25 say you are right and the administration is wrong.

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1 Ms. Weaver. I should also note that there are a whole  
2 variety of reasons the CBO numbers different from the  
3 Social Security numbers, having to do with fundamental  
4 methodology as well as assumptions about how many reviews  
5 will be conducted, how many even under present law would be  
6 terminated. And they really make quite a different  
7 assumption about the numbers that would be terminated under  
8 the new proposal relative to SSA, quite dramatically  
9 different assumptions.

10 Senator Danforth. Anyone else?

11 (No response)

12 Senator Moynihan. That clears that up.

13 Senator Danforth. Well, that is it for today. We have  
14 four items left.

15 Senator Moynihan. We would like to know when we are  
16 going to meet tomorrow.

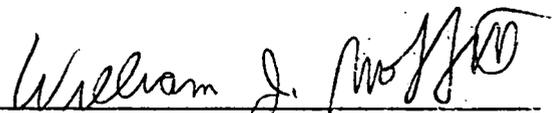
17 Mr. DeArment. I assume we will meet tomorrow  
18 afternoon. That is what Senator Dole said. Probably at  
19 2:00. But we will notify all of the offices as to the  
20 time.

21 Senator Danforth. Right. Thank you.

22 (Whereupon, at 4:26 p.m., the mark-up session was  
23 recessed.)  
24  
25

C E R T I F I C A T E

1  
2 This is to certify that the foregoing proceedings of  
3 a mark-up session before the United States Senate, Committee  
4 on Finance, Tuesday, May 15, 1984, were held as herein  
5 appears, and that this is the original transcript thereof.  
6

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8 

9 WILLIAM J. MOFFITT  
10 Official Reporter

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12 My Commission Expires April 14, 1989  
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