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EXAMINING DUE PROCESS IN ADMINISTRATIVE HEARINGS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

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SECOND SESSION

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EXAMINING DUE PROCESS IN ADMINISTRATIVE HEARINGS

THURSDAY, MAY 12, 2016

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:04 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Sasse, Heitkamp, and Tester.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning, everyone. Welcome to today's Subcommittee hearing. Today we are going to look at several issues surrounding administrative law judges (ALJs), their independence, and the importance of due process as provided by the Administrative Procedures Act (APA). The APA validates due process principles through the guarantee of an administrative hearing before an independent decisionmaker. These independent and impartial decisionmakers are most often administrative law judges.

The office of the ALJ is unique in our Federal Government. Although they are like Federal judges in the sense that we expect them to preside over formal administrative adjudications independently, ALJs are, in fact, executive branch employees selected by the Office of Personnel Management (OPM) to oversee adjudications as required by law. Though ALJs are spread throughout the executive branch, our focus today will center on ALJs from the Social Security Administration (SSA), as they employ the largest number of Federal ALJs. ALJs are hired through the Office of Personnel Management. OPM is tasked with reviewing all ALJs' qualifications. And OPM has made strides in providing qualified ALJs to the Social Security Administration and elsewhere across the executive branch.

At the same time, over the last four 4 years, Congress has appropriated significant resources so that the Social Security Administration could hire more ALJs to address its backlog of disability claims. Yet, the agency has been unable to hire sufficient numbers of approved ALJs to tackle the rising backlog of cases—a backlog which topped 1 million last year and, may I say, in my own State of Oklahoma around 13,000. But instead of hiring more ALJs, in a misguided effort to expedite the adjudications process, the Social

Security Administration is in the process of moving tens of thousands of pending cases from ALJs to non-APA attorney examiners, who are regular employees of the agency and lack the requisite decisional independence. In March, SSA posted close to 30 non-APA "Attorney Examiners" job openings to support this initiative. The Social Security Administration proposal raises important questions about whether cases heard by non-APA attorneys constitutes a violation of the Administrative Procedures Act. Further, Social Security regulation makes repeated reference to a claimant's right to an independent decision from an ALJ.

SSA's newfound policy also raises procedural issues. Given the magnitude and potential economic effect of the Social Security Administration's proposed reinterpretation of its own rule here, it appears that the rule should also have been submitted by SSA to the Office of Information and Regulatory Affairs (OIRA). Economics aside, the proposal creates an inequity where some claimants will receive the independent decision guaranteed to them by the APA and others may not. Furthermore, for non-disability cases the loss of due process is compounded by the fact that a majority of these individuals are unlikely to have access to attorney representation due to a lack of a financial incentive for that attorney representative. But once a sizable number of claimants have been denied a hearing before an ALJ, there is the potential that the Social Security Administration's proposal to move cases away from ALJs to non-APA attorneys could result in a large class action lawsuit.

While we all share the goal of eliminating the hearing backlog—and I do agree we all share that goal—it is our concern not just about meeting those results; we must also focus on how we get there. Accordingly, there are three main points I would like to address today:

First, I would like to focus on the how attorney examiners, drawn from the SSA's own ranks, can be said to appear impartial, especially to the extent that they may review cases de novo.

Second, I would like to know more about the Social Security Administration's policy pivot, which in the past allowed for certain transfers on a case-by-case basis, to permit now large-scale transfers of entire classes of cases.

Third, I believe we need to carefully consider alternative proposals to the Social Security Administration's untested and legally ambiguous policy, such as using retired ALJs from local offices to hear these cases. If the Social Security Administration believes that there are not enough qualified ALJs to meet the current demand, shouldn't they and OPM instead focus on new recruitment efforts to increase the supply of worthy applicants?

There are a lot of issues as we deal with Social Security right now. There are some success stories. I met yesterday with the Inspector General (IG), talking about the fraud that has now been exposed in the West Virginia case. It is a $600 million fraud case that was exposed. There are others on the horizon. I am proud of the work that SSA is doing in changing some of the processes for handling ALJs and some of the oversight and some of the intentional things they are doing to be able to work on the backlog. We just have to make sure that we do this right.

There are millions of dollars in each of these fraud areas, and there is a lot that is pending in case we have an exposed area for a class action lawsuit. It has got to be done right.

We are happy to have with us here today Deputy Commissioner Theresa Gruber from the Social Security Administration, Associate Director for H.R. Solutions Joseph Kennedy from the Office of Personnel Management, and Marilyn Zahm, an ALJ from the Social Security Administration, to help us navigate these important issues. We are grateful for your testimony. I look forward to the issues we will discuss at this hearing.

With that, I would like to recognize Ranking Member Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman, and thank you for that great outline of why we are here today. I think over several decades, Congress has held dozens of hearings about the Social Security Administration and its management of retirement and disability benefits. This oversight is important since traditional Social Security and Social Security disability are critical and important programs that impact people all across the Nation, and in North Dakota.

Since I took office in 2013, literally hundreds of North Dakotans have asked me for help in navigating the Social Security programs. It works out to about five new cases every month. Many of these individuals are seeking help with the appeal of a disability claim. Others find themselves subject to overpayments or caught in some other kind of bureaucratic struggle. Nationwide, there are over 1 million people awaiting a decision or hearing by the Social Security Administration. These millions of individuals find themselves caught up in bureaucracy, struggling to find the correct path forward—whether it is submitting the correct medical proof or understanding the disability program rules. It is critical that today we keep these citizens in mind.

Our interest today in the big and complicated subject of Social Security disability is relatively narrow. We want to learn about the Social Security Administration's proposal to shift certain non-disability appeals away from the realm of administrative law judge hearings to proceedings presided over by administrative appeals judges (AAJs) and attorney examiners within the agency's Appeals Council. This proposed action has raised, I think, very serious questions about whether this change will accomplish what the Social Security Administration hopes to achieve and, most importantly, the impact of this policy on the thousands of Americans seeking appeals of these decisions.

I look forward today to better understanding the differences between ALJs and attorney examiners, as well as the challenges the Social Security Administration faces in managing competing needs and challenges. I want to fully understand the rationale for this change and, most importantly, get clarity on how claimant due process will be affected if this plan is implemented.

Those who are familiar with the work of this Subcommittee know that we are interested—in fact, charged with the responsibility of improving the efficiency, transparency, and effectiveness of our

Federal Government. This hearing provides an opportunity to discuss how this proposal meets those standards, while ensuring the integrity and fidelity of administrative appeal decisions.

Finally, given the important role that the Administrative Procedures Act plays in much of this Subcommittee's work, I welcome testimony that illuminates how and why the independence conferred upon ALJs by the APA should be preserved or enhanced. That is a critical question here, because it seems that we have taken a turn and deviated from what has always been the norm when you make a change like this, especially when it involves due process under law, the only opportunity that someone has to present their case, impartiality, the fact that you should have an opportunity to not be judged by people who probably already were part of a system that judged your claim. It is a troubling set of facts, but my mind I think remains open to better understand how we can improve efficiency but not take shortcuts on due process or on the rights of citizens of this country, especially to critical programs like the Social Security program.

So thank you again. I look forward to your testimony, and I look forward to this Committee's discussion after your testimony.

Senator LANKFORD. Thank you. At this time we will proceed with testimony from our witnesses.

Ms. Theresa Gruber is the Deputy Commissioner for Disability Adjudication and Review at the U.S. Social Security Administration. Ms. Gruber has served the Social Security Administration in various capacities since starting with the Minnesota field office in 1991. She has a Bachelor of Arts from St. Mary's University in Minnesota.

Ms. Marilyn Zahm is an administrative law judge at the Buffalo, New York, Office of Disability Adjudication and Review with the U.S. Social Security Administration, where she was appointed in 1994. She is in the first year of a 3-year term as president of the Association of Administrative Law Judges. You know what the best role is in any association? Past president. [Laughter.]

Yes, and you are in your first year of 3 years as the president, so you have to take it on.

Before becoming an ALJ, Ms. Zahm was a litigator for the National Labor Relations Board (NLRB) and legal services authority.

Mr. Joseph Kennedy is Associate Director for Human Resources Solutions at the U.S. Office of Personnel Management. He has worked on H.R. reform in various capacities within the OPM office and was a Fellow to Congresswoman Morella. Mr. Kennedy received his Bachelor of Arts from the University of the District of Columbia.

I would like to thank all of our witnesses for appearing before us today. It is the custom of the Subcommittee to swear in witnesses, so if you do not mind, I would like to ask you to please stand and raise your right hand. Do you swear that the testimony that you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. GRUBER. I do.

Judge ZAHM. I do.

Mr. KENNEDY. I do.

Senator LANKFORD. Thank you. You may be seated. And let the record reflect the witnesses have all answered in the affirmative.

We are using a timing system today. You will see a clock in front of you as you start your oral testimony. Obviously, your written testimony is already a part of the permanent record. In your oral testimony, if you can stay as close to 5 minutes as you can, that will allow question time, and we will have interaction time for a while.

Ms. Gruber, we are honored to be able to receive your testimony first.

TESTIMONY OF THERESA GRUBER,[1] DEPUTY COMMISSIONER, DISABILITY ADJUDICATION AND REVIEW, U.S. SOCIAL SECURITY ADMINISTRATION

Ms. GRUBER. Thank you, Chairman Lankford, Ranking Member Heitkamp, and Senator Sasse. My name is Theresa Gruber. As the Deputy Commissioner for Disability Adjudication and Review since July 2015, I am responsible for SSA's hearings and appeals operation. Thank you for inviting me today to discuss the significant public service challenge that we face, over 1.1 million individuals and their families awaiting a hearing decision.

I began my career at SSA in a Minnesota field office, as you said, and I have known firsthand the faces behind each appeal and am profoundly aware that they are counting on us to make decisions in their cases.

It troubles me that people are waiting an average of 17 months for a hearing decision, and in some places the wait is considerably longer. Any wait, but especially this wait, is too long for Americans who are facing hardship, having to make unimaginable choices between one basic need like paying a mortgage or rent over another equally important one. The status quo is unacceptable.

Given the urgency of the situation, we must take every reasonable step to reduce the amount of time people across the Nation wait for a hearing decision. As outlined in my written testimony, we have developed a comprehensive multi-year plan: the Compassionate and Responsive Service (CARES) plan.

A key pillar of that plan is our significant and collaborative effort to timely recruit, hire, and retain enough administrative law judges, to meet the extraordinary demand. And I thank both my colleagues on the panel for their help toward that end.

We know, though, that progress on that front will not come fast enough to address the critical need to increase decisional capacity quickly, so ALJ hiring is not our only strategy.

Our plan combines a number of initiatives to help increase decisional capacity. One of the initiatives, the Adjudication Augmentation Strategy, is part of an all-hands-on-deck approach where we will use highly qualified administrative appeals judges, or AAJs, from the Appeals Council to help bring down the backlog. These adjudicators will hold hearings, where necessary, and issue decisions in non-disability cases and in disability cases that are already pending before them that may have otherwise been remanded back to an ALJ. If we are going to be successful in reduc-

[1] The prepared statement of Ms. Gruber appears in the Appendix on page 30.

ing wait times for Americans, we must increase our decisional capacity at the hearing level.

Let me assure you at the outset that our decision to have AAJs on the Appeals Council hold hearings and issue decisions in certain cases comports with due process. Since its inception in 1940, the hearings process has safeguarded a claimant's right to due process and continues to do so.

The fundamental requirement of due process is that the decisionmaker be fair and impartial. While hearings have generally been conducted by ALJs, previously called "referees" and then "hearing examiners," our Appeals Council members have always had the authority to hold hearings and issue decisions. When our Appeals Council members take these actions, they follow the same rules as ALJs.

Our hearings process provides, for example, a neutral decisionmaker; an opportunity to make an oral presentation to the decisionmakers; an opportunity to present evidence and witnesses; an opportunity to confront and cross-examine evidence and witnesses; the right to appoint a representative; and a decision based on the record with a statement of the reasons for the decision. Our Appeals Council members will provide no less.

The augmentation strategy is just that: an augmentation of, not a replacement of, ALJs. In fact, with adequate and sustained funding, we plan to have a record number of ALJs on board by fiscal year (FY) 2018, that number being 1,900.

We will continue to collaborate with Congress, our employees, our Federal partners like OPM, our union, and advocates to reduce wait times. We have made some progress. We are on target this year to reduce the wait time for those who have waited the longest.

The Fiscal Year 2017 President's budget request gives us the best chance to stay on track to fulfill our collective duty as public servants and take the steps we need.

The people and families waiting are not just numbers or a distant statistic. They are people in our communities, and for some of us in our families, each entitled to a quality and timely hearing decision, and I am confident both our ALJs and AAJs will provide. We ask for your support, and I thank you for your time today. And we will be happy to take any questions.

Senator LANKFORD. Thank you. Ms. Zahm.

TESTIMONY OF HONORABLE MARILYN ZAHM,[1] ADMINISTRATIVE LAW JUDGE, BUFFALO, NEW YORK, OFFICE OF DISABILITY ADJUDICATION AND REVIEW, U.S. SOCIAL SECURITY ADMINISTRATION, AND PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

Judge ZAHM. Chairman Lankford, Ranking Member Heitkamp, Senator Sasse, thank you for this opportunity to discuss the Social Security Administration's plan to divert two categories of cases from administrative law judges to attorney examiners.

As mentioned, I am president of the Association of Administrative Law Judges, and the views I express today are those of the judges.

[1] The prepared statement of Judge Zahm appears in the Appendix on page 57.

No one is more aware of the seriousness of the unprecedented pending caseload than the ALJs, who every day see the toll that waiting for a hearing can take on a claimant.

The agency plans to hire 65 new attorney examiners with the internal organizational title of administrative appeals judges, along with close to 300 staff, to hold hearings and issue decisions on nondisability and remanded cases.

The agency's initiative to remove these cases from ALJs violates the Administrative Procedure Act, which requires APA judges to hear APA cases. It also violates the agency's own regulations. Moreover, this plan eliminates valuable rights that have been granted to the American public.

For decades, ALJs have conducted evidentiary hearings on appeals made from adverse agency determinations in conformity with SSA's own regulatory scheme set out in the Code of Federal Regulations (CFR). The regulations guarantee the right to a hearing before an ALJ.

What SSA plans to do is to remove categories of cases from ALJs and have these cases heard by their own hand-picked people. It contends that Appeals Council attorneys are equivalent to ALJs. This is simply not true.

Please review the chart[1] that is included and is up here on the floor—yes—comparing ALJs to Appeals Council attorneys with regard to qualifications in hiring, discipline, hearing authority, ex parte contacts, performance reviews and bonuses, and claimants' appeals rights.

Why are all these safeguards and rules for APA judges important? They are what gives the American public confidence that they will get a fair hearing, that a judge is independent and cannot be improperly influenced by the agency. This is the very right that Congress granted to the American people when it passed the APA in 1946.

These new Appeals Council attorneys, who have never held SSA hearings or issued decisions, will have to undergo training, and since they will all be located in the D.C. area, they will have extensive and costly travel to hold hearings.

SSA has told the Association of Administrative Law Judges (AALJ) that this new program is temporary and will last for one year. But the precedent of having decisions made by individuals who are not APA judges will be long-lasting.

Under the agency's plan, claimants who appear before these Appeals Council adjudicators will lose their right to a level of appeal. Instead of simply writing a letter to the Appeals Council to obtain a review of their cases, their recourse will be to file an action in Federal district court, a much more difficult and expensive endeavor.

The regulations SSA uses to justify its plan do not provide sufficient legal support for its position. I refer you to the legal analysis prepared by administrative law expert Dean Harold Krent, who has concluded that these regulations do not permit the agency to transfer whole categories of cases to the Appeals Council for hearing. This plan is a case of unnecessary bureaucratic overreach.

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[1] The chart referenced by Judge Zahm appears in the Appendix on page 68.

The AALJ has suggested an alternative use of these resources to reduce the pending caseload. The particulars are set out in my written Statement. Our proposal does not violate a claimant's right to an independent APA adjudicator or a claimant's right to an internal level of appeal, nor does it contravene long-standing regulatory procedures.

In conclusion, SSA's initiative to supplant ALJs with Appeals Council attorneys eliminates APA protections for the American public in the name of expediency. Not only is this plan ill-advised, it will not make a dent in the backlog of pending cases. More likely, a court challenge will necessitate the rehearing of all of these cases by an ALJ. We are adamantly opposed to this plan.

Thank you.

Senator LANKFORD. Thank you. Mr. Kennedy.

TESTIMONY OF JOSEPH KENNEDY,[1] ASSOCIATE DIRECTOR, HUMAN RESOURCES SOLUTIONS, U.S. OFFICE OF PERSONNEL MANAGEMENT

Mr. KENNEDY. Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, I am pleased to have the opportunity to testify this morning regarding the role of OPM with respect to the hiring process for administrative law judges.

ALJs help ensure fairness and certain procedural requirements are met in administrative proceedings before Federal agencies. Twenty-eight Federal agencies employ ALJs, and as of September 2015, there are approximately 1,800 ALJs across the Federal Government.

Consistent with the Administrative Procedure Act and civil service law, OPM is responsible for establishing ALJ qualifications and classification standards, developing and administering the ALJ examination, and maintaining a register of qualified candidates. To preserve the independence of ALJs, OPM approves certain personnel actions affecting incumbent and former ALJs, such as promotions, transfers, reassignments, reinstatements, and details, and approves agencies' position descriptions for ALJs.

To provide surge support, OPM also administers the ALJ loan program and the senior ALJ program. To be qualified, applicants must be licensed and authorized to practice law and must also have 7 years of relevant experience. ALJ applicants also must undergo an examination. For the 2013 examination, OPM psychologists surveyed the Federal ALJ population and worked closely with incumbent ALJs from across the country to develop the current multi-hurdle assessment process.

Given the breadth and the input from ALJs across the government and the rigor with which the exam was developed, OPM has great confidence in the ability of this examination to identify high-quality candidates for ALJ positions across government. Under this examination process, applicants who meet the preliminary qualification requirements go through an online assessment. Applicants in the higher-scoring subgroup are invited to participate in the in-person component of the examination. Eligible candidates are then placed on the ALJ register based on their final numeric rating.

[1] The prepared statement of Mr. Kennedy appears in the Appendix on page 69.

Agencies make selections from the candidates provided by OPM consistent with the law governing Competitive Service.

OPM is confident there is a robust list of candidates on the current register to cover the near-term hiring needs of agencies. However, we recognize that SSA is facing an unprecedented challenge to manage their current backlog. We are working closely with SSA leadership to respond to the increasing need of ALJ candidates they need to meet their hiring goals to manage the backlog.

For example, during the past year, OPM processed additional applicants under the 2013 announcement and added candidates to the register. OPM also opened the ALJ examination for new applicants by April 1st, as required by the Bipartisan Budget Act of 2015. Prior to opening, OPM conducted an extensive recruitment effort, targeting national bar associations, women and minority bar associations, ALJ associations and unions, chief ALJs, and various veterans organizations. When the announcement was posted, it yielded more than 5,500 applications, the largest applicant pool in more than 15 years. OPM is currently reviewing the applications to determine which applicants meet preliminary qualifications. After we complete the administration of the examination, which will take some time, OPM will add the candidates who successfully completed all the components of the examination to the register. The new candidates and the candidates currently on the register will remain there until they are appointed to an ALJ position or until OPM develops and administers a new ALJ examination.

While keeping in mind its government responsibilities, OPM has worked collaboratively with SSA for over a year to assist SSA with its hiring needs. OPM meets with SSA officials, providing suggestions to their hiring process, and as noted previously OPM recently administered the examination to an additional wave of 2013 applicants to further supplement the list of available candidates on the register. These efforts added depth to the pool OPM draws from to provide candidates to agencies that employ ALJs, including SSA. OPM is committed to continue working with SSA so it can appoint more ALJs.

Thank you for having me here today, and I will be happy to answer any questions you may have.

Senator LANKFORD. Thank you, Mr. Kennedy. Thank you to all of our witnesses for their testimony today. This conversation, as is the habit of this Subcommittee, is a more open dialogue as we go through the questions, and so we will have a lot of back-and-forth.

I want to get just a couple clarifying statements here at the beginning of this. Ms. Gruber, how many ALJs does the Social Security Administration have right now?

Ms. GRUBER. At last count, 1,506.

Senator LANKFORD. OK. And your statement is we need to get to 1,900.

Ms. GRUBER. That is our current hiring plan: 250 this year, 250 next year, 250 the following year. I will say we have slightly adjusted our expectation this year because we are trying to gauge whether this summer, will be able to hire enough ALJs to meet the 250. So I am thinking 225 to 250 will be our target for this year. But by that, we would top out at about 1,900.

Senator LANKFORD. Do you have enough in the pool from what OPM is sending you? My understanding is OPM is sending about 5,000—they get about 5,000 applications coming in for ALJs. Then they are whittling that number down to try to get you the number that they would recommend from the pool that then they are handing to you. Do you have enough to be able to get to that 250 number? Or are you saying there are not enough qualified folks to be able to get to the 250 number?

Ms. GRUBER. Just to be clear, as for the new exam, we will not have access to those names until about, I would say, the spring of 2017, although we are working collaboratively with OPM to see if there is any way to streamline and speed up that timeline.

With respect to the——

Senator LANKFORD. How many do you have access to now? If that is the spring of 2017, do you have access to some in the spring of 2016?

Ms. GRUBER. As Mr. Kennedy testified, they updated our registers or our certificate of eligibles both in November and in March. Right now, we are interviewing from the March certificate. We have 81 certificates for 81 different geographic locations. In each geographic location, we have multiple vacancies, generally, two or three. In some places we have as high as six, seven, or eight vacancies.

When we received our aggregate list of certificates in March, we received about 5,800 names. It is important, though, to recognize for us that is not the number of candidates—and if I were an ALJ candidate myself, I would apply for many locations. So when we looked at the 5,800, we actually only have access to, I think, 260 unique names for vacancies across 81 offices. What we are doing right now is interviewing those individuals——

Senator LANKFORD. So wait. I am sorry to interrupt you.

Ms. GRUBER. Sure.

Senator LANKFORD. You have 260 applicants for——

Ms. GRUBER. Unique names that we can consider for the vacancies across 81 locations, correct.

Senator LANKFORD. So when we talk about 5,000 on this, for OPM, how many does OPM receive as far as applicants total that you have worked down to that 260 then? Is that the 5,000 number that I have seen before? There are 5,000 applicants as you interview and go through the first stage and as you are getting down to about 260, then they are trying to apply to multiple locations from there?

Mr. KENNEDY. Mr. Chairman, thank you for that question. When we receive about 5,000 applicants, you typically will see about maybe 50 percent of those will actually fall out.

Senator LANKFORD. Right. And so you are thinking there are 2,500 or so that are going through the process. Then that actually gets down to 260? That is what I am trying—this is a new number for us, to say there are 260 individual names.

Ms. GRUBER. Sure. Again, as Mr. Kennedy had said, there are applicants who apply for the exam.

Senator LANKFORD. Sure.

Ms. GRUBER. Then they go through a number of stages in the OPM process, and as he had said, about half fall out. What actually

gets referred is the list of eligibles to all the hiring agencies, which might be, for example, 2,500 names. When we go in, we say we have 81 locations that we would like lists of eligibles for. They give us a list of 75 names per location, and what I was explaining is when we go through the process of saying how many of those 75 names per location across 81 certificates are duplicates, we only really have 260 unique individuals.

For example, if I hire Candidate A for Newark, New Jersey, and Candidate A also applied for Fargo, North Dakota, I cannot hire that candidate for Fargo. I have to move down the list. And that is where the difficulty comes. It is really a numbers thing for us.

Senator LANKFORD. OK. So part of the question then I have is that when I wrote a letter earlier to Carolyn Colvin about this, the statement came back to me, "We cannot hire enough qualified ALJs to be able to actually hit the backlog numbers that we need," which begs the question then: Who are the AAJs here that are these individuals? Because the first thing that comes up is if you cannot hire enough of these and you say, well, we cannot hire enough of these and so we are going to go to these, it is an obvious question to say are we getting people less qualified than we are getting for the ALJs? Who are these individuals that are then being tapped on as the AAJs?

Ms. GRUBER. Thank you, Mr. Chairman, for the question. One thing I will also say is, we have seen in both your opening statement and Judge Zahm's statement, talk about attorney examiners. That is really the personnel title for this position. Attorney examiners on a position description are administrative appeals judges. They are the administrative appeals judges that staff our Appeals Council. They are the administrative appeals judges that are referred to even on OPM's own website. And it is the administrative appeals judges back, in the early 2000s that Congress acted to bring on par from a pay standpoint with ALJs. The pay scale for both are exactly the same.

In terms of who they are, many are internal hires, although we do plan, as we open the positions to also have external vacancies.

Senator LANKFORD. So do they have other tests that they will do internally?

Ms. GRUBER. Well, in terms of what we look for are people who have good interpersonal skills. We look for people who understand the sequential evaluation process. That is why a number of internal candidates will certainly be individuals that will compete well.

Senator LANKFORD. So what I am trying to figure out is—and it is one of the things that we have tried to search through everything to figure out who these individuals are. When you are talking about bringing on other individuals to be able to supplement, I know who ALJs are. I know the training that they have. I know the background; I know the qualifications. I cannot seem to figure out who these individuals are other than they are internal. Are they internal to the Washington, D.C., office? Do they have other jobs? And will they retain those other jobs while they are also doing this so this is really kind of a part-time—occasionally, they are going to do some of these hearings, but at other times they are going to do something else with their tasks? Or who are these individuals, and what is their interaction with other individuals? An

ALJ obviously is separate and independent through the process. They are receiving a case. I do not know if these other individuals are sequestered away from other folks that are in the middle of the decision process because I just do not know.

Ms. GRUBER. Thank you again for the question.

First, in terms of how we are recruiting, we are opening job vacancies across the country. They can be individuals who are in the Baltimore-Washington area. They can be individuals across the Nation. We have opened the vacancies internally. We plan to open external vacancies as well. Not everybody, I would certainly say, who applies to be an administrative appeals judge, is someone who has ever even applied for an ALJ position.

In terms of the training, we are working right now on a pretty significant training plan that mirrors and tracks closely the plan in terms of ALJ training. One big difference between administrative appeals judges currently is they do not conduct face-to-face hearings. Part of the training that we do for a new ALJ who has never done a hearing in our process, we teach them sequential evaluation. We teach our AAJs the same thing. We teach a class on how to conduct and do fair and impartial hearings.

The same will happen with our AAJs. We look for people with good interpersonal skills because I think that is one other thing to point out. Our process is non-adversarial. That is unlike other administrative law proceedings. We need people who can understand how to work with a claimant who comes to us at a very difficult time. And as both have said—or as you had said in your opening remarks, I think about 20 percent of our claimants are not represented. So it takes a unique kind of skill. And we are a high-production environment.

Senator LANKFORD. OK. I would expect, though, when you are talking about the non-disability cases, these are folks that are coming back—they may have retirement or pension issues or overpayments. I would expect them to have a much lower number for representation because, quite frankly, the representatives are paid to get someone on disability, not necessarily someone is overpaid, there is no benefit to them to do that. So I would expect for these administrative judges you are talking about that very few would have representation with them. Is that correct?

Ms. GRUBER. When you look at the non-medical piece, I think that that is a fair——

Senator LANKFORD. OK. So then I am still trying to get an answer to my initial question. Will these individuals also do something else? Or will they solely be dealing with these cases, these 40,000 cases? Or will they do the case hearings at times but they also do something else at other times?

Ms. GRUBER. In our Appeals Council, the other category of cases that folks handle are cases that are pending for the Appeals Council review. That is at 30,000. All of the members will do that piece, but we will segregate out a group of the judges to focus solely on the non-disability cases

Senator LANKFORD. So they will solely focus on hearings, is what they are hired for, they are not current employees that will do something else part-time and they will also do——

Ms. GRUBER. In terms of the non-DIB cadre, they will be solely dedicated to that. The rest are already doing the work. We are simply proposing that they would expand the amount of work they do.

Senator LANKFORD. OK. We will have a lot of questions here. I do not want to take up all the time here for our interaction.

Senator HEITKAMP. Obviously we are concerned about taking a process that we believed was required by law, which is an independent ALJ, and now doing a process internally that draws upon some of the folks who have already done the informal kind of adjudication, which was unsatisfactory. Right? You have an informal process where you review these and obviously have denied benefits, resulting in the need for an appeal. That is where we are at, right?

So what we are trying to get at is are these same people who are involved in this informal process of determining appeals going to be the ones that sit as now a fact finder for what could result in an appeal to the Federal district court?

Ms. GRUBER. No, they are not.

Senator HEITKAMP. OK. Good. That is what I need to know, because we are trying to figure out why you are doing this. We understand that you are in crisis when you have this many appeals pending. I want to know, in your decisionmaking, what was the matrix of ideas that came in? And why didn't you choose an idea that would beef up the ALJs whether you go back and find some retired Article III judges, whether you go back and find retired ALJs to come on to amp up, the ability to do this, working with OPM? I understand the OPM process, and we do not want people classified as ALJs unless they are clearly qualified. But by the same token, we do not want people deciding cases unless they are qualified. And so why do we think we need this level of qualification for an ALJ but have someone within your agency doing these tasks without the same level of qualification?

I think we are buying ourselves—I think our concern here is, No. 1, to understand your decisionmaking, and I applaud you. The last thing we want to do here is tap down creative thinking on how we solve governmental problems. But we also do not want to buy ourselves a bigger problem, and I think that the Chairman in the front end here talked about, the potential for a class action, the potential for more appeals to the district court, which would, in fact, result in more resources being utilized and more time in the appeals process.

And so what were the alternatives that you examined coming to this decision to make this change?

Ms. GRUBER. Thank you, Ranking Member Heitkamp. One of the things that I think is important for me, when I came into this job, I was asked to look at the challenge that faces us and what can we bring to bear to address it. As I have said in my testimony, both written and oral, this piece of the plan is a small part of our overall plan. There is no single silver bullet or solution.

Senator HEITKAMP. But you have to admit it is small but controversial.

Ms. GRUBER. Absolutely.

Senator HEITKAMP. So you are taking on a lot of water for something that you are calling small.

Ms. GRUBER. But I do think that it is important for me to say we are looking at business process changes. A number of the business process changes in our plan are about how can we best support our decisionmakers, our ALJs, so that they can do what only they can do, which is conduct hearings and issue decisions.

We are looking at a lot of IT innovations, a lot of changes, how we can move out manual work and paper workloads, how we can leverage video so that we can erase service imbalances from State to State, which there certainly are, when I look at wait times.

Senator HEITKAMP. But when the public says you made a decision to hire your own judges, it seems like I would say, the system is rigged.

Ms. GRUBER. I do not think that that is actually the case. The rigor with which we look to hire administrative appeals judges mirrors the rigor, in my mind——

Senator HEITKAMP. Then why not hire administrative law judges?

Ms. GRUBER. I think that is part of the——

Senator HEITKAMP. That is the problem. You cannot come here and say we are going to do this and de facto they have the same qualifications, the same ability, and the same independence as an ALJ. I go back to then why not hire ALJs? That is the disconnect for us here.

Ms. GRUBER. But we are not adopting one construct over another. Our plan calls for aggressively hiring ALJs at the same time we are utilizing all of our other strategies. To hire ALJs——

Senator HEITKAMP. I do not think you are answering my question. And I do not mean to be combative. I came into this without a strong opinion one way or the other and recognizing—because as I said in my opening comments, this is something that I do consistently. Our office spends a lot of time dealing with your office on appeals. People, especially elderly people, struggle with process. They struggle with understanding the bureaucracy. We help them navigate that. We get great responses from you. So I did not come to this—but I keep hearing the same thing, which is we are not taking shortcuts, it will be impartial and independent, they will have the same qualifications, the appeals rights will not be violated because we will keep an adequate record.

Then I keep going back to if you can find people who can do that, who have the level of qualifications, why can't they be ALJs? Why do we have to have this hybrid risking the potential for, a lot of mischief later on?

Ms. GRUBER. Again, I think that from my standpoint it is a matter of timing. We are hiring as many ALJs as we can. I will give you an example, though, from 2015. We planned to hire——

Senator HEITKAMP. I get it. I get it that you can hire faster than you can through the process of OPM.

Ms. GRUBER. But we have not set that process aside. We are trying——

Senator HEITKAMP. I get that. But why can't we amp up the OPM process so that there is more—these same people who you say are qualified to do this, or looking at kind of how do you clear this backlog. And so I think, Mr. Kennedy, the question comes back to you. Do you believe that OPM can meet the needs of Social Secu-

rity as they are looking at trying to take care of this backlog and do their job? I mean, I am sympathetic to them.

Mr. KENNEDY. Thank you, Senator. We are confident that we have the number of candidates on the current register to meet agency projections as we know them.

Senator HEITKAMP. No. Let us assume that she now tells you she wants to hire ALJs instead of going the route that she is committed to. What is your role? And how do you meet her needs in providing a pool? She has already explained that, the numbers get skewed because somebody applies for five different positions so you count them five times in the numbers. That is not helpful to her. It is not helpful to us to understand this problem.

Mr. KENNEDY. Thank you for your question, Senator. In March of this year, we added additional names to the register. We released the new re-administration of the current exam, and we will be adding additional names. That will take some time because the process is a really detailed and structured process to get through.

We will be also meeting with SSA later on this month in our Innovation Lab to think through other creative ideas of how OPM and SSA can work together to meet their backlog. We take this very seriously.

Senator HEITKAMP. But I think she is telling you that she does not have enough qualified people in the pool that you have sent in order to take care of her backlog. That is what she is saying, and so they are turning to an alternative method. And if that is not the reason why they are turning to an alternative method, then we really have a lot bigger discussion here.

Mr. KENNEDY. Senator, I think that is something that OPM and SSA are working through. OPM looks at the examination process that we put ALJs through. It is potentially the most comprehensive examination in government. And we feel those who come through that process are extremely qualified.

We do know that the Social Security Administration has some concerns, and we want to sit with our colleagues and make certain we better understand that to see what we can do in the future to support our colleagues.

Senator LANKFORD. I am just as turned around, though, because I understand if there are 250 openings this year and you get 260 applicants for it, I am fairly confident you are not going to be able to hire 250 people out of 260 applicants. So if we are starting with 5,000 and we end up with 260 at the end, are we agreed that is the number that we are at? Because I have heard 5,000, I have heard 2,500. And I am trying to figure out how to be able to get the accurate number here.

Mr. KENNEDY. Senator, I do not have the actual number with me. I will be more than happy to get the number to you.

Senator LANKFORD. Somehow we need to be able to followup, and we will get that for the record in the days ahead, because that is a critical aspect of—if OPM is not sending enough people over that are qualified, then we need to obviously get that resolved, and that is very helpful to everyone on this.

I do share Senator Heitkamp's concern on this that the more that we go outside the structure and the system, the more exposed that we are and the more exposed the taxpayer is to some sort of litiga-

tion so we have a class action suit coming in the days ahead. So that is the concern here.

And the other concern is, Is this a temporary program or do you think this is a long-term structure? Is this a temporary program?

Ms. GRUBER. It is a temporary program. It is a program that we believe will be temporary as we bring down the backlog——

Senator LANKFORD. So what does temporary mean? Help us understand.

Ms. GRUBER. And Judge Zahm——

Senator LANKFORD. Because, by the way, in the Federal Government, it is hard to find anything temporary. [Laughter.]

Ms. GRUBER. Judge Zahm, I know that you said that someone had said a year.

Judge ZAHM. Yes. More than once.

Ms. GRUBER. OK. What I intend is that this will be in play until about 2020, which is our target for eliminating the backlog and reducing our wait time to 270 days.

Senator LANKFORD. So starting that in 2017, about a 3-year time period to actually use these individuals to try to help. And you are talking about dealing with about 40,000 cases of 1.1 million——

Ms. GRUBER. Correct.

Senator LANKFORD [continuing]. Creating a training structure, a hiring structure, a whole unique section for 40,000 people. And I am still confused why we should do that. Is it your expectation that most of these hearings will be done by video or will be——

Ms. GRUBER. Yes.

Senator LANKFORD [continuing]. Done in person?

Ms. GRUBER. The expectation is most of the hearings will be done by video. And I think it is also important to note just for the record that ALJs travel today.

Senator LANKFORD. Sure.

Ms. GRUBER. And we spend roughly a little over about $1 million today to support traveling. So I do anticipate there will be some travel, but right now about 30 percent of our claimants opt out of the option to have a video hearing.

Senator LANKFORD. 30 percent of the total group or 30 percent of this non-disability——

Ms. GRUBER. 30 percent of the total.

Senator LANKFORD. What is the percentage of this non-disability group that opt out of the video?

Ms. GRUBER. I would have to——

Senator LANKFORD. Because that is a very different section.

Ms. GRUBER. Right. So as to not give you the wrong information, I would have to submit that for the record,[1] if I may.

Senator LANKFORD. OK.

Ms. Zahm, can I ask you a question on this? Of your history and background around this, how many folks opt out on a video hearing? And you had mentioned in your testimony as well that this creates an entirely new large bloc. Historically, someone could opt out as an individual, as a single person, in order to be able to make the decision that they are going to avoid this process and they are

[1] Approximately 8.5 percent of non-disability claimants opted for an in-person hearing instead of a video hearing.

going to expedite it. Now we are talking about a whole class of people being pulled, 40,000 people. What has been your experience in the past of how many people actually opt out either the video conference at this level or opt out of this entirely?

Judge ZAHM. I would say probably that Terrie's 30 percent is probably accurate. I do not have access to those figures. However, I would note that in the application for these attorney examiner positions, the agency said there would be 50 percent travel. So they are anticipating these people will travel 50 percent of the time.

Senator LANKFORD. So is the assumption that individuals then would say, "I do not want to do the video conference," and at that point they are going to have to travel?

Judge ZAHM. Correct.

Ms. GRUBER. No, the assumption in that is that we tell prospective applicants, "You might have to travel." So some people say, "I do not want to apply for that job because it might involve travel." In terms of claimants, they will have the same rights to either opt in or opt out of video.

Senator LANKFORD. Right. But is it your expectation at this point that 30 percent of the folks—or 30 percent of the individuals will say, "I do not want to do a video conference," and these new AAJs are going to have to travel to those locations?

Ms. GRUBER. I do not have any information to suggest that we would widely vary from the 30 percent, but, again, I will look at these two specific categories of cases to see if the opt out is higher or lower than the typical hearing population.[1]

Senator LANKFORD. Some of this goes back to the legal standing as well. Ms. Zahm, you brought this up as well. We are crossing into unknown territory because it has not been done before. We are talking about 40,000 people. We are talking about, I think, a significant exposure for a class action suit once it is all said and done. We are trying to come back and redo these things. Most of these individuals will not have representation with them because the class of cases that are coming through do not have representation.

Our office had asked the Social Security Administration for information of how did you come to this legal decision, which we thought was a fair question of oversight. The response that we got back was, "That is attorney-client privilege, and we cannot tell you how we came up with this decision."

Attorney-client privilege is not recognized by Congress. Executive conversations, that is exempted can get access to. But the conversation internally within the agency and your conversations of how you came to the legal justification on this is something that should be appropriate in our oversight.

Senator HEITKAMP. Yes, and it would suggest that you guys are concerned about litigation when you are trying to privilege that information. If it is just legal advice, then why privilege it? The taxpayers paid for it. Let us see it.

You said in your testimony you always have authority. We now have a legal brief in the testimony here that you do not have the legal authority. That is a foundational piece for us to understand

[1] Approximately 24.6 percent of claimants declined a video hearing following an Appeals Council remand.

in oversight. And so we have not even talked about that. We start from the beginning. Is this legal what you are doing? And are we buying, like the Chairman said, a lawsuit? We have a difference of opinion. We have one—and the only person who has presented any kind of argument—and, obviously, this is not a court of law. But the only person who has presented any argument is Ms. Zahm. And so, in order to do our job of oversight, we need to know what your legal justification is so we can evaluate it here. Otherwise, we will draw our own conclusions on what your legal authority is. And we may only consider the evidence in front of us, and that would not be good for you because we do not have yours.

Senator LANKFORD. So can we get it?

Senator HEITKAMP. Yes.

Ms. GRUBER. I just want to make sure that I am clear. In Attachment C to my testimony was a summary of our legal analysis, and I know that staff had late last week met with your staffs to talk. We included our Office of General Counsel (OGC). I would be very happy to set up any sort of additional setting where we can go at length through the legal analysis. Our point of view is that, and our legal analysis is that, we have had longstanding regulatory authority to vest the Appeals Council with these functions.

Senator LANKFORD. But in individual cases, not in whole new blocs of cases. Has that ever been done before?

Ms. GRUBER. No, it has not been done before. But what I can say is that this is a very small percentage.

Senator HEITKAMP. Do you understand that when you take a classification of claimants and you say these folks are going to get the ALJ and these folks are not going to get the ALJ, you may have an equal protection problem? I am just saying, we are not exaggerating, I do not think——

Senator LANKFORD. No.

Senator HEITKAMP [continuing]. The concern that we have for your legal underpinnings. And, sometimes the fix that you create to a problem has unintended consequences, and that is our concern.

I want to go back to taking a look at where you are—what your thought process was in selecting this alternative. And if there is a way that we can better understand the kind of relationship that you have with OPM, the concerns that you have about OPM, whether we are looking at, recruiting people who have already been vetted and in the system, there is probably some 67-, 68-year-old, former ALJs or judges who could be brought back on a temporary basis to adjudicate some of these claims. Those are the kinds of things that I need to know. What was your decisionmaking process?

Ms. GRUBER. Like I had said, Ranking Member Heitkamp——

Senator HEITKAMP. I know. It is a small part.

Ms. GRUBER. I was not actually going to say that. What I was going to say is we are using senior ALJs to the greatest extent that we can. And we have worked with our judges' union and our management associations to let us recruit as many senior ALJs as we can.

One of the things that we are looking to collaborate with OPM on is what incentives, what kind of—staying with us a little bit longer incentives can we provide. So senior ALJs are part of our

plan, absolutely. In fact, right now we have—I think the latest number was right around 21 senior ALJs. If I can get more than that, that helps us, for example, in 2015, for the 50 ALJs we were unable to hire, even though our target was 250, that translates into 25,000 lost hearings. Any way that we can speed up our hiring of ALJs, that is a key tenet of our entire plan, as is recruiting enough ALJs to meet our hiring targets.

In terms of the analysis—and I appreciate the question—the first thing I asked is, What options are available to us legally? That is where this option, which I think had been talked about many years in the past, how can we use the Appeals Council differently? Again, the Appeals Council is currently the group that reviews ALJ decisions today. That is their function, to review. It is the Appeals Council that has led most of the quality efforts that we have seen over the past several years that have resulted in lower remand rates to ALJs, that have resulted in better quality numbers in terms of agree rate. The second thing I looked at was cost-effectiveness, and then, finally, operational viability?

And so, again, I think that our plan looks at this. How do we augment, how do we increase decisional capacity?

One of the other things that we are actively using are data analytics. How can we pinpoint those cases that do not need to go to an ALJ of any sort, that because there has been a change in the condition or a worsening, can we identify—can we make a decision sooner in the process? And we have seen excellent initial outcomes from those efforts.

To me, it is really about looking at cases at every stage of the process and how can we make it better, and that is what we have laid out in our plan. But this piece is about increasing decisional capacity, and for me it is not choosing one type of adjudicator in favor of another. And it is not abandoning in any way the ALJs. In fact, I think the evidence, at least from my standpoint, shows a significant long-term investment in the ALJ construct now and moving forward.

Senator LANKFORD. So if I am picking this up still correctly, we are still talking about trying to get from OPM more people in the process, more qualified people in the process. If there were more people coming from OPM, qualified, ready to go in this, this would not have been considered?

Ms. GRUBER. I would think——

Senator LANKFORD. Because you have the funding that is necessary to hire the ALJs. You are talking about bringing on quite a few additional folks, these AAJs. You have already said they are the exact same pay scale. They are going to require 300 additional staff around them. You have enough money to be able to hire and bring on all of those additional folks, so you clearly have enough money to be able to hire the ALJs as well. This is about the number of qualified people coming in the process.

Ms. GRUBER. I think that that is a fair assessment.

Senator LANKFORD. OK. So somehow we have to be able to resolve this back-and-forth on how we are getting more qualified folks in there. If you are identifying qualified people but they are not getting over here to OPM to be able to come back to you, we are standing up a new temporary system for three years and

spending a tremendous amount of money creating a new system and, we believe, creating a system that is legally vulnerable for us long term, that we have asked for the justification on this, and I understand you do not want to be able to turn over everything on this. I do think it is important so that we get the documents, even if we see them in camera, that we have the ability to be able to go through the legal justification because there are real questions here that I would assume your counsel would have gone through and would have given you all the different alternatives.

But at the end of the day, we have still got to have more people, and even three years past this time, we may still have the same situation here. So from the OPM side of it, how do we increase the flow?

Mr. KENNEDY. Mr. Chairman, thank you for that question. Out of respect for the Ranking Member, I do want to give the number that I at least have right now. There are currently about 600 candidates on the register, and we clearly will be able to increase that number when the other exam actually is—when we actually put additional individuals——

Senator HEITKAMP. Does that include the duplication that Ms. Gruber is talking about?

Mr. KENNEDY. No. This would be 600 individuals.

Senator HEITKAMP. Individuals.

Mr. KENNEDY. Yes.

Senator HEITKAMP. And geographically dispersed?

Mr. KENNEDY. Geographically dispersed. And one thing I want to say, because I want to make certain that everyone understands, that SSA and OPM are working together. We are trying to make certain that we typically try to give at least three names for every vacancy. SSA brought it to our attention a few months back that we need to make certain we are doing a better job on the unique names, and we are trying our best to make certain that we are responding to provide more unique names.

Again, I think that everyone understands that SSA is just in an unprecedented situation, and I think the more we talk with SSA, the more the two organizations work together, we are going to remedy this. This is important for both of us. We are going to remedy this.

Senator HEITKAMP. But we do not want the inefficiency of starting this whole process when we could, fix the one that we have. I think that is really the challenge. As the Chairman outlined, we are taking on a lot of work, a lot of training, a lot of folks here on a temporary basis, if we could just get to making this process that you have work better.

Senator LANKFORD. Can I ask a question? Was OPM involved in creating the job description for these attorney examiners? Was this something that you cooperatively did together?

Mr. KENNEDY. No. The Office of Personnel Management would not have had a role in that, sir.

Senator LANKFORD. So the creation of the job description and the design of this just SSA did on their own?

Ms. GRUBER. And just to be clear, the administrative appeals judge position, which is what we functionally call it, has been around for several decades. This is not a new job description for us.

Senator LANKFORD. OK. Mr. Kennedy, one of the statements you made just brought this to my mind. You were talking about the unprecedented backlog. I wish in some way this was an unprecedented backlog. You go back to 10 years ago, 12 years ago, we are still dealing with a 500-day wait, where you have 17 months through the process to be able to wade through it. And so this is not new. The sheer numbers, we are dealing with 1.1 million now in the backlog, but the time period to wait for the individual is not unprecedented.

So I guess one of the background questions we did not ask on this, Ms. Gruber, and what you are sensing at this point is the why. Why have we reached this number? Why do we have these high numbers in the backlog that cannot seem to come down? We continue to invest more resources in this. We continue to see a growing amount here.

Ms. GRUBER. Thank you, Mr. Chairman. The why is difficult. Certainly, back in 2007–08 when we saw a similar backlog, maybe not the total pending at 1 million but, rather, right around the 750,000 mark, the wait times, like you said, were over 500 days. Part of the why is a number of years, about three years, of funding that was $1 billion less than the President's budget. I do think continued growth in receipts—right now, the main factor in our issue where we are is that our receipts continue to outpace our dispositions. And until that dynamic shifts, we are going to continue to grow the backlog. And that is a problem for us.

So I would say funding is a big factor. I do think continued receipts is a big issue in it, and ensuring that staff at all levels—ALJs, our support staff, our administrative appeals judges at the Appeals Council—no matter what role they play, are accountable and productive.

Senator LANKFORD. Right. Ms. Zahm, why do we have a backlog?

Judge ZAHM. The American public is getting older, so that is a factor. The recession was a factor. And I noticed in the agency's submission of their chart of ALJ hiring, there were years when there was no hiring, so the cases accumulated.

We also do not have the most efficient system. We have made suggestions to the agency on how to modernize our adjudicatory system. We need to have some rules of practice. We need to have more support for the ALJs. This is a very labor intensive process, and the courts have added more and more layers of requirements on ALJs in terms of issuing decisions, and it takes longer to do so.

It always takes longer to do a good job than a slipshod job, and the danger with the backlog is that the pressure to get the cases out the door may undercut the quality of those decisions.

Senator LANKFORD. Right, and that was our concern in 2010 when it seemed to be a higher priority on getting things out the door and just decreasing the backlog than getting good cases. We do not want to have that again because every one of these cases is $300,000 to the Federal taxpayer. And if the paperwork is not done right and if we do not have a good opinion at the end of it, we have no way to evaluate whether this person has had any medical improvement. And so they are in the system forever regardless of their physical condition because we do not have a good paper-

work trail on it. So it is a nightmare scenario for the American taxpayer.

I do not know of a single place that I have traveled in my State of Oklahoma, not one, where somebody in that region has not said to me, "I have a cousin, I have a neighbor, I have someone that is on disability. They work for cash all the time. They are very engaged." It is a common conversation in many areas. The West Virginia cases that were just exposed were $600 million in fraud. And in my conversations with the Inspector General yesterday, we have another case coming out soon that will be even larger than that one dealing with disability fraud that is coming out.

This is an incredibly important issue to a lot of people, both for the individuals that are truly disabled, that while they are waiting 500-plus days, their counsel has told them, "Do not go get a job, do not work," because if you are working, that is the first thing the ALJ is going to ask you, "Are you working now?" Well, if you are working now, then clearly you can work at another time. And so no matter what situation they are in, they are waiting 500 days without a job for a decision, and so they have either got this huge gap in their employment record, or they are truly disabled, and they have waited a year and a half for a hearing. So either way it is a really bad situation for them.

Judge ZAHM. Yes.

Senator LANKFORD. So the resolution, you all understand, we understand it. We just want to make sure at the back end of it we are not having to redo it and we have a backlog that gets even bigger because we created another system, and then that system did not work, and now everything is even worse with the new set.

Senator HEITKAMP. I think the question becomes where do we go from here, Mr. Chairman. Obviously, we hope that this oversight Committee hearing has at least raised some flags within the Social Security Administration to maybe, slow down implementation of this idea, to think differently or at least have this ongoing discussion.

We can talk until we are blue in the face, but if your decision is we are going to proceed, for us to try and do something here to stop you from proceeding, let me tell you, that is a difficult thing for us to get done.

And so I am curious on where we are today. Are you, gung-ho we are going to get this done, we are going to move ahead? Or will you kind of take a pause here with us and help us better understand this?

Senator LANKFORD. Or find a way to get more ALJs.

Ms. GRUBER. Yes, as I said in my oral testimony it is about capacity. My history is working with the disability process. One of my first jobs in the Senior Executive Service (SES) was to look at a backlog at our initial level and ask "how do we increase capacity". And some of the solutions were not popular ones. But certainly at the end of the day, my job is to make sure claimants are not harmed, and that is my absolute commitment. I think the issues raised here, the issues raised by Judge Zahm, are ones that I will take back and, with my team look at very closely.

I do think, we have not given you insight, deeper insight into the legal analysis we have done. I myself am not an attorney, but the

summary we gave, laid out the regulations that really flow from the Social Security Act. And nowhere in the Social Security Act, in Section 205 or anywhere else, does it talk about the type of decisionmaker that must preside at a hearing. But I understand, we certainly have a longstanding practice where we used ALJs.

That said, I would like to find a way to meet with you.

Senator HEITKAMP. I guess what I am saying is we would prefer that you hit the pause button on this idea so that we can better understand the oversight, better understand where you are at, and have further conversations about this.

Senator LANKFORD. And I would comment only in the legal aspects of it. It has not been done before. It will be challenged because it has not been done before. De novo cases, for instance, are clear within the statute that they cannot be transferred to a non-APA decisionmaker. There are some areas that are pretty clear in it. And to try to transfer a whole class of cases into a new area rather than individuals is a big shift, and there will be a lot of challenges. And at the end of the day, I do not want us to end up with a longer backlog because we tried a novel theory that may or may not have worked. That is why the legal opinion on this is so important to us as well. We want to help walk through this. And if we can help resolve these issues, we want to do this, because all of us have the dual responsibility with this to the individuals that are applying that are legitimately, clearly disabled, cannot work anywhere in the economy, to be able to get through the system. But those that are on the edges that are not disabled to also make sure they do not get into the system, because they are $300,000 each and they create a culture around our communities that is very, very destructive.

So both of those are very important to us. So it is not just a matter of speed. And I know a lot of these cases you are talking about are overpayment cases that do resolve some of those issues, but it is very important that we deal with both the taxpayer interest and those individuals in the disability community.

Senator HEITKAMP. I guess you are going to hit the pause button so we have a chance here to kind of vet this further?

Ms. GRUBER. I think it is a very fair question. As you know, we have not implemented it yet. Part of what we are doing is vetting, and I think that this is a significant discussion, and I am very willing to engage in additional discussion.

Senator HEITKAMP. Yes, and thank you for that. And in no way do I want to even suggest that we should not be looking at creative ways to do this——

Senator LANKFORD. Right.

Senator HEITKAMP [continuing]. That we do not appreciate the difficulty of your job, and that you really have presented very appropriate testimony here today. We just do not have a comfort level both legally and in terms of due process with the direction you are taking. And we do not have a comfort level that we have really explored all potential opportunities for going the traditional route.

And so thank you for your testimony today. It has been very helpful.

Senator LANKFORD. Judge Zahm, any final statements?

Judge ZAHM. Just that when Terrie mentioned that the position description for attorney examiners has been around a long time, that was accurate. However, adding the duty of holding hearings only appeared in the position description in February of this year. That had not been a part of the position description in the past.

Also, in terms of is an attorney examiner the same as an administrative law judge or the same qualifications or are you getting the same benefits if you are a claimant, I would point to the fact that Mr. Kennedy has outlined just how rigorous a hiring process and vetting process it is, that it takes a year between the time someone applies and someone gets on a list. And the position application for these attorney examiner AAJ jobs had a 15-day application period, and they are already starting to hire. So you can see there is quite a bit of difference in terms of looking at candidates and evaluating their qualifications.

Senator LANKFORD. We had a hearing not long ago on the Federal hiring process, period, and USAJOBS and all of the great joy that it really is in getting through the process. There is a tremendous amount of other issues that need to be resolved there with length of time. Often we get very qualified candidates that are not going to wait a year to get a job. They are going to go do something else in that year. And we are going to call them and say, "OK, we are ready now," and they are going to say, "Sorry. I have already taken a new job somewhere." So that is a whole different issue that you bring up there on that one.

Mr. Kennedy, any final statements?

Mr. KENNEDY. Mr. Chairman, I just want to thank you for having the Office of Personnel Management at this hearing. As I was listening, all I could think about was those individuals out there waiting. There is probably a chance that everyone in this room probably knows someone who is waiting. And the Office of Personnel Management feels confident in the number of candidates that we have on the register, but we do recognize that the Social Security Administration has some concerns, and we want to work with them. We pledge to work with them, and we will work with them, and we will remedy this situation.

Senator LANKFORD. OK. Ms. Gruber, any final statement?

Ms. GRUBER. No. Thank you for the opportunity, and I absolutely commit to work with you, Senator Lankford and Senator Heitkamp, to address all of the concerns as thoroughly as we can.

Senator LANKFORD. OK. Thank you. And I would say only as a final statement, please do not hear from us we are interested in speed and not quality. We have done that before. We have seen the results. I think that is part of the reason we have so many people in the pipeline now, because since that was created, if you get in the pipeline, you get onto the system. So we want this to be done well and to be done right. So do not accelerate the process just to be able to get people through the pipeline. But at the end of the day, we have to have good legal justification. The individuals that are truly disabled need to be protected in the system, and people that just want to get a government check that may have legitimate pain but can work in the economy based on the definitions that have been provided in statute, they can work in the economy, still should work in the economy, as tough as that may be.

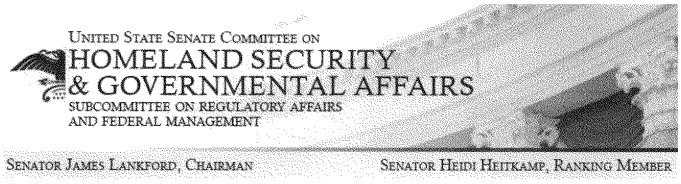
So you have a lot of tough decisions on a day-to-day, all of you do, to be able to make those decisions, and I appreciate what you are doing on that.

So, with that, let me make a quick closing statement. The hearing record will remain open for 15 days until the close of business on May 27 for the submission of statements and questions for the record. I thank all of you for being here.

This hearing is adjourned.

[Whereupon, at 10:20 a.m., the Subcommittee was adjourned.]

APPENDIX



May 12, 2016

Opening Statement of Senator James Lankford

Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management Hearing titled:

"Examining Due Process in Administrative Hearings"

Good morning and welcome to today's Subcommittee hearing. Today we will look into several issues surrounding administrative law judges, their independence and the importance of due process as provided by the Administrative Procedure Act. The APA validates due process principles through the guarantee of an administrative hearing before an independent decision-maker. These independent and impartial decision-makers are most often administrative law judges, or ALJs.

The office of the ALJ is unique in our federal government. Although they are like federal judges in the sense that we expect them to preside over formal administrative adjudications independently, ALJs are in fact executive branch employees selected by the Office of Personnel Management to oversee adjudications as required by law. Though ALJs are spread throughout the executive branch, our focus today will center on ALJs from the Social Security Administration, as they employ the largest number of federal ALJs. ALJs are hired through the Office of Personnel Management. OPM is tasked with reviewing all ALJ's qualifications. OPM has made strides in providing qualified ALJs to the Social Security Administration and elsewhere across the executive branch.

At the same time, over the last 4 years, Congress has appropriated significant resources so that the Social Security Administration could hire more ALJs to address its backlog of disability claims. Yet, the agency has been unable to hire sufficient numbers of approved ALJs to tackle the rising backlog of cases—a backlog which topped one million last year. But instead of hiring more ALJs, in a misguided effort to expedite the adjudications process, SSA is in the process of moving tens of thousands of pending cases from ALJs to non-APA attorney examiners, who are regular employees of the agency and lack the requisite decisional independence. In March, SSA posted close to 30 non-APA "Attorney Examiners" job openings, to support this initiative. This SSA proposal raises important questions about whether cases heard by non-APA attorneys constitutes a violation of the Administrative Procedure Act. Further, Social Security regulation makes repeated reference to a claimant's right to an independent decision from an ALJ.

SSA's newfound policy also raises procedural issues—given the magnitude and potential economic effect of SSA's proposed reinterpretation of its own rule here, it appears that the rule should also have been submitted by SSA to the Office of Information and Regulatory Affairs. Economics aside, the proposal creates an inequity where some claimants will receive the independent decision guaranteed to them by the APA and others will not. Furthermore, for non-disability cases the loss of due process is compounded by the fact that a majority of these individuals are unlikely to have access to attorney representation due to a lack of financial incentive. But once a sizable number of claimants have been denied a hearing before an ALJ, there is the potential that SSA's proposal to move cases away from ALJs to non APA attorneys could result in a large, class action lawsuit.

While we all share the goal of eliminating the hearing backlog, our concern isn't just about meeting desired results; we must also focus on how we get there. Accordingly, there are three main points I would like to address today: First, I would like to focus on the how attorney examiners, drawn from the SSA's own ranks, can be said to appear impartial, especially to the extent that they review cases *de novo*. Second, I would like to know more about SSA's policy pivot, which in the past allowed for certain transfers on a case-by-case basis, to permit large-scale transfers of entire classes of cases. Third, I believe we need to carefully consider alternative proposals to SSA's untested and legally ambiguous policy, such as using retired ALJs from local offices to hear these cases. If SSA believes that there aren't enough qualified ALJs to meet the current demand, shouldn't they and OPM instead be focused on new recruitment efforts to increase the supply of worthy applicants?

We are happy to have with us today Deputy Commissioner Theresa Gruber from SSA, Associate Director for HR Solutions Joseph Kennedy from the Office of Personnel Management, and Marilyn Zahm, an ALJ from the Social Security Administration to help us navigate these important issues. We are grateful for your testimony and I look forward to the issues discussed at this hearing. With that, I will recognize Ranking Member Heitkamp for her opening remarks.

May 12, 2016

Opening Statement of Senator Heidi Heitkamp,
Ranking Member, Homeland Security and Governmental Affairs Committee
Subcommittee on Regulatory Affairs and Federal Management

"Examining Due Process in Administrative Hearings"

Thank you Mr. Chairman. Over several decades, Congress has held dozens of hearings about the Social Security Administration and its management of retirement and disability benefits. This oversight is important since traditional Social Security and Social Security Disability are critical programs that impact people all across the nation, and in North Dakota.

Since I took office in 2013, hundreds of North Dakotans have asked me for help navigating Social Security programs. It works out to about five new cases every single month. Many of these individuals are seeking help with an appeal of a disability claim. Others find themselves subject to overpayments or caught in some other type of bureaucratic struggle. Nationwide, there are over 1 million people awaiting a decision or hearing by the Social Security Administration. These millions of individuals find themselves caught up in bureaucracy, struggling to find the correct path forward – whether it is submitting the correct medical proof or understanding the disability program rules. It is critical that keep those people in mind as we proceed today.

Our interest today in the big and complicated subject of Social Security is relatively narrow. We want to learn more about the Social Security Administration's proposal to shift certain non-disability appeals away from the realm of Administrative Law Judge hearings, to proceedings presided over by Administrative Appeals Judges and Attorney Examiners within the agency's Appeals Council. This proposed action has raised serious concerns about whether the change will accomplish what the Social Security Administration hopes to achieve; and, most importantly, the impact this policy will have on the thousands of Americans seeking appeals of agency decisions. I look forward today to better understanding the differences between ALJs and Attorney Examiners, as well as the challenges the Social Security Administration faces in managing competing needs and challenges. I want to fully understand the rationale for this change, and, most importantly, get clarity on how claimant due process will be affected if the plan is implemented.

Those who are familiar with the work of this subcommittee know that we are interested in improving the efficiency, transparency and effectiveness of our federal government. This hearing provides an opportunity to discuss how this proposal meets those standards, while ensuring the integrity and fidelity of administrative appeal hearings and decisions. Finally, given the centrality of the Administrative Procedure Act in so much of this subcommittee's work, I welcome testimony that illuminates how and why the independence conferred upon ALJs by that seminal law should be preserved or enhanced. Thank you again. I look forward to the testimony of the witnesses.

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

UNITED STATES SENATE

MAY 12, 2016

STATEMENT FOR THE RECORD

THERESA GRUBER
DEPUTY COMMISSIONER
FOR DISABILITY ADJUDICATION AND REVIEW
SOCIAL SECURITY ADMINISTRATION

Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

Thank you for this opportunity to testify on "Examining Due Process in Administrative Hearings." My name is Theresa Gruber. I have been the Deputy Commissioner for Disability Adjudication and Review at the Social Security Administration (SSA) since July 2015.

Today, I will talk about the significant public service challenges that we face, with over 1.1 million individuals and their families awaiting a hearing decision; they are counting on us, with the support of Congress, to find a solution. These individuals are waiting an average of 17 months for an answer from us—and in some places, the wait is much longer.

I began my career in Social Security working in a field office in Minnesota. I have worked directly with the people we serve and for me and the men and women who work with me, these are not just shockingly large numbers. We see the faces and families behind each appeal. It is our duty as public servants to use every tool we have to address this crisis. I will briefly discuss why we are facing this crisis, and I will tell you about our multi-year plan to address it: the Compassionate and Responsive Service (CARES) plan, which I have attached, see Attachment A. The CARES plan recognizes that we can only address wait times through a comprehensive and multi-layered approach that includes strategies and tactical initiatives in a variety of areas such as business process improvements, information technology innovations, and investments in staffing and facilities. Those investments include a temporary measure to augment our adjudicative capacity by using the skills of our administrative appeals judges (AAJs) to help in our efforts.

Let me assure you at the outset that our decision to have AAJs on the Appeals Council hold hearings and issue decisions in certain cases comports with high standards of due process. Currently, AAJs have the authority to hold hearings. Since its inception in 1940, our hearings process – including hearings held by the Appeals Council – safeguards a claimant's right to due process. Our hearings process provides, for example, a neutral decisionmaker; an opportunity to make an oral presentation to the decisionmaker; an opportunity to present evidence and witnesses; and opportunity to confront and cross-examine evidence and witnesses; the right to appoint a representative; and a decision based on the record with a statement of the reasons for the decision.

And, because AAJs on the Appeals Council will operate under the same standards and rules as the ALJ hearing process, they too will meet these requirements. When AAJs on the Appeals Council hold hearings and issue decisions, they will act as neutral decisionmakers, as do our ALJs. Moreover, our decision to have AAJs hold hearings and issue decisions is consistent with our longstanding regulations and is merely a temporary measure to augment our adjudicative capacity and address this unacceptable backlog that is delaying decisions for too many Americans.

The success of our efforts depends on two conditions: adequate and sustained funding from Congress and a sufficient and updated list of administrative law judge (ALJ) candidates from which to hire. The Fiscal Year (FY) 2017 President's Budget would allow us to continue to fund

our increased hiring needs and complete more hearing decisions. But funding is not enough – we also need a sufficient pool of ALJ candidates to enable us to hire in a timely manner enough ALJs. Unfortunately, for a number of years, we have not been able to hire a sufficient pool of ALJ candidates meeting SSA's unique needs, but as described below, we are collaborating with our Office of Personnel Management (OPM) colleagues to develop new solutions to this issue.

Introduction

The work we do matters for millions of our citizens – seniors, people with disabilities, children, widows, and widowers. We administer a number of programs, including the Old-Age, Survivors, and Disability Insurance (OASDI) program, commonly referred to as "Social Security." Social Security is a social insurance program under which workers earn coverage for retirement, survivors, and disability benefits by working and paying Social Security taxes on their earnings. The DI portion of Social Security helps replace a portion of the lost earnings for workers who, due to their significant health problems, can no longer work to support themselves and their families. DI also ensures that workers who become disabled and their families are protected from the loss of future retirement benefits. The contributions that workers pay into Social Security also finance the share of our administrative budget used for processing Social Security claims and benefits, with the level of funding set by Congress each year.

We also administer the Supplemental Security Income (SSI) program, funded by general revenues, which provides cash assistance to aged, blind, and disabled persons with very limited income and resources. Between Social Security and SSI, we pay over $930 billion per year to more than 65 million beneficiaries. As with the OASDI program, the level of funding provided to administer the SSI program is set by Congress each year.

The scope of our work is immense. Just to provide a few examples, in FY 2015, over 40 million people visited our 1,200 field offices nationwide; we handled approximately 37 million calls on our National 800 Number; and we completed over 8 million claims for benefits. SSA also completed 87 million online transactions. In addition, in FY 2015, we received around 746,000 hearing requests, and issued approximately 663,000 hearing dispositions through our network of 163 hearing offices. Nearly all of these hearing requests and dispositions involve claims for Social Security disability benefits or SSI payments. We perform all this work – and much more work – in an extremely efficient manner, with our discretionary administrative costs being only about 1.3 percent of our benefit payments.

A Plan for Compassionate and Responsive Service

Unfortunately, at present, and for the first time in our history, over 1.1 million people are waiting for a hearing decision. For a full description of our administrative process, see Attachment B. Almost all of the people waiting for a hearing decision are claimants seeking Social Security disability benefits or SSI disability payments whose claims have been denied at the State DDS level. The Act has a very stringent definition of disability—i.e., the inability to engage in

substantial gainful activity due to a medically determinable physical or mental impairment that has lasted or is expected to last at least one year or to result in death[1] and many individuals are initially denied benefits ultimately are found eligible. In many cases, the appeals process uncovers more detailed and complete medical evidence and sometimes individuals' medical conditions deteriorate, which can lead to successful applications upon appeal. Disability recipients have very serious health conditions - among those who start receiving disability benefits at the age of 55, one in five men and one in seven women die within five years of the onset of their disabilities.

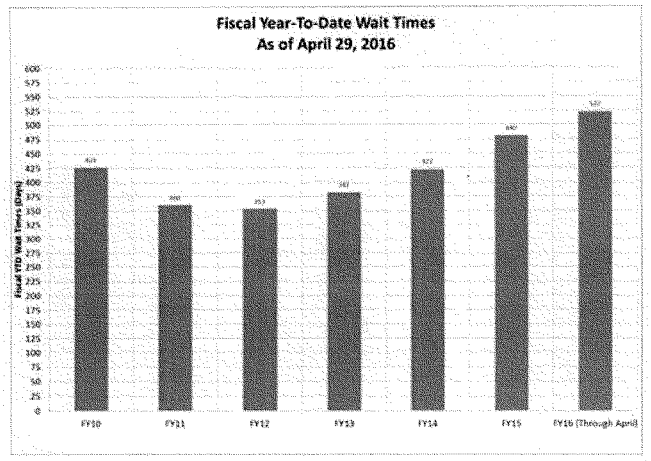
While claimants await a hearing, they may develop new or worsening conditions. Moreover, it is not uncommon for these claimants to endure severe financial difficulties because they are out of the workforce, often for extended periods. Therefore, hearing delays can intensify an already difficult and stressful situation. Wait times for a hearing decision are now approaching 17 months on average. The situation is urgent. Our employees have shared with us stories of individuals who became or were within days of becoming homeless because of the time it took to get a hearing. Our employees also have told us of individuals who, because they are unable to get necessary medical treatment, experience significant worsening in their conditions. Our judges have shared with us having to dismiss cases, or substitute a party, because claimants have died while waiting for a hearing and decision.

Although we made measurable progress through 2011 toward reducing the number of hearings pending, severe budget cuts adversely affected our progress. For three years in a row, in FYs 2011-2013, we received for each year nearly a billion dollars less than the President requested in his budget. During those years, we had to make deep reductions in our services to the public and in our stewardship efforts, while still striving to meet our mission and serve the public. For example, decreased budget allocations drove our difficult decision to curtail plans to open eight additional hearing offices that would have increased adjudicatory capacity. We also were unable to hire the numbers of ALJs necessary to maintain progress. While our budgets were more stable in FYs 2014 and 2015, we faced challenges in hiring a sufficient number of ALJs to meet SSA's needs to replace the ALJs lost to attrition.

Exacerbating the situation, over the same period, we received a record number of hearing requests, due primarily to the aging of the baby boomers as they entered their disability-prone years. We also received an increase in applications during the economic recession and its aftermath. During this time, our resources to address disability claims did not keep pace with the increase in applications and backlogs grew. Primarily for these reasons, wait times for a hearing and the number of pending hearings began to rise again. (See Figure 1.)

[1] See 42 U.S.C. § 423(d)(1) (2016).

Figure 1.



In light of these challenges, Acting Commissioner Colvin charged me with developing a comprehensive strategy to address our hearings wait times and the growing queue of people awaiting a hearing decision. We ultimately developed the CARES plan to help reduce wait times and the number of cases pending a hearing.

As noted earlier, the CARES plan recognizes that we can only address wait times through a comprehensive and multi-layered approach using the tools available to us today, while at the same time developing and implementing new tools for the future. Through our CARES plan, we expect in FY 2018 that we will begin to reduce the average wait for a hearing decision, which currently averages over 540 days. With adequate and sustained funding, we plan to achieve an average wait time of no more than 270 days in FY 2020. We also expect to reduce the number of pending cases by half in FY 2020.

The CARES plan combines a number of immediate, tactical, and strategic initiatives to increase hearings decisional capacity, improve ALJ support and staff efficiency, and strengthen personnel oversight, accountability, and policy compliance without sacrificing our commitment to quality. We consider the CARES plan a living document, which will change as we gain more experience with each initiative, begin new initiatives, and adapt to the changes in our operational environment. However, the success of our plan will require adequate and sustained funding for the various initiatives as well as a sufficient pool of ALJ candidates meeting SSA's unique needs.

People and Quality

Underlying our CARES plan are two interdependent components: people and quality—engaged, well-trained people providing quality service. Our employees have a long tradition of serving our customers and a firm understanding that who we serve is why we serve. We will continue to depend on employees who work hard every day knowing that their work makes a huge difference to a person or family. Inherent in this compassionate and responsive service is quality, and quality includes the timeliness of our actions. Service delayed is service denied.

We define high-quality decisions as policy-compliant and legally sufficient decisions. We have always had to operate in a high production environment, and the hearings process is no exception. Regardless of whether they ultimately receive benefits, the millions of people who apply for our benefits deserve timely and accurate decisions. Quick decisions without quality or quality decisions without timeliness are not acceptable.

While the CARES plan includes many different initiatives, I will start with the initiative that is the topic of this hearing. Hiring ALJs is always critically important, and I will describe our efforts to do this. With the help of Congress and our colleagues at OPM, we are working to develop both short and long-term solutions. However, we do not think it is viable to build our entire plan to address the current unacceptable backlog solely around strategies related to improving ALJ hiring – progress there will not come fast enough to address the critical need to increase adjudicative capacity quickly. Given the urgency of our the need to address the hearings backlog, it would be unacceptable not to take every reasonable action to reduce the amount of time people – your constituents, many of whom have contributed into Social Security and are insured for coverage – wait for a hearing decision.

With that in mind, we developed a short-term action that we can begin immediately, and incrementally, to augment our current adjudication capacity. We call this initiative our Adjudication Augmentation Strategy (augmentation strategy). The augmentation strategy is a short-term initiative to utilize AAJs to hold hearings and issue decisions in non-disability cases[2] and cases that are already before the Appeals Council and may have otherwise been remanded back to the ALJ.

Augmentation Strategy

The cases targeted for the augmentation strategy represent only 3.6 percent of our hearings pending and the non-disability cases often involve issues that ALJs do not typically encounter.

[2] A non-disability case is an appeal of an initial eligibility determination on non-disability issues such as, but not limited to the following: insured status; age; citizenship; income; living arrangement; resources (excess resources, workers compensation, other); relationship (marital, paternity, adoptions, other); retirement factors; nonpayment of benefits because of failure to furnish proof of an SSN; alleged misinformation deterring an applicant from filing for benefits; application of an offset (windfall elimination provision, government pension offset, public disability benefit, workers compensation, other); cessation based on work activity; and overpayments.

A small number of AAJs and staff will specialize in adjudicating the non-disability issues, thus freeing up critical ALJ resources to handle disability hearings. But I want to be clear. Although the augmentation strategy is consistent with the Act and our regulations, this is a temporary initiative aimed at addressing a current need – bringing wait times down to 270 days. It allows us to use highly qualified adjudicators, whom we have thoroughly vetted, as we continue with our extraordinary efforts to hire more ALJs. The augmentation strategy is not part of a plan to replace ALJs in our hearings process.

The augmentation strategy is based on longstanding agency regulations. Since the beginning of the Social Security hearings process in 1940, our regulations have authorized the members of the Appeals Council to hold hearings. Under our current regulations, the Appeals Council has the authority to remove a pending hearing request from an ALJ, hold the hearing, and issue the decision.[3] Moreover, nothing in our existing regulations precludes the Appeals Council from holding a hearing in a case that is before it on request for review or on remand from a Federal court. (See Attachment C for a Summary of Our Legal Rationale for the augmentation strategy.)

As we planned this initiative, we were very deliberate about the cases the Appeals Council would handle. We selected non-disability cases because ALJs see far fewer of these cases and therefore often do not gain enough sufficient experience to handle this work efficiently. By contrast, the Appeals Council has AAJs who specialize in these cases, making them exceptionally suitable to handle this workload timely and accurately.

When a claimant is dissatisfied with an ALJ hearing decision, she can appeal to the Council. Thus the second set of cases are a subset of cases already before the Council – cases where the Council could have completed action on the appeal but have generally remanded back to the ALJ. Under the augmentation strategy, the Council will complete the action on the case and issue the final decision, thus preventing an additional workload from returning to the hearing offices and freeing ALJs to hold hearings on other cases. The sole objective of this strategy is to increase capacity to hold more hearings and issue decisions so that we can, collectively, reduce the time people and their families are waiting for a decision.

In developing the augmentation strategy, we were careful to ensure that we took all actions necessary to protect claimants' due process rights. Let me reassure you that when AAJs conduct hearings and issue decisions, they will function as neutral decision makers and will follow the same rules that govern hearings before ALJs.[4] We safeguard the claimant's right to due process, regardless of whether an ALJ or an AAJ conducts the hearing and issues the decision.

We did not decide to ask the Appeals Council to take on this work lightly. We strategically decided which cases make the most sense for the Appeals Council to handle, ensured that the Appeals Council has the authority to perform this work, and developed an implementation plan. Claimants who disagree with Appeals Council decisions will continue to be able to seek judicial

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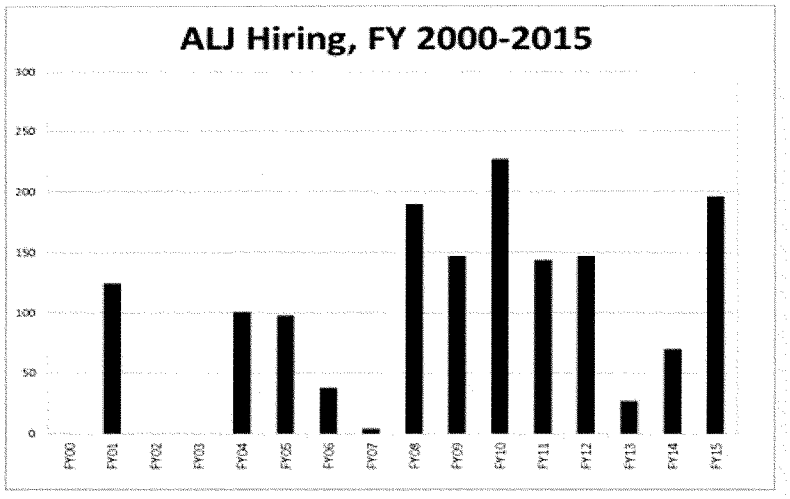
[3] See 20 C.F.R §§ 404.956, 416.1456.

[4] See 20 C.F.R §§ 404.956, 416.1456 ("If the Appeals Council holds a hearing, it shall conduct the hearing according to the rules for hearings before an administrative law judge.").

review in Federal court. We will continue to run robust quality reviews on both ALJ and AAJ hearing decisions.

Despite any best efforts, there are far more hearing requests pending than our ALJ corps can currently handle, and our first priority must be to help the more than one million people who are waiting for an answer. We are working to hire new ALJs as quickly as we can and are working jointly with OPM on those efforts.



Administrative Law Judge Hiring

Ideally, our goal is to recruit and retain enough ALJs to process our hearings workload in a timely manner. While we have committed agency funding, we have been unsuccessful in obtaining and retaining enough ALJ candidates who meet SSA's needs. We currently have 1,506 full time permanent ALJs on duty, but we lose 100 or more ALJs each year through retirement or for other reasons, such as a reassignment to another agency. For example, last year 112 ALJs left the agency. We hoped to hire 250 ALJs to maintain our ALJ corps, but had sufficient candidates to hire only 196 for SSA positions – a large improvement over previous years. We have hired 52 ALJs in FY 2016 and plan to hire a total of 225.

We continue to work in close collaboration with our OPM colleagues, our partners in hiring qualified ALJs. We appreciate the leadership and efforts made in this regard by OPM Acting Director Beth Cobert.

In addition, we thank Congress for recognizing the importance of this issue by enacting section 846 of the *Bipartisan Budget Act* of 2015, which requires OPM, upon our request, to "expeditiously administer a sufficient number of competitive examinations, as determined by the Commissioner, for the purpose of identifying an adequate number of candidates to be appointed as Administrative Law Judges." To that end, I am pleased to report that OPM recently opened an examination announcement so that the current ALJ register of eligible candidates can be replenished with additional qualified applicants. OPM also refreshed the ALJ register with new candidates from the 2013 Examination this fiscal year.

While we will not begin receiving lists of potential candidates from this exam until sometime in 2017, it is a critical part of our strategy to ensure adequate ALJ hiring into the future; and in the near-term, SSA is reviewing ALJ candidates from prior exams and is working with OPM to reach the FY 2016 ALJ hiring goal. An ALJ register with a sufficient number of candidates over the next several years will be critical to our ability to hire the number of ALJs we need to deal with this public service crisis. With aggressive hiring and partnership with OPM, we plan to bring the ALJ corps to over 1,900 by the end of FY 2018. In support of our ongoing hiring efforts and the new April examination, we worked with OPM, management associations, for our judges, advocacy groups, and national, state, and local bar associations to launch a massive recruiting effort designed to attract a broad and diverse ALJ applicant pool.

Hiring a sufficient number of ALJs is critical to improving our service delivery. But it takes time to recruit, hire, and train new judges, and it requires adequate funding for our agency. In the meantime, in the absence of our CARES plan and the augmentation strategy, the number of pending hearing requests would continue to grow and individuals and their families would wait longer for decisions.

Business Process Improvements

We are aggressively hiring ALJs. But as history has taught us, while hiring a sufficient number of ALJs is a critical component of reducing the wait time for a hearing decision, it cannot be our only plan. That is why our CARES plan includes a number of initiatives that provide additional decisional capacity.

We have undertaken a number of pre-hearing triage initiatives aimed at increasing disposition capacity. These initiatives will allow us to better prepare a case for hearing and allow certain functions to be handled by staff or technology, thus freeing judges to do the work only they can do. We are also using technology to provide virtual support.

One of our initiatives to triage cases is our Pre-Hearing Conference program. We currently lose over 12 percent of scheduled hearings because claimants do not show up or unrepresented claimants seek postponements of the hearing to allow them to obtain representation. We are piloting our Pre-Hearing Conference program for unrepresented claimants. The objectives of this program are to (1) advise claimants of their right to representation, (2) begin developing the case file well before the hearing, and (3) remove roadblocks to a successful hearing, such as the need for an interpreter. So far, we have implemented this program in 36 of our 163 hearing

offices to improve the hearings process for unrepresented claimants, and we will continue to pilot this program in additional offices and to evaluate whether it effectively improves the number of hearings held for non-represented claimants.

Another triage initiative is the 1000+ Page Case Initiative. As of November 2015, data indicated that nearly five percent of all cases have over 1,000 pages of medical evidence. With the 1000+ Page Case Review, Senior Attorneys conduct pre-hearing reviews of cases with large medical files, summarize the information, and provide an analysis for the ALJ. This initiative focuses on case readiness – how we can prepare the case better for the ALJ to review. The team conducting this pilot has tested a summary for ALJs in the first phase, and has provided important feedback that will help us continue to improve our processes. In the second phase of the pilot – beginning in June 2016 – the team will collect data to determine the time saved by ALJs and decision writers from this case review. After that, we will determine whether and how to roll out the initiative nationally.

We also implemented the National Adjudication Team (NAT) with senior attorney advisors, who have the authority to issue decisions in certain cases. The NAT screens, develops, and adjudicates cases where the evidence supports a fully favorable decision, removing these cases from the pending hearings workload. We select cases based on characteristics most likely to lead to a fully favorable decision, such as alleged impairments and the claimant's age. If the NAT cannot issue a fully favorable decision after gathering medical evidence, it prepares a case summary to assist the ALJ who will hear the case. We conduct an in-line review of a sample of NAT decisions to ensure quality in the process.

Information Technology Innovations

Technology also helps us be more efficient. Video hearings have proved to be a convenient and effective alternative that allows us to conduct more timely hearings and alleviate pressure on our hearing offices with longer wait times. Increasing our use of video hearings is a key strategy in our ability to address service imbalances across the country by matching available ALJs where the need is greatest. We are just beginning to provide medical and vocational experts and claimant representatives with online electronic folder access, which will eliminate the manual work and time staff currently spend on producing compact disc copies of the record. We also are pursuing an automated appeals process for claims filed with the Appeals Council.

Facilities

We are certainly aware of and support the government's actions to reduce its physical footprint. Video hearings help with that, but we will still need sufficient space to hold hearings so that we can schedule them timely. We have a multipronged approach to better utilize our space, including repurposing vacant space for the hearings operation that is already Federally owned or leased, using existing space more efficiently, and sharing services. While we need enough appropriate space to hold hearings, we also need enough ALJs to timely hold hearings.

We are committed to working collaboratively with our unions and we have had several discussions with them about how to improve service. We remain open to all ideas. However, the status quo is not acceptable to the one million people waiting in line.

Many of us here today have a close relative or friend who has needed our programs. That is true of me, too. It is important to me both as a government leader and on a personal level that our programs work as intended. I would not use the Appeals Council's longstanding authority to hear and decide cases, or any of the other CARES initiatives, if I thought they would harm the public or interfere with due process.

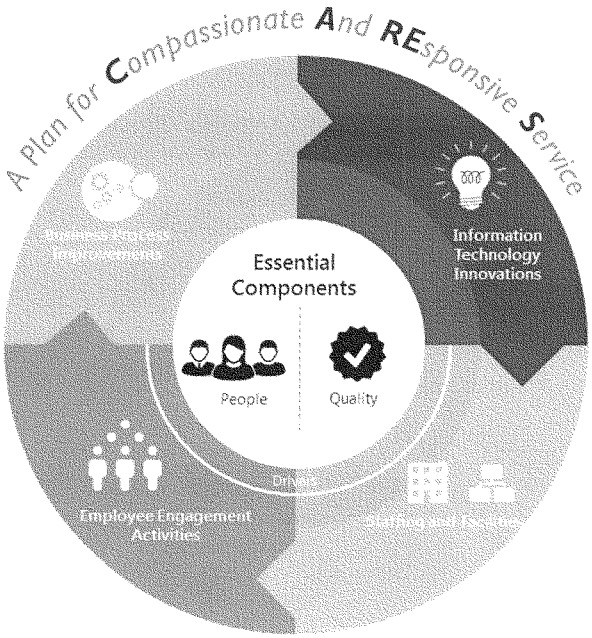
I have the deepest regard for what Social Security means to Americans and for our employees who work hard to ensure we deliver quality service. We will continue to collaborate with Congress, our employees, advocates, and our Federal partners like OPM to find innovative solutions to hearing wait times. I am pleased to say that we are on target this year to reduce the wait time for those who have been waiting the longest. We have issued decisions on 99 percent of cases that began the fiscal year at 430 days old or older (our 252,000 oldest cases). That said, reducing wait times across the board must be our priority. The FY 2017 President's Budget request, which fully funds the CARES plan, gives us the best chance to stay on track and fulfill our duty as public servants. Sustained, adequate funding is critical to implementing our multi-year CARES plan to reduce the wait time for a hearing decision.

To us 1.1 million is not just a number; it is a line of people and their families—many of whom are in desperate circumstances. For many of them, long wait times can mean catastrophic consequences, such as losing a home or making agonizing choices between other basic needs. When the status quo stops working, we need to rethink what we are doing. To address the urgency of over one million people waiting for a hearing decision, we are committed to improving our process. We believe our plan, including a growing and sustained ALJ corps, numerous initiatives to more fully support the ALJ corps and appeals processes, and augmenting our ability to meet the urgent need of the public come together as a set of short and long term measures that will help us reduce the average wait time for a decision.

I thank you for your interest in discussing these important issues. I hope that this Subcommittee will work with us to improve service to our fellow Americans and your constituents. I would be happy to answer any questions.

Attachment 3

Leading the Hearings and Appeals Process into the Future



Leading the Hearings and Appeals Process into the Future: A Plan for Compassionate And REsponsive Service (CARES)

Executive Summary

The Social Security Administration (SSA) is facing a significant public service crisis in our hearings and appeals process. At present, and for the first time in our history, more than one million people are waiting for a hearing decision. The situation is urgent. Our ability to decrease the number of hearings pending, reduce the average wait time for a hearing, and significantly improve our service to these claimants requires adequate and sustained funding. In addition to the necessary funding, we are committed to continue to use data analysis, to listen to our employees and partners, and most importantly, to remain dedicated to providing a high quality, modern and timely disability appeals process now and into the future.

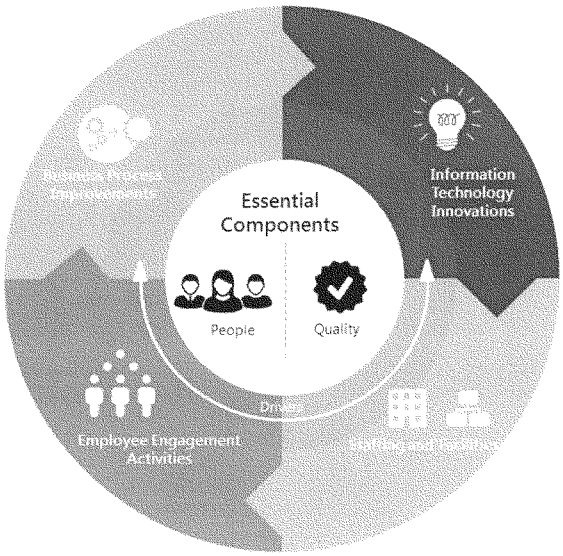
These challenges require both immediate tactical initiatives to address the over one million cases pending a hearing, and initiatives to ensure the hearings and appeals process is efficient, effective, and sustainable. The CARES plan outlines our current comprehensive and multi-layered approach to deal with the immediate crisis of the growing number of hearings pending and increasing wait times. It will also help to serve as a foundation to explore potential future initiatives, as we continue our efforts to identify ways in which we can better serve our customers.

We have built our plan on two essential components: **people and quality**—engaged, well-trained people providing quality service. We have also identified several broad categories of drivers that will help our employees provide quality service to the people who need us most. These drivers include:

- Business Process Improvements;
- Information Technology Innovations;
- Staffing and Facilities; and
- Employee Engagement Activities.

We are pursuing a number of innovations, new or enhanced practices, and quality initiatives to address our critical priority. We believe that we can combine our current plans with potential future initiatives to transform our hearings and appeals process, so we are well positioned to better serve the American public for years to come.

We have outlined a myriad of tactically important steps we can take, right now, to address our service crisis. However, we need adequate and sustained funding to execute the CARES plan. We also commit to an ongoing search for the ways in which we can serve our customers better. We will continue to use data analysis to inform, listen to our employees and partners, and most importantly, remain vigilant in our goal to serve. In our pursuit to meet the needs of the more than one million people waiting, we must consider every constructive avenue for change.



A History of Hearing Pending Levels and Wait Times

Our disability programs are complex, resource-intensive, and require robust administration. Disability claims and appeals require our employees to understand our rules and regulations, analyze the merits of each case, and make difficult decisions. While we automate where we can, the disability programs we administer require a sufficient number of well-trained, engaged employees to assist the American public with their disability appeals.

Over the history of our disability programs, there have been many initiatives to reform or improve the hearings and appeals process. However, despite any streamlining we have achieved, we have been continuously affected by external influences that slowed our hearings process. These external influences have been instrumental in increasing the number of hearings pending as well as a rise in wait times for our customers.

Administrative Law Judges (ALJs) are our primary decision makers in the hearings process. From 1999 through 2008, the Office of Personnel Management's (OPM) ALJ registry was not updated because of an adverse ruling in litigation commonly referred to as the Azdell litigation. However, due to severe staffing shortfalls in the early 2000s, SSA received temporary authority to hire an additional 126 ALJs from the old register. While we hired this limited number of judges, it unfortunately did not keep pace with the growing number of pending cases and the attrition of approximately 100 ALJs each year, who leave primarily to retirement. The inability to hire ALJs, the number of retiring ALJs, and several years of insufficient funding caused pending levels and wait times to rise dramatically. As we

look at resolving the current crisis of over one million Americans waiting for their hearing, it is imperative that we not only replace ALJ attrition losses, but also increase the number of ALJs to reduce the number of hearings pending.

In 2007, our pending level rose to 750,000 hearings, nearly triple the number pending in 2000. The average processing time almost doubled to 500 days between 2000 and 2007. As a result, we developed an aggressive plan to reduce the growing hearings backlog by 2013. At the same time, the economy entered a recession, which contributed to a significant increase in disability applications. This increase in applications exacerbated the number of hearings pending and wait times. We worked diligently to address the growing backlog by shifting funding from our other priorities to the hearings and appeals workloads and successfully implementing many important initiatives to improve service, including:

- Completing implementation of the electronic folder eliminating our paper-intensive disability process;
- Hiring additional ALJs;
- Expanding our national video-conferencing network, allowing us to hold more hearings via video;
- Establishing National Hearing Centers, which use video technology to hold hearings to assist backlogged offices;
- Opening National Case Assistance Centers to help offices prepare cases and write hearing decisions;
- Creating a national standardized electronic business process;
- Adopting the aged case initiative and enforcing the first-in/first-out approach to reduce the number of aged cases; and
- Providing program training to ALJs and other hearing office staff through easily accessible computer systems on a large range of topics.

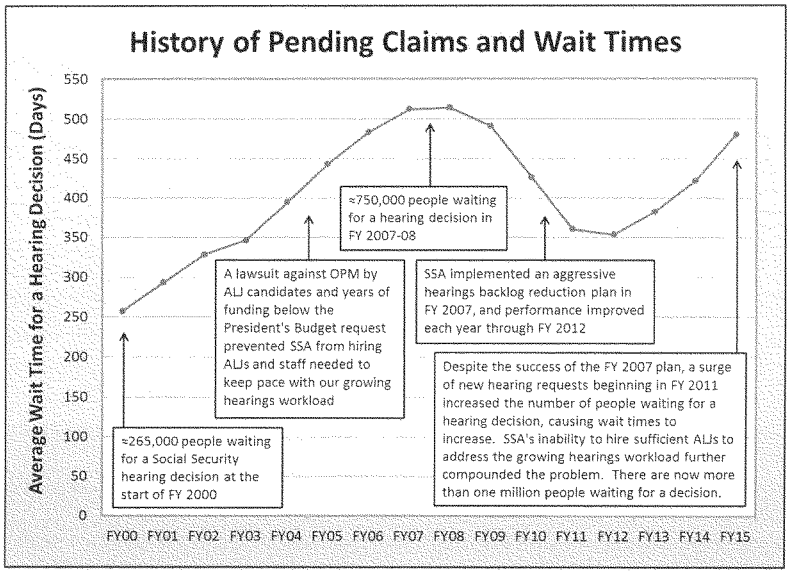
Although we made measurable progress through 2011 toward eliminating the hearings backlog, severe budget cuts adversely affected our progress. Decreased budget allocations drove our difficult decision to curtail plans to open additional new hearing offices that would have increased adjudicatory capacity. We also continued to face difficulty in hiring a sufficient number of qualified ALJs. As a result, wait times for a disability hearing and the number of pending hearings began to rise again. Now, we are mindful of these lessons learned and the ongoing impact of changes in our operational landscape.

Defining the Numbers: Cases Pending and Wait Times

Although the terms 'pending' and 'backlog' have often been used interchangeably to describe our appeals crisis, they are not the same. We can express the 'backlog' as a mathematical equation. The backlog, which constitutes only a part of the total pending, is the extent to which the number of pending cases prevents us from meeting our timeliness expectations. We define the hearings backlog as the number of pending cases that push the average wait time over 270 days. Currently, we have over one million people awaiting a hearing, which is about twice as many as our business process and staffing levels allow us to handle.

We base our 270-day timeframe on our statutory and regulatory timeframes for our hearings process, and the amount of time necessary for our employees to complete each stage of the process. We believe

that we will be successful in providing timely, quality hearing decisions and we will consider that we have been successful with our plan once we have met our average national processing time of 270 days.



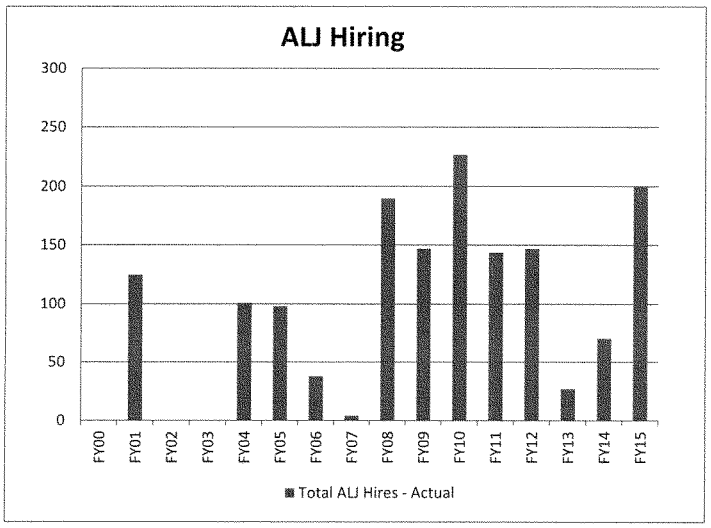
In the past, we provided the number of pending cases to inform decision makers and the public as to how efficiently the program was working. However, this measure is not necessarily meaningful to our claimants who are likely more concerned about how long they will wait for a hearing than how many people are waiting. Using average wait time, also referred to as processing time, is a better, meaningful service metric that will help us more readily define success by providing a tangible measure for our customers. A similar analogy to this expectation is individuals waiting in line at a store with building checkout lines. People begin to get upset if there are not enough cashiers on the registers. The real concern is not how many other people are waiting but how quickly the line is moving and how long it will take to be served.

Definition of Success

When the national average waiting time for a hearing decision is 270 days, we will consider the portion of our pending hearings that are considered a 'backlog' eliminated. We plan to achieve this goal by the end of fiscal year (FY) 2020, but the success of this plan will require adequate and sustained funding as well as OPM's ability to provide enough qualified ALJs timely.

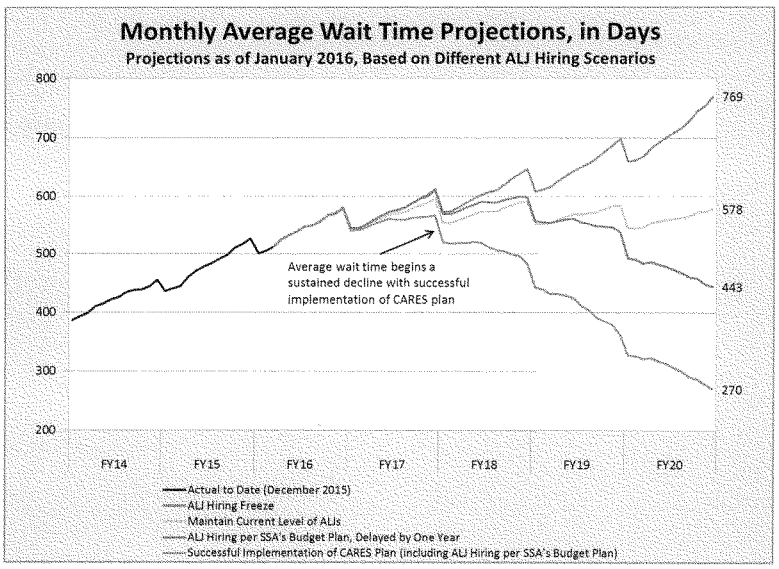
Our plan requires sustained, adequate funding in the future to expand the number of ALJs and increase the number of hearings we complete. In order to meet our hiring goals, we are working in close collaboration with OPM to provide a larger and continuously refreshed register of qualified ALJ candidates. We also need an immediate re-announcement of the ALJ examination. If we meet our hiring goals, we will increase our hearing decisions in FY 2017 to approximately 784,100, nearly 18 percent more than our FY 2015 levels. If we are successful with these hiring plans, we believe that by FY 2018, our ALJ corps will be at the appropriate levels to address the continued growth in pending hearings and wait times for a hearing.

Our projections show that we will need to hire at least 250 new ALJs in FY 2016, FY 2017 and FY 2018 to reach an average wait time of 270 days by FY 2020. This need to hire ALJs also requires hiring support staff for each ALJ. Currently, we have approximately 4.5 support staff for every ALJ. We have been committed to increasing the number of qualified ALJs for the past several years, but with limited and sporadic success, as illustrated in the chart below.

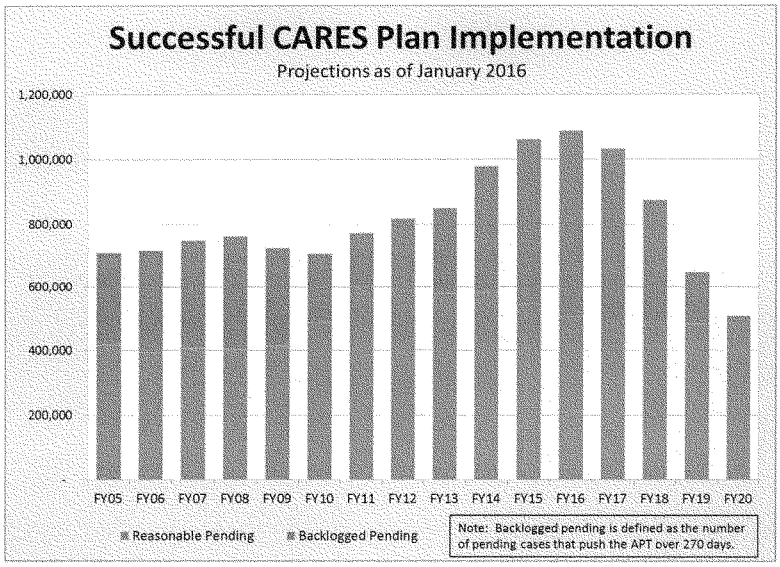


We believe the Bipartisan Budget Act of 2015 will help to address certain delays we have experienced when seeking a new register of ALJ candidates, but we will continue to review and study additional ways to augment our capacity and our efficiency.

As shown below, having sufficient ALJs has a direct impact on the time claimants wait for a hearing decision. Sustained funding and the ability to hire sufficient ALJs and support staff will allow us to achieve an average wait time of 270 days by the end of FY 2020.



We have learned from our history of pending hearings and wait times that sufficient case processing is directly dependent on having a sufficient number of qualified ALJs. However, as we think broadly about the future of our programs and our customers, we know that we cannot base a sustainable plan to reduce the number of pending hearings and wait times solely upon ALJ hiring ability. Through our CARES plan, and with sustained and adequate funding and support from OPM, we expect to begin to eliminate the backlog in FY 2017 and to eliminate it by FY 2020. We also expect that we will reduce the average wait time for a decision from the over 500 days currently to no more than 270 days in FY 2020, and we expect to cut the number of pending cases in half.



Definition of Success for the Appeals Council

Our CARES plan is a comprehensive look at ODAR workloads including the Appeals Council (AC) in the Office of Appellate Operations (OAO), which among other activities is responsible for the final level of administrative review. The AC reviews ALJ decisions and dismissals and handles certain Federal court actions. There is a direct correlation between the number of cases handled and types of action taken by the hearing offices and AC workload levels. OAO anticipates a significant rise in the number of requests for review it receives from the hearing level as more ALJs are hired, trained, and issue dispositions.

The longer-term goal is to process requests for review in an average of 180 days. Staffing is the single factor that most strongly affects OAO's success in delivering timely service and continuing its important quality work. However, as we implement this plan, we are incorporating other measures we can take to assist in reducing wait times and number of pending cases at the hearings and the appeals levels.

The CARES Plan

We built our CARES plan around two interdependent components: **people and quality**—engaged, well-trained people providing quality service. We consider the CARES plan a living document, which we will change as we gain more experience with each initiative, begin new initiatives, and adapt to the changes in our operational environment.

People

Our employees have a strong commitment to public service. They understand that when they took the oath to become Federal employees, they accepted the responsibility to serve the American public. Our employees have a long tradition of serving our customers and a firm understanding that ***who we serve is why we serve***. As we work to address the million people waiting for a hearing decision, it is important to note that our plan requires an emphasis on the people – our employees – who provide that service every day. Thus, our plan also includes initiatives that will help empower and engage our employees, provide them with improved tools to do their jobs, and foster an environment where they are best equipped to provide compassionate and responsive service.

Who we serve is ***why*** we serve.

Quality

We are part of a rich organization whose "signature" is one of compassion and dignity in responsive service. Inherent in compassionate and responsive service to the American people is quality. We define high-quality decisions as policy-compliant and legally sufficient decisions. We have always had to operate in a high production environment, and the hearings process is no exception. Regardless of whether they ultimately receive benefits, the millions of people who apply for our benefits deserve timely decisions that are high quality. Quick decisions without quality or quality decisions without timeliness are not compassionate or responsive service.

The Importance of Investing in Quality

Quality requires an investment, but that investment pays off. Employees who do quality assurance work can prevent additional work by limiting appeals and remands – allowing SSA to process the case once, not multiple times. ODAR quality reviews identify trends that may require policy clarifications or targeted training and feedback.

For example, beginning in 2011, we limited the number of cases that could be assigned to an ALJ. That limit helps ensure that ALJs take the time to follow SSA policy and procedures in their decisions. In addition, we provide desktop training and feedback tools to ODAR employees and ALJs, such as the *How MI Doing* tool. While there are administrative costs for expanded quality measures, many of our employees appreciate the convenience of this added assistance.

Tactical and Strategic Initiatives

Our plan includes several broad categories of drivers that will propel our efforts to address the service crisis at the hearings and appeals levels. These include:

- Business Process Improvements;
- Information Technology Innovations;
- Staffing and Facilities; and
- Employee Engagement Activities.

Business Process Improvements

We continue to look for opportunities to make the hearings and appeals process more efficient while ensuring quality decisions. Part of our strategy for moving forward includes frequent benchmarking with other agencies to both share information about our strategies and to learn about successful strategies they have used. We are also looking at ways to streamline our processes, eliminate duplication, and efficiently utilize our limited resources to provide better and faster service to the public.

In this section, we provide brief descriptions of our tactical initiatives and actionable strategies. Please note that this list of initiatives is not exhaustive – potential new initiatives may be added, and existing initiatives may be modified or removed depending on their success.

Pre-Hearing Triage Initiatives: This set of initiatives aims to increase overall hearings adjudication and disposition capacity through new and innovative techniques and providing additional adjudication resources. Under this category, we plan to:

- ✓ Increase our use of Senior Attorneys where appropriate;
- ✓ Expand the use of pre-hearing conferences that explain the hearings process to and better prepare unrepresented claimants for their hearing;
- ✓ Test the use of predictive modeling in both hearing offices and the AC levels;
- ✓ Test the use of screening and data analytics tools (e.g. SmartMands); and
- ✓ Provide additional staff time and assistance to heavily impacted or backlogged hearings offices.

Case Readiness Initiatives: Through this set of initiatives, we will improve the support provided to ALJs in case development and preparation. One key effort is our **1,000 Plus Page Initiative**, in which staff will review and prepare cases with 1,000 pages or more of evidence prior to the ALJ review and hearing.

Optimized Hearing Office and Case Assistance Center Models: Under this strategy, we will address support staff efficiency by strengthening and streamlining hearing office and centralized case assistance business process models. Through these efforts, we plan to enhance information sharing among our hearing offices, national hearing centers, and our centralized case assistance centers. For example, in FY 2016, we will build and foster a more collaborative virtual working environment to support interaction between ALJs and geographically dispersed support staff. We will pilot the use of collaborative technologies to facilitate a virtual team model through a concept called the **Virtual Hallway**.

Proactive Quality: In addition to the pre-effectuation and post-effectuation quality reviews that the AC conducts, we are testing an inline quality review process at the hearing level that promotes consistency and continuous improvement in case processing by ensuring: (1) case files are properly prepared; (2) cases are properly scheduled; (3) the record is adequately developed; and (4) a legally sufficient draft decision is prepared. Most importantly, our inline quality review initiative is designed to correct identified errors before a final decision is issued.

Natural Language Processing Capabilities: Currently, the AC uses natural language processing (NLP) in its data analytics studies. NLP offers a way to extract select information from electronic disability records, converts unstructured information in text into structured or numerical data, and facilitates robust data analysis. The AC is testing the use of NLP to scan ALJ decisions for language that suggests a higher likelihood of an error so we can select and identify those cases for a pre-effectuation quality review. SSA is conducting a study with NIH researchers to explore automated ways to extract meaningful information from scanned images of medical records and identify duplicate documents.

Information Technology Innovations

We designed our technology investments to provide faster, streamlined, and more efficient IT tools for our employees, external stakeholders, and the public. Specifically, any IT improvements we make must help to remove inefficiencies in our case processing systems, drive policy-compliance and consistency across offices, and/or provide self-service options that allow us to provide customer choice and redirect staff away from manual workloads. We will measure the success of any IT investment we make in the hearings and appeals process by the extent to which that investment helps to reduce the wait time for our customers and eliminate the number of backlogged cases.

Under this category of improvements, we plan to:

- ✓ Expand the use of video hearings in order to balance workloads and eliminate service inequity across the country;
- ✓ Provide online electronic folder access for medical and vocational expert contractors (MEs and VEs) to eliminate staff time to produce CD copies of case folders;
- ✓ Reduce the number of hearings level cases that turn into paper; and
- ✓ Develop an online Appeals Council (AC) Request for Review (iAppeals for Appeals Council) that will eliminate paper requests for review, reduce the potential for lost cases, and improve the efficiency of the AC's business process.

Staffing and Facilities

Staffing

We are aggressively pursuing opportunities to increase our decision-making capacity. It is important to note that our plan depends on sufficient funding so we can hire a sufficient number of ALJs and support staff. As emphasized earlier, any significant setbacks in ALJ hiring will pose a serious challenge to reducing the number of pending hearings and wait times. We hope that with the recent passage of the Bipartisan Budget Act of 2015 and our close collaboration with OPM (our partner in the ALJ hiring process) we will have a sufficient quantity of qualified ALJ applicants across the country. We are also exploring ways to attract and recruit a greater number of prospective ALJ candidates

especially for harder-to-fill geographic locations. However, to make continual progress, we need a larger and continually updated list of qualified ALJ candidates and sufficient, sustained funding from Congress.

Concurrently, we are actively pursuing ways other organizations across SSA can help augment our adjudicative and non-adjudicative capacities to help with our growing appeals workloads. We realize that when we make the difficult decision to move work from one part of the agency to another, other important workloads are affected. To help address our current public service crisis, we plan to temporarily augment capacity by:

- ✓ Collaborating with the Office of Quality Review (OQR) who will assist ODAR in critical case processing activities; and
- ✓ Utilizing Appeals Council (AC) Administrative Appeals Judges (AAJs) to hold hearings and issue decisions on a subset of cases.

In the OAO that runs the AC, we will also focus on hiring appropriate staff and Administrative Appeals Judges (AAJs) to address the growing post-hearing appeals workloads and to reallocate current staff as necessary to help address the increased number of cases that will result from the increased decisions at the hearing level.

In addition to our focus on staffing, we are working to streamline the structure of work where it makes sense. For example, we recently realigned the Limited Income Subsidy Appeals Unit (SAU) from ODAR to the Office of Operations because of closer alignment with other Office of Operations workloads.

Facilities

We have a multipronged approach to better utilize our space, ensuring that we maintain focus on incorporating the staff we need into the space we currently have available. By increasing space options, we will provide greater access to hearings for claimants and reduce wait times.
We plan to:

- ✓ Repurpose vacant space that is already federally-owned or leased for the hearings operation;
- ✓ Make more efficient use of existing ODAR space; and
- ✓ Co-locate our hearing offices with field offices and continue to add "shared services" rooms in our field offices allowing claimants to participate in an ALJ hearing from the convenience of the local field office.

Employee Engagement Activities

Increasing meaningful employee engagement is critical to our ability to serve the public and meet the demands of our growing workloads. A highly engaged workforce will increase innovation, quality, productivity, and performance.

We are using the results of the 2014 and 2015 Federal Employee Viewpoint Survey (FEVS) for ODAR employees and creating a plan of action to improve employee engagement.

Specifically, we plan to:

- ✓ Enhance communication and help build a shared set of goals across ODAR;
- ✓ Implement an internal ODAR development program, covering all positions and grade levels, in order to attract, retain, and develop employees for technical, management, and leadership positions; and
- ✓ Increase availability for telework under current collective bargaining agreements.

I am always inspired by what our employees do every day – the amount of work that you do, the quality and accuracy of your work, and the compassion in which you deliver services. That is what makes our organization one of the best in government.

~ Acting Commissioner Carolyn Colvin

Other Long-Term Plans

We will continue to evaluate options and initiatives to improve service to our customers, as well as flexibilities or improvements in rulemaking. For example, in the past year we instituted new rules related to scheduling and appearing at hearings and the submission of evidence. We will continue to examine ways in which we can improve our service to provide a high quality, modern and timely disability appeals process.

We're committed to new ways of doing business.

Conclusion

We have built our CARES plan around a set of two interdependent components—**people and quality**—and integrated those two components with a complementary set of tactical initiatives. Our plan builds on successful initiatives from past efforts and renews our commitment to finding new strategies to dramatically reduce wait times for the public and reduce the number of pending cases. However, this plan will not have a significant impact on the more than one million people waiting for a disability hearing decision without adequate and sustained funding – this is critical.

This plan offers a blueprint for steps we will take in the short-term but also lays out the path for evaluating potential future changes. With the unprecedented challenge of more than one million people waiting for a hearing decision, we cannot maintain the status quo.

Attachment B

Definition of Disability

The Social Security Act (Act) generally defines disability, for purposes of programs authorized under the Act, as the inability to engage in any substantial gainful activity (SGA) due to a physical or mental impairment that has lasted or is expected to last at least 1 year or to result in death. SGA is defined as significant work, normally done for pay or profit. Under this very strict standard, a person is disabled only if he or she cannot perform a significant number of jobs that exist in the national economy, due to a medically determinable impairment. Even a person with a severe impairment cannot receive disability benefits if he or she can engage in any SGA. Moreover, the Act does not provide short-term or partial disability benefits.

Our process for determining disability is designed to meet the strict requirements of the law as enacted by Congress. Due to strict program requirements, disability beneficiaries comprise a significantly smaller subset of the total number of Americans who report living with disabilities, including severe disabilities.

Overview of Administrative Process

When we receive a claim for disability benefits, we strive to make the correct decision as early in the process as possible so that a person who qualifies for benefits receives them in a timely manner. In most cases, we decide claims for benefits using an administrative review process that consists of four levels: (1) initial determination; (2) reconsidered determination; (3) hearing; and (4) Appeals Council (AC) review. At each level, the decisionmaker bases his or her decisions on the Act and our regulations and policies.

In most States, a team consisting of a State disability examiner and a State agency medical or psychological expert makes an initial determination at the first level of review. The Act requires this initial determination. (Field office and other Social Security employees issue initial determinations in claims for other types of benefits.) A claimant who is dissatisfied with the initial determination may request reconsideration, which is performed by another State agency team.

A claimant who is dissatisfied with the reconsidered determination may request a hearing. The Act requires us to give a claimant "reasonable notice and opportunity for a hearing with respect to such decision." Under our regulations, an administrative law judge (ALJ) conducts a *de novo* hearing unless the claimant waives the right to appear, or the ALJ can issue a fully favorable decision without a hearing; in these cases, the ALJ issues a decision based solely on the written record. If the claimant is dissatisfied with the ALJ's decision, he or she may request AC review. The Act does not require administrative review of an ALJ's decision. If the AC decides not to review the ALJ's decision, the ALJ's decision becomes our final decision. If the AC issues a decision, the AC's decision becomes our final decision. A claimant may request judicial review of our final decision in Federal district court.

Attachment C

Summary of Legal Authority for Agency Augmentation Strategy

As one strategy to reduce the overall number of pending hearing requests, the Social Security Administration (SSA) plans to have administrative appeals judges (AAJ) on the Appeals Council conduct hearings and issue decisions in two categories of cases: (1) non-disability cases when a request for hearing is pending before an administrative law judge (ALJ); and (2) cases that are pending before the Appeals Council on a request for review, on own motion review, or on remand from Federal court that require a supplemental hearing. This plan comports with the Social Security Act (Act), the agency's existing regulations, and due process.

Sections 205(b)(1) and 1631(c)(1)(A) of the Act define SSA's administrative hearing process. These sections of the Act require the agency to give an individual "reasonable notice and opportunity for a hearing." Section 205(b)(1) also broadly authorizes the Commissioner "to hold such hearings . . . and other proceedings as the Commissioner may deem necessary or proper for the administration of this title." Section 1631(c)(1)(A) contains substantially the same language. The Supreme Court has long recognized that the Act grants the agency "the power by regulation to establish hearing procedures . . . so long as the procedures are fundamentally fair."[1]

Since the beginning of SSA's hearings process in 1940, SSA's regulations have authorized members of the Appeals Council to hold hearings and issue decisions.[2] This authority predates the Administrative Procedure Act, which was enacted in 1946 and is modeled on the Social Security Act.[3] The regulations that authorize the Appeals Council to remove a pending hearing request from an ALJ, hold the hearing, and issue the decision, 20 C.F.R. §§ 404.956, 416.1456, do not limit the type or the total number of cases that the Appeals Council can hear and decide, nor has the agency limited the Appeals Council's authority on the issue in any other way. Consequently, the Appeals Council has authority under the existing regulations to remove *any* hearing request that is pending before an ALJ, hold the hearing, and issue the decision.[4]

Sections 404.956 and 416.1456 do not directly apply when the Appeals Council conducts a supplemental hearing in a case that is pending before it on a request for review, on own motion review, or on remand from Federal Court. Nevertheless, sections 404.956 and 416.1456 express the agency's longstanding view that members of the Appeals Council are suitable presiding officials at administrative hearings, and that it is beneficial for Appeals Council members to hear and decide some cases.

When a case is before the Appeals Council because the claimant requested review or the Appeals Council decided to exercise own motion review, neither the Act nor the regulations prohibit the Appeals Council from holding a supplemental hearing. Similarly, when a case is pending before the Appeals Council on remand from a Federal court, the regulations provide that

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[1] *Richardson v. Perales*, 402 U.S. 389, 400–01 (1971).
[2] 5 *Fed. Reg.* 4169, 4172 (codified at 20 C.F.R. § 403.709(d) (1938-1943 Cum. Supp.)).
[3] *Richardson v. Perales*, *supra*, at 409.
[4] *Mullen v. Bowen*, 800 F.2d 535, 540 n.5 (6th Cir. 1986) (noting that, "under both the APA and [SSA's] regulations, the agency itself, or the Appeals Council, may decide to assume the responsibility for conducting a hearing.").

the Appeals Council "may make a decision, or it may remand the case to an administrative law judge with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision."[5] If the Appeals Council decides to make a decision under the authority in these regulations, nothing in the regulations prohibits the Appeals Council from holding a supplemental hearing.

When a claimant requests Appeals Council review, the regulations permit the Appeals Council to deny or dismiss the request, or grant the request and either issue a decision or remand the case to an ALJ.[6] Once a case is before the Appeals Council on review, the claimant may ask to appear before the Appeals Council and present oral argument.[7] If the claimant does not request to appear and present oral argument, the regulations do not preclude the Appeals Council from scheduling an oral argument or another hearing proceeding on its own initiative.[8]

The regulations that govern decisions by the Appeals Council also do not prohibit the Appeals Council from conducting hearing proceedings. These regulations provide only that the Appeals Council may issue a decision after reviewing all the evidence in the ALJ hearing record and any additional evidence received, subject to the limitations on the Appeals Council's consideration of additional evidence.[9] And, 20 C.F.R.§ 404.976 specifically states that if additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so. This allowable activity will reduce the wait times for claimants.

The proposal to have administrative appeals judges on the Appeals Council hold hearings and issue decisions in certain cases also comports with due process. There is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs.[10] With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.[11] Because the members of the Appeals Council will function as neutral decisionmakers and follow the same rules as ALJs, allowing members of the Appeals Council to conduct supplemental hearings in certain categories of cases would comport with due process.

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[5] 20 C.F.R. §§ 404.983, 416.1483.
[6] 20 C.F.R. §§ 404.967, 416.1467.
[7] 20 C.F.R. §§ 404.976(c), 416.1476(c)..
[8] 20 C.F.R. §§ 404.976(b)(2), 416.1476(b)(3) (providing that, on review, if the Appeals Council needs additional evidence and can obtain the evidence more quickly than an ALJ, it may do so, unless it will adversely affect the claimant's rights.)
[9] 20 C.F.R. §§ 404.970(b), 404.976(b), 416.1470(b), 416.1476(b), 404.979, 416.1479.
[10] *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 195 (1982); Jerry L. Mashaw, et al., *Final Report: Study of the Social Security Administration Hearing System* 66 (1977).
[11] *See, e.g., Schweiker v. McClure, supra*, at 195; Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1279-80 (1975).

STATEMENT OF
THE HONORABLE MARILYN ZAHM
PRESIDENT
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

UNITED STATES SENATE

MAY 12, 2016

Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

Thank you for this opportunity to appear before you to discuss the Social Security Administration's plan to divert two categories of cases from Administrative Law Judges to Attorney Examiners at the Appeals Council.

I am Marilyn Zahm, an Administrative Law Judge assigned to the Buffalo, NY hearing office since 1994. I am also the president of the Association of Administrative Law Judges (AALJ), a group of 1300 Administrative Law Judges (ALJs) employed by the Social Security Administration across the country. The views I express today are those of the Association. I do not speak for the Agency.

The Social Security Administration (SSA) has an unprecedented number of cases pending at the hearings level. There are over 1.1 million people waiting for a hearing and decision. No one is more aware of the seriousness of this problem than the ALJs. Every day we see the toll that waiting up to two years for a hearing can take on a claimant.

The SSA leadership, to its credit, is mobilizing all resources to deal with this caseload.

However, as part of its plan, the Agency has launched an initiative that is inconsistent with the Administrative Procedure Act (APA) and its own regulations and that is not in the best interests of the American public.

The Social Security Administration plans to shift certain categories of cases from ALJs to Attorney Examiners at the Appeals Council. This action violates the Agency's own regulatory process that evidentiary hearings on appeals from adverse Agency determinations are to be presided over by ALJs appointed pursuant to the APA. I have attached a legal analysis from administrative law expert Dean Harold Krent, concluding that this plan is *ultra vires*. (See Appendix A) Not only does SSA's agenda starkly depart from the law and regulations, it is poor public policy, as it strips claimants of their right to an independent, APA adjudicator and, also, their right to an appeal before the Appeals Council.

SSA plans to hire 65 new Attorney Examiners (with the internal organizational title of Administrative Appeals Judges), together with 295 support staff, to augment the current 70 attorney examiners in the Appeals Council. These new appeals council attorneys, according to SSA, will hold hearings and issue decisions on two subsets of cases: non-disability and remanded cases. Non-disability cases are a specialized group of cases involving issues such as overpayments, underpayments, workers' compensation offsets, paternity, fraudulent retirement, selection of representative payee, and matters of income and resources. There are approximately 10,000 non-disability cases appealed to the hearings level annually; and, about 30,000 remands pass through the Appeals Council each year.

Currently, and for decades, evidentiary hearings on appeals made from adverse Agency determinations have been conducted by ALJs. SSA has 1500 ALJs located in 165 hearing offices throughout the country. ALJs are selected by federal agencies through the Office of Personnel Management (OPM) after a rigorous hiring process, the requirements of which include years of trial experience, a full-day written examination, and a structured interview conducted by, among others, sitting ALJs and law professors. The applicants' qualifying experience, together with the results of the test and interview, are scored and the names of the top candidates are sent to any agency seeking to appoint an ALJ.

ALJs are appointed pursuant to the APA, the law passed by Congress after World War II to ensure that federal agencies could not improperly influence their adjudicators. In order to assure judicial independence, ALJs are forbidden by law from having ex-parte communications with certain agency personnel. They cannot receive bonuses or undergo performance appraisals. Suspension and removal for good cause must be accomplished by filing charges at the Merit Systems Protection Board, where an independent judge will preside over the hearing. All of these safeguards are imbedded in the law to protect the American people by ensuring that ALJs can exercise their judicial independence in applying the law.

What SSA plans to do is to divert a subset of cases from ALJs and have them heard by their own handpicked people. Instead of an ALJ presiding over the evidentiary hearing and issuing a decision, an appeals council attorney will be adjudicating the case. SSA argues that having appeals council attorneys hold regulatory evidentiary hearings is not a violation of the claimants' rights as, it contends, appeals council attorneys are equivalent to ALJs. This is simply not true.

These appeals council attorneys are directly selected by the Agency and promoted, demoted and disciplined by their Agency supervisors. They receive bonuses and performance evaluations. In short, the Agency has direct control over these adjudicators who do not have statutorily-protected judicial independence. (See Appendix B for a chart comparing ALJs to appeals council attorneys)

These new appeals council attorneys, who have never held SSA hearings or issued decisions, will have to undergo training to perform this work. Since the learning curve for a new ALJ is nine months, this training will take at least several months even if the individuals involved are familiar with the disability program. Moreover, they will all be located in Baltimore, Maryland and Falls Church, Virginia, and time and travel costs will be required because these appeals council attorneys will be obligated to travel across the country to hold hearings for any claimant who declines a video hearing. SSA has asserted that this new program is a temporary measure and will end in one year. It is not productive or cost effective, however, to spend the time and money to train non-ALJs to hold hearings and issue decisions if they are going to only be assigned to handle this work for one year - unless, of course, SSA intends to continue to transfer more types of cases from ALJs to appeals council attorneys.

What is more, under the Social Security Administration's plan, claimants who appear before these appeals council adjudicators will lose their right to a level of appeal.

Currently, if a claimant is unhappy with the decision of the ALJ, an appeal can be commenced by a simple letter that will trigger the process of a complete review by the Appeals Council of the evidence, the hearing recording, and the ALJ's decision. Decisions of the Appeals Council are then appealable to Federal Court.

Under SSA's new plan, however, a claimant having his case heard and decided by an appeals council attorney will not thereafter be able to appeal to the Appeals Council, but must seek redress directly in Federal Court, a much more expensive and difficult course. Moreover, claimants with non-disability cases, particularly overpayments, are often unrepresented as they do not have sufficient resources to hire an attorney and therefore would be particularly handicapped in filing an appeal.

The regulations relied on by SSA to justify its plan to divert these cases do not provide sufficient legal support for the Agency's position.

Title 20 Code of Federal Regulations, Part 404 §900 vests in all claimants:

- the right to a hearing before an administrative law judge if dissatisfied with the determination of the state agency, and

- the right to a review before the Appeals Council if dissatisfied with the decision of the administrative law judge.

Sections 929 and 930 affirm the right to a hearing before an ALJ. Section 970 also provides that disappointed claimants may seek review of any adverse ALJ decision before the Appeals Council.

The agency cites Part 404.956 for Title 2 cases, and the corresponding Title 16 regulation, 416.1456, for its authority to remove the non-disability caseload from ALJs. However, those regulations, which state that the Appeals Council may assume responsibility for holding a hearing by requesting that the administrative law judge send the hearing request to it, gives the Appeals Council only a limited power to hear particular cases. In fact, this is the manner in which the agency has interpreted these regulations in the past, as only individual cases, such as those involving novel issues, have been escalated from the ALJ level to the Appeals Council level. These regulations have not been used to

subsume whole categories of cases to be heard by the Appeals Council. Any attempt to do so flies in the face of the longstanding regulatory scheme that clearly contemplates that claimants have the right to have ALJs hold their evidentiary hearings. Interpreting these regulations in the way SSA asserts would allow it to replace ALJs with appeals council attorneys in any or all cases.

The agency also argues that Part 404.983 and 416.1483 authorizes the Appeals Council to hold hearings on Federal Court remands. However, those regulations, which state that the Appeals Council may make a decision on the case or remand it to an ALJ to take action and issue a decision, including the holding of a hearing, make plain that the Appeals Council may act if it can make a decision without a further evidentiary hearing.

SSA's initiative to remove the non-disability and remand hearings from ALJs and have the cases heard by appeals council attorneys is a dramatic change that is not contemplated or supported by the law or regulations.

As stated earlier, the AALJ is as concerned as the Agency is about the pending caseload. We applaud SSA for its efforts to find remedies. With this in mind, we welcome the opportunity to offer a solution that meets the goal of reducing the backlog. Our solution, however, will not violate a claimant's right to an independent, APA adjudicator or an internal level of appeal, nor will it contravene longstanding regulatory procedures.

The Association of Administrative Law Judges proposes the following alternatives to SSA's plan.

With regard to handling the non-disability caseload:

- Create a specialty cadre of ALJs throughout the country, approximately three per Region, to handle the non-disability cases in addition to some disability cases. The cadre can be composed of current ALJs or retired Senior ALJs who are re-employed for this purpose.

- Deploy the resources that would have gone to the appeals council attorneys to this ALJ cadre. That is, have an assigned clerical employee gather all of the evidence and prepare the file. Have a well-trained attorney review the file, ensure that the appropriate documents are exhibited, and prepare a legal memorandum for the ALJ, outlining the evidence and the issues to be determined. Once the ALJ has heard the case and made a decision, have the attorney, who is already familiar with the file, draft the decision. The ALJs will be located in the local hearing offices. The attorney and clerical staff can be located in a regional office or a central location. Because non-disability cases have specialized issues, a central location where the support staff can collaborate may make good sense.

- This AALJ solution takes advantage of the fact that ALJs are already trained and are located in the field, therefore reducing travel time and attendant costs.

With regard to remanded cases:

- The AALJ agrees that if the Appeals Council can make a determination on the record before them, it should do so; the existing regulations are clear in this regard.

- If an evidentiary hearing is necessary, it is more cost effective and efficient for the case to be sent back to the ALJ in the local hearing office to hold the hearing and issue a decision. Again, no additional travel costs or time will be required and no additional training is necessary. And, the right to an appeal of the ALJ decision to the Appeals Council would be preserved.

SSA is proposing to hire a total of 350 new employees to implement its initiative; clearly, it has the funds to do so.

Under the AALJ plan outlined above, sixty attorneys and clerical employees will be needed to staff the specialty ALJ cadre; anywhere from ten to thirty retired Senior Judges could be re-appointed. That leaves approximately 260 additional attorneys and clerical staff members who can be available to work directly with the ALJs in the hearing offices with the highest number of backlogged cases. If each ALJ has two attorneys and a clerk to work directly with the Judge - insuring that all evidence is submitted, reviewing case files, writing summaries and drafting decisions - the Judge would be able to hold more hearings and issue more decisions. Moreover, if the existing adjudicatory system were to be modernized by, for instance, enacting rules of practice and closing the record, the ALJs could hear and decide even more cases.

In conclusion, it is important for this Committee to understand the implications of SSA's initiative to supplant ALJs with appeals council attorneys. This program is a thinly veiled attempt to eliminate APA protections for the American public in the name of efficiency. Not only is this plan ill advised, it will not make a dent in the backlog of pending cases. More likely, a court challenge will necessitate the rehearing of all of these cases by an ALJ.

Thank you for this opportunity to address this important issue.

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Memorandum

To: Marilyn Zahm
President, AALJ

From: Harold J. Krent
HJK

Date: April 12, 2016

Re: The Social Security Administration's Plan to Empower the Appeals Council to Act as a Front Line Adjudicator

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You have asked me to opine whether SSA's plan to shift two categories of cases from Administrative Law Judges (ALJs) acting pursuant to the Administrative Procedure Act (APA) to Attorney Examiners on the SSA Appeals Council would stand up to a legal challenge. Although I am unaware of the legal predicate for the SSA's plan, I conclude below, based on my independent assessment of SSA's regulatory scheme, that the plan cannot be reconciled with the preexisting regulatory scheme.

The Plan

The Social Security Administration (the Agency) plans to vest in the Appeals Council the responsibility in two contexts to conduct evidentiary hearings under the Social Security Act:

> Requests for hearings to appeal an underlying administrative determination where disability is not at issue. The class of non-disability cases includes overpayment cases and non-medical entitlement appeals, including questions regarding retirement, questions of state law, including paternity, and income and resources, among others.
>
> Cases remanded by the federal courts for further hearing.

As a result, claimants in these two categories would no longer have a right to a hearing before an Administrative Law Judge or the right to an appeal. By compressing the two stages of review into one at the Appeals Council level, SSA has departed from its regulations and undermined the rights of the claimants.

Right to a Hearing before an Independent Hearing Officer

SSA in Title 20 Code of Federal Regulations Part 404 §900, vests in claimants in all SSDI and SSI cases, the right to a:

> ***Hearing before an administrative law judge.*** If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge and
>
> ***Appeals Council review.*** If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

Section 930 affirms a claimant's right to a hearing before an Administrative Law Judge, listing the many contexts in which a claimant is entitled to a hearing before a neutral ALJ, including of relevance here "an initial determination denying waiver of adjustment or recovery of an overpayment." Unlike Administrative Appeals Judges[1] serving on the Appeals Council, Administrative Law Judges are creatures of the Administrative Procedure Act and shielded to a large extent from political influence. Independent Administrative Law Judges are thus tasked by long-standing Social Security regulations with holding *de novo* evidentiary hearings and entering decisions in a wide variety of matters arising under the Social Security Act, in accord with Part 400.930. Such issues touch on both disability and non-disability matters, including issues of paternity, overpayment, fraudulent retirement, selection of representative payees, and matters of

[1] The actual OPM title of the position is Attorney Examiner; Administrative Appeals Judge is an internal SSA title.

income and resources, among other questions. The bedrock right to an independent factfinder is provided to all SSDI and SSI claimants.

Moreover, Part 929 instructs that

> If you are dissatisfied with one of the determinations or decisions listed in §404.930 you may request a hearing. The Associate Commissioner for Hearings and Appeals, or his or her delegate, shall appoint an administrative law judge to conduct the hearing . . . At the hearing you may appear in person or by video teleconferencing, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses.

Part 929 thus reinforces the importance of the right to an independent factfinder, as opposed to Administrative Appeals Judges serving on the Appeals Council.

Right to An Appeal

In addition to pledging an evidentiary hearing before an independent ALJ, the regulations provide that disappointed claimants may seek review of any adverse ALJ decision. Part 404.970 provides that the Appeals Council will review a case if—

> (1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest.

The regulation therefore tracks the APA's guarantee of an appeal from an adverse ALJ decision. 5 U.S.C. 556-57.

The Appeals Council can consider new evidence, but if a hearing is required, it is to remand a case to an administrative law judge so that he or she may hold a hearing. 404.977. Indeed, the Appeals Council can review an ALJ decision on its own motion. 404.969. Given that SSA has

delegated final decisionmaking authority to the Council, the Council's decision is final and no further appeal to the agency is permitted. 404.981. For Administrative Appeals Judges serving on the Appeals Council instead to preside at the evidentiary hearing renders the entire regulatory chapter largely superfluous and deprives claimants of the right to appeal. Accordingly, SSA's proposal not only deprives two categories of claimants of an evidentiary hearing before an independent hearing officer, it also deprives them of an appeal.

To be sure, the Appeals Council pursuant to Part 404.956 has the limited power to hear *particular* hearings *after* a claimant has requested a hearing before an ALJ: "If you have requested a hearing and the request is pending before an administrative law judge, the Appeals Council may assume responsibility for holding a hearing by requesting that the administrative law judge send the hearing request to it." Part 404.956 permits the Council to spot check ALJ decisionmaking. Part 404.956 thus stands as a limited exception and provides no warrant for the wholesale delegation of cases under the recent proposal. In such cases, no "request is pending before an administrative law judge." Indeed, in the only appellate case that even references Part 404.956, *Mullen v. United States*, 800 F.2d 535, 551 (6th Cir. 1986), the court stressed that, despite Part 404.956, "under the Secretary's regulations, the ALJ serves as the initial fact finder and decision maker when an individual requests a hearing on his or her claim for benefits under Title II of the Act." *Mullen v. United States*, 800 F.2d 535, 551 (6th Cir. 1986). In announcing the revisions that included Part 404.956, the agency itself did not suggest that any significant change was contemplated. To the contrary, the agency summarized shortly thereafter that, "After an initial determination is made with respect to a claim for social security or SSI benefits, the claimant or beneficiary is given the opportunity to appeal. There are, in most cases, three steps in the administrative appeals process: (1) reconsideration, (2) hearing before an ALJ, and

(3) Appeals Council review." 51 Fed. Reg. 288 (1986). Thus, Part 404.956 cannot bear the weight likely ascribed to it by the agency. The agency presumably promulgated the section as a failsafe in case it needed to protect a claimant from an ALJ deemed biased or erratic. SSA is threatening to transform a limited exception into a categorical exclusion. Thus, Part 404.956 does not provide the agency warrant to deprive classes of claimants with the right to a hearing before an independent ALJ and then to an appeal before the agency itself.

Nor can SSA utilize Administrative Appeals Judges in the Appeals Council to hold hearings in cases remanded from the federal courts. Part 404.983 provides rather that the Appeals Council can take only one of two actions. It may:

> [M]ake a decision, or it may remand the case to an administrative law judge with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. If the case is remanded by the Appeals Council, the procedures explained in § 404.977 will be followed.

There is no option under the regulations for the Appeals Council to conduct an evidentiary hearing under Part 404.983. Instead, the regulation makes plain that a hearing, if required, will be conducted by an Administrative Law Judge. The Appeals Council may choose to act if it can "make a decision," absent further evidentiary hearing. Had SSA intended the Appeals Council to conduct evidentiary hearings when faced with a federal court remand, it would have so specified. Indeed, Part 404.983 requires the Administrative Law Judge to comply with Section 404.977, which, in turn, requires the Administrative Law Judge to act as he or she would in the usual conduct of an evidentiary proceeding.

CONCLUSION

SSA's recent proposal starkly departs from its own regulations, at least with respect to those of which I am aware. Claimants in the two contexts not only are deprived of a neutral hearing

officer protected from agency interference by the APA, but also the right to an appeal to a different entity within the agency. Any such dramatic change can be accomplished only by emendation of the governing regulations. Simply put, SSA's plan is *ultra vires*.

Administrative Law Judge (ALJ) Independence Compared To Agency Attorney Examiner

	ADMINISTRATIVE LAW JUDGE	ATTORNEY EXAMINER/ ADMINISTRATIVE APPEALS JUDGE
HIRING PROCESS	OPM recommended, rigorous screening, testing and a minimum requirement of 7 years trial experience	Agency determines qualifications, no independent OPM review
DISCIPLINE	Discipline, including removal, for "good cause" determined by MSPB after formal administrative hearing	Subject to agency discretion
HEARING AUTHORITY	Statutory authority for formal hearing on the record under the Administrative Procedure Act (APA)	No APA statutory authority
AGENCY CONTACT	Ex-Parte contacts about case facts prohibited	As agency employees no statutory prohibition on discussing cases with other agency employees
PERFORMANCE REVIEWS AND BONUS	Exempt from Civil Service Reform Act performance appraisal requirements; pay set by OPM and not tied to performance reviews; ineligible for Agency Bonus	Agency sets employee pay, reviews performance and determines bonus
CLAIMANTS' APPEAL RIGHTS	Appeal from an ALJ decision is made to the Agency's Appeals Council by means of a letter. The next level of appeal is to Federal Court	Loss of one level of appeal as no appeal to the Appeals Council. Only appeal is to Federal Court

WHO WOULD YOU RATHER HAVE DECIDING YOUR FAMILY MEMBER'S DISABILITY CASE?

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

STATEMENT OF
JOSEPH KENNEDY
ASSOCIATE DIRECTOR
HUMAN RESOURCES SOLUTIONS
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

on

"Examining Due Process in Administrative Hearings"

May 12, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee:

I am pleased to have the opportunity to appear before you this morning to discuss the role of the Office of Personnel Management (OPM) with respect to the hiring process used for Administrative Law Judges (ALJs). I also will discuss the distinction between ALJs and other hearing officers government-wide.

The Role of ALJs

The ALJ position was created by the Administrative Procedure Act (APA) to ensure fairness in administrative proceedings before Federal government agencies. ALJs have two primary duties which are 1) presiding over agency hearings, taking evidence, and acting as a preliminary fact finder in proceedings, and 2) making an initial determination about the resolution of a dispute. As of September 2015, there were 1,778 ALJs employed in agencies across the Federal government who handle benefits or regulatory matters.

Not all Federal agencies use ALJs to adjudicate disputes before the agency. There are several other kinds of hearing officers who conduct administrative proceedings throughout the Federal government. Further, Congress established requirements specific to ALJs that do not apply to

other categories of hearing officers. ALJs are in the Competitive Service, and must meet qualifications standards set by OPM and pass an examination designed and administered by OPM. Other hearing officers are typically in the Excepted Service and are assessed on an agency-by-agency basis. The ALJ competitive examination is designed to test for qualifications and competencies that are relevant to service in any of the agencies that employ ALJs, while Excepted Service hearing officers are assessed based on agency-specific qualifications. Veterans' preference points are given to ALJ applicants who are preference eligible, while agencies hiring other hearing officers are exempt from the rules concerning veterans' preference for the Excepted Service and must apply veterans' preference only to the extent administratively feasible. Like other employees in the Competitive Service, ALJs acquire "competitive status" which allows them to be reinstated in ALJ positions after they leave service. ALJs are subject to separate pay provisions, are not subject to performance evaluations, and may not be given awards. Other hearing officers are governed by the normal rules applicable to other positions in the Competitive and Excepted Service. ALJs may be removed only for cause through an action brought by the employing agency at the Merit Systems Protection Board. The removal of other hearing officers occurs pursuant to the adverse action procedures that govern other positions in the Competitive and Excepted Service.

Finally, OPM has oversight authority for ALJs throughout the Federal government, including authority over ALJ job classification and pay setting. Other categories of hearing officers are subject to the decentralized administration more typical of the rest of the Civil Service.

The Role of OPM in the Hiring Process

Consistent with the Administrative Procedure Act and Civil Service laws, OPM is responsible for establishing ALJ qualifications and classification standards, for determining ALJs' pay according to their duties, developing and administering the ALJ examination, and maintaining a listing, referred to as the "ALJ register," of qualified candidates from which OPM can draw to certify candidates for each geographic location at which an employing agency plans to appoint new ALJs. To preserve the qualified decisional independence of ALJs, OPM also is responsible for approving non-competitive personnel actions affecting incumbent ALJs, such as promotions, transfers, reassignments, reinstatements, and details; and for reviewing agencies' position descriptions for ALJs and the job opportunity announcements that agencies use for reinstating ALJs or for hiring ALJs already employed by other agencies. To assist agencies with their workload challenges, OPM also administers the ALJ Loan program, which allows interagency details of ALJs, and the Senior ALJ program, which permits agencies to bring back retired ALJs for a limited duration. By law, OPM cannot delegate the ALJ examination to any other agency to develop or administer.

Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management

May 12, 2016

The ALJ qualification standard developed by OPM prescribes minimum requirements for entry-level ALJ positions. The current qualification requirements, which were last updated in 2008, are defined in the *Qualification Standard for Administrative Law Judge Positions*. To be qualified for an ALJ position, applicants must be licensed and authorized to practice law, and must also have a full seven years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority; qualifying administrative law experience involves cases in which a formal procedure was initiated by a governmental administrative body.

ALJ applicants also must undergo an examination, which is periodically revised to account for changes in the occupation, incorporate new methodologies, and ensure that assessments are updated and valid. For the current version of the examination, which was first administered in 2013, OPM industrial-organizational psychologists worked closely with incumbent ALJs from across the country, and surveyed the entire Federal ALJ population to develop the current rigorous multi-hurdle assessment process. Given the breadth of input from ALJs across Government and the rigor with which the examination was developed, OPM has great confidence in the ability of this examination to identify top quality candidates for ALJ positions across Government.

Under this assessment process, applicants must first meet the preliminary requirements described in the *Qualification Standard*. Those who meet the preliminary qualification requirements go through an online assessment, which includes a Situational Judgment Test, a Writing Sample, and an Experience Assessment. Applicants whose scores are within the range for the higher-scored sub-group are invited to participate in the in-person component of the examination, which includes a Written Demonstration, Logic-Based Measurement Test, and Structured Interview. Applicants must receive a required minimum score on the Written Demonstration or Structured Interview to be considered to have passed the examination and receive a final numerical rating. Those who do not pass are not eligible to be on the register. Veterans' preference points are added, as appropriate. Eligible candidates are then placed on the ALJ register in descending score order, based upon the final numerical ratings. When an agency wants to hire a new ALJ for a particular location, OPM issues a list of candidates who have indicated a willingness to be considered for that location, which is drawn from the top of the register. Agencies hiring entry-level ALJs make selections from the candidates provided by OPM consistent with the law governing the Competitive Service regarding the order of selection. Once an ALJ is appointed by an agency, the ALJ receives a "career appointment," and is not subject to a probationary period.

Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management

May 12, 2016

OPM is confident there is a robust list of candidates on the current register to take care of the near-term hiring needs of the agencies, as currently indicated. However, we recognize that SSA is facing an unprecedented challenge to manage the existing backlog. We are working closely with them to respond to their concerns and needs regarding increasing the number of candidates to accommodate SSA's aggressive hiring goals to manage the backlog. For example, during the past year, OPM processed additional applicants under the 2013 Job Opportunity Announcement to allow a larger swath of the qualified applicants who had completed and been scored on the on-line assessment to proceed to the balance of the examination. The final scores for these candidates were recently entered and these candidates were added to the register. OPM also added candidates whose appeals were resolved favorably to them and who successfully completed the balance of the examination. In addition, OPM continues to add to the register by conducting ongoing quarterly examinations for 10-point veterans as required by Civil Service law.
OPM recently opened the ALJ examination for applications from March 29 to April 8, 2016, thereby meeting the April 1 deadline for reopening established by Section 846 of the Bipartisan Budget Act of 2015. Prior to opening the current examination and in anticipation of increased hiring needs for the Social Security Administration (SSA) for the next several years, OPM increased full-time staff, recruited additional intermittent staff, and identified internal surge support in preparation for administering the current and future examinations. In addition, OPM conducted an extensive recruitment effort, which included targeting national bar associations, women and minority bar associations, ALJ associations and unions, all Chief ALJs in hiring agencies, and various veteran organizations. When the announcement for entry-level ALJ positions was posted on USAJOBS.gov, it yielded more than 5,000 applications.

OPM is currently reviewing the applications received during the open filing period to determine which applicants satisfy the preliminary qualification requirements and exceed the screen-out level for the on-line assessment. After the administration of the examination to the current applicant pool is complete, the assessment process has been concluded, and final numerical ratings have been calculated, OPM will add to the register all the candidates who successfully completed all components of the examination. Both these new candidates and the candidates currently on the register will remain there until they are appointed to an ALJ position or until OPM develops and administers a new ALJ examination.

OPM's Role in Assisting the Social Security Administration with Its Hiring Needs

While keeping in mind its overall responsibilities to the competitive ALJ examination process, OPM has worked collaboratively with the SSA for over a year to assist SSA with its ALJ hiring needs. OPM met with SSA officials to discuss specific hiring requirements, suggested changes to its process for granting permission to transfer and expanding geographic locations, and

developed a checklist for SSA to use when preparing the documentation OPM uses to audit SSA's selection process. In addition, as noted above, OPM administered the remaining portions of the 2013 examination to an additional wave of applicants who had met preliminary qualifications and taken the on-line assessment, in order to help meet agencies' increased hiring projections in 2016. OPM also surveyed ALJ applicants currently on the register to give them an opportunity to update the locations where they wanted to be considered for ALJ employment. These efforts added depth to the robust candidate pool from which OPM draws to provide ALJ hiring agencies with certificates of candidates for entry-level ALJ employment. OPM is committed to continue working with SSA so it can appoint more ALJs to help eliminate its case backlog.

Conclusion

Members of the Subcommittee, thank you for having me here today to discuss the role of OPM in the ALJ hiring process and the ALJs' independence. I would be happy to address any questions you may have.

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE
P.O. Box 1772 • Washington, DC 20013 • www.faljc.org

May 23, 2016

The Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
Hart Senate Office Building, SH-601
Washington, DC 20510

The Honorable Heidi Heitkamp
Ranking Member
Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
Hart Senate Office Building, SH-605
Washington, DC 20510

Re: Examining Due Process in Administrative Hearings

Dear Senator Lankford and Senator Heitkamp,

On behalf of the Federal Administrative Law Judges Conference (FALJC), the largest organization of United States Administrative Law Judges (ALJs) from every federal agency, we thank you for your thoughtful questions at the Subcommittee's hearing on Examining Due Process in Administrative Hearings and respectfully request that this letter be included in the written record.

We understand the Social Security Administration's (SSA's) Office of Disability Adjudication and Review (ODAR) intends to hire about 70 new Administrative Appeals Judges (AAJs) (and corresponding support staff) in its internal Appeals Council to hold hearings and issue decisions on two categories of cases[1] that have been traditionally heard and decided by ALJs, i.e. non-disability cases and supplemental hearings in cases the Appeals Council would otherwise remand to an administrative law judge.[2] As the

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[1] *See* ACUS, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT DRAFT REPORT at 11 (March 24, 2016). *See also* Letter from Sen. James Lankford to Hon. Carolyn W. Colvin, Acting Commissioner, SSA, dated April 5, 2016.

[2] SSA's regulations dictate those cases that should be heard by an "administrative law judge" in 20 C.F.R. § 404.930 (a). *See also* 20 C.F.R. § 405.5 (defining Administrative Law Judge as "an administrative law judge appointed pursuant to the provisions of 5 U.S.C. §3105 who is employed by the Social Security Administration).

professional organization that represents Administrative Law Judges across all federal government agencies, we write to express our concerns about such a change in processing these cases.

Under SSA's regulations, parties in non-disability cases (typically for overpayment of disability benefits) are entitled to a hearing before an ALJ if they request one.[3] To have such cases heard by someone else is not consistent with the established regulatory scheme. Allowing non-ALJs to hold supplemental hearings in disability cases previously heard by an ALJ raises even more serious concerns, because the case has been determined to be an ALJ proceeding subject to the Administrative Procedure Act (APA) and its requirements with respect to any hearing to be conducted.[4] While an agency may designate any impartial person to review an ALJ decision as if that reviewer had presided at the hearing,[5] it may not appropriately deny a claimant a hearing before an ALJ on remand, where the case has been initiated as an ALJ proceeding.

Hence, the legality of this program is, at best, questionable. The established practice is codified by Social Security regulations that are consistent with the APA.[6] Using AAJs in lieu of ALJs would run afoul of the basic provisions of the APA by placing the powers of the ALJ in the hands of individuals not appointed pursuant to the provisions of 5 U.S.C. § 3105. Such a change in practice feeds into the growing concerns with the use of executive agency administrative judges.[7] It also creates the risk of costly litigation given this legal uncertainty, and portends the possibility that all of the decisions rendered by these AAJs will be remanded by the courts to be re-heard by ALJs.

The value of requiring an ALJ to hold these hearings is most notable in that ALJs have qualified judicial independence through statutory protection from adverse employment actions.[8] AAJs, however, have no such protection, and are subject to the will of the agency for promotions and discipline. ALJs are only hired after being deemed qualified through a competitive examination administered by the Office of Personnel Management.[9] This examination process, in part, determines whether the applicant has the appropriate temperament to perform the duties of an ALJ, including conducting hearings with members of the public, as well as the appropriate background and experience. AAJs, on the other hand, are selected directly by SSA from a pool of in-

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[3] 20 C.F.R. § 404.930 (a).

[4] OPM has essentially determined these SSA proceedings are subject to the APA by certifying ALJ applicants for appointment to SSA as ALJs. Indeed SSA has acknowledged that its proceedings are subject to the APA by certifying that it needs ALJs to conduct them. 20 C.F.R. § 405.301(b). Congress has repeatedly indicated that it regards these proceedings as subject to the APA. See Bipartisan Budget Act of 2015, H.R. 1314, 114th Cong. § 846 (2015) (requiring OPM to open the register for new ALJ applicants upon the request of SSA).

[5] *See* 5 U.S.C. § 557(a).

[6] *Cf.* 20 C.F.R. Part 405 and 5 U.S.C. §§ 551 et seq.

[7] *See* Barnett, Kent, *Due Process vs. Administrative Law*, The Wall Street Journal (Nov. 15, 2015).

[8] *See* 5 U.S.C. § 7521(a) (1980) ("An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.")

[9] https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Fact-Sheet

house applicants without such an examination process. While this "shortcut" may allow SSA to hire AAJs quickly, it deprives the claimant and the American public of the services of the independent decision makers contemplated by Congress.

The use of AAJs in this manner would also undermine the established appellate procedure in disability cases. Under the existing appeals process, decisions rendered by ALJs must be appealed to the Appeals Council before they can be filed at the District Court level.[10] With AAJs being used in lieu of ALJs, citizens would be forced to have their appeals from these decisions heard only at the District Court, a much more costly and daunting effort that is likely beyond the financial means or ability of the typical disability claimant.

We understand that SSA faces an unprecedented service crisis and needs to take measures to address the volume of cases on its hands. Rather than subverting the regulatory framework that is consistent with relevant statutes, we urge SSA to focus on improving practices and procedures, hiring more ALJs, and providing increased staffing to assist ALJs in hearing cases. As we have heard from our membership, quality file preparation and legally sufficient decision writing are key to an ALJ's ability to efficiently adjudicate cases. Investing resources in these areas makes both economic and legal sense in addressing this crisis.

FALJC, established in 1947, is dedicated to improving the administrative judicial process, presenting educational programs, and representing the concerns of federal Administrative Law Judges. We would be happy to discuss suggestions for improvements to SSA adjudications and to the administrative hearing process.

If you have any questions regarding the foregoing, please contact FALJC's legislative consultant, Lillian Gaskin at 202-293-1411.

Regards,

Erin Masson Wirth

Erin Masson Wirth
Administrative Law Judge
President, Federal Administrative Law Judges Conference
www.faljc.org

cc: Nathan Kaczmarek
Warren Flatau
Rachel Nitsche

[10] *See generally* SSA, The Appeals Process, SSA Publication No. 05-10041 at 2 (2015).

The Honorable James Lankford
Chairman
The U.S. Senate Subcommittee on Regulatory Affairs and Federal Management
U.S. Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington DC 20510

Statement for the Record

Hearing of the U.S. Senate Subcommittee on Regulatory Affairs and Federal Management:
Examining Due Process in Administrative Hearings
Held May 12, 2016, 9 a.m., SD-342, Dirksen Senate Office Building

Submitted by:
Allsup
300 Allsup Place, Belleville IL 62223
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Thank you for the opportunity to submit a statement for the record for this hearing.

Allsup is a provider of specialized services and technologies that help meet the financial and healthcare needs of Americans with disabilities. Founded in 1984, Allsup companies work nationwide to deliver a range of advocacy services and integrated products that help reduce the financial impact of disability, including: assessing eligibility and obtaining Social Security Disability Insurance (SSDI) benefits, supporting return-to-work efforts, and ensuring the healthcare needs of individuals are met as they move across the disability continuum. A subsidiary, Allsup Employment Services Inc. (AESI), is a Social Security Administration (SSA)-approved Employment Network.

Through our role in representing hundreds of thousands of SSDI and SSI claimants, we've observed for decades the activities within the SSDI program and monitored related data and trends that affect our claimants' experiences, their benefits and their rights. It is on behalf of our claimants that we provide this statement.

SSA's decision to remove two classes of hearings (non-disability cases (404.956 and 416.1456); and supplemental hearings in cases the council would otherwise remand (404.983) and 416.1483) from the purview of the administrative law judges (ALJs) and transfer them to the administrative appeals judges (AAJs) and attorney examiners (AEs) within the Appeals Council concerns us.

While we understand and applaud the SSA's effort to reduce the backlog for our claimants at the hearing and the Appeals Council level, we encourage lawmakers to evaluate a continuing trend taking place within the program.

From our vantage, the SSA has adopted a number of policies and taken actions that can be interpreted as limiting the independence of ALJs, and that may limit a claimant's ability to receive a fair and impartial hearing. There is limited transparency of the bigger picture—and the impact—when smaller, incremental changes such as these are implemented by the agency.

Some in the disability community question if these actions have resulted in an historic, double-digit decline in ALJs' decision rate to award benefits to claimants during the past three years. Are the judges, in response to these changes, now under pressure to spend less time adjudicating claims and to approve fewer claims by eligible applicants? Also, has this steep rise in denials been the real driver of the growing backlog now before the Appeals Council?

The topic under consideration by the U.S. Senate Subcommittee on Regulatory Affairs and Federal Management, "Examining Due Process in Administrative Hearings," May 12, 2016, only addresses one decision by the agency. Allsup encourages the committee and all parties represented to consider and resolve the underlying issues that led to the agency's effort to reduce the workload on the ALJs in this manner.

We outline key considerations as follows.

Judicial Independence

Allsup notes that in the past five years, the SSA has implemented a number of measures that appear designed to address the incidence of ALJ "outliers" (those with unusually high award rates), but also may restrict all judges from proper and effective adjudication of claims. While changes may have been warranted to ensure consistency and training among the ALJ corps, it could be argued that the federal agency has enacted measures and is introducing new proposals that move beyond the original mission of intercepting inappropriate claims to the point of reducing fairness in the disability determination process. This harms the due process that should be accorded individuals.

This is particularly true for the more than 1 million people with disabilities whose claims are now pending review at the hearing level and beyond, when the complexity and rules of the program are most cumbersome for individuals to navigate.

Administrative Procedure Act

The SSA began using administrative law judges[1] following passage of the Administrative Procedure Act (APA) of 1946. In order to ensure fairness and due process for the individual, the APA separated the rulemaking functions from the administrative adjudicative proceedings[2] in federal agencies.

[1] http://www.socialsecurity.gov/legislation/testimony_071111.html
[2] http://www.gao.gov/products/GAO-10-14

Ensuring the separations between rulemaking, adjudicative proceedings and judicial independence have been debated frequently since passage of the APA and implementation of the SSDI hearing process. The SSA has taken significant recent action to exert more control over the hearing process, targeting ALJs' performance and, perhaps, their fundamental role. The ALJs' union, citing the APA, has publicly challenged the SSA's legal ability to do so. One example is the lawsuit, *Association of Administrative Law Judges v. Colvin,* No. 1-13-CV-02925 (N.D. Ill. filed April 18, 2013), which was dismissed[3] Feb. 26, 2014. Judge Zahm called out related concerns by ALJs in her testimony before the subcommittee.

SSA Measures Enacted: Highlights and Perspective

Following is a highlight of measures enacted by the SSA that may help inform decisions and actions planned by the subcommittee.

FY 2010

- The Office of Disability Adjudication & Review (ODAR) created the Division of Quality to review ALJ-related issues and ensure compliance.
- In August 2011, ODAR rolled out the "How MI Doing?" reporting tool[4], which allows ALJs, decision writers and senior case technicians to monitor and compare their performance to peers in their office, region and nation. The use of "How MI Doing?" has since been expanded for use by Appeals Council adjudicators[5].

FY2011

- ODAR began developing an "early monitoring system" to oversee ALJ performance at hearing offices.
- Chief ALJ established new controls over the transfer of cases from one ALJ's docket to another to ensure proper case rotation.
- ODAR began "pre-effectuation" reviews of ALJ decisions which occurred within the claimant's 60-day appeal deadline, thus allowing the decision to be subject to change. (Previously, ODAR was conducting reviews post-effectuation, meaning ALJs' decisions could not be altered.)

FY2012

- Office of Chief ALJ formed the "Triage Assessment Group." The group's focus was to formalize the "early monitoring system" to detect problems with ALJ performance at hearing offices.
- The SSA added to its Appeals Council staff and began reviewing favorable decisions by ALJs and attorney advisors through what's known as "own motion review," resulting in an increasing number of remands on favorable decisions.
- A metric for remands was added in April 2012, allowing ALJs to view remanded cases and see why they were remanded. Factors being examined, or flagged, are number of

[3] http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_13-cv-02925/pdf/USCOURTS-ilnd-1_13-cv-02925-0.pdf
[4] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-12-11289_0.pdf
[5] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13039.pdf

dispositions, number of on-the-record (OTR) decisions, and frequency of hearings with the same claimant representative.
- The expanded ODAR oversight process now includes the Division of Quality, the Triage Assessment Group and the ALJ Early Monitoring System.
- Increased scrutiny has resulted in mandatory training for all ALJs on topics including: when evaluating treating source opinions, and questionable phrasing of claimants' residual functional capacity.

FY 2014
- In December 2013, the Office of Personnel Management and SSA released[6] a new revised "position description" for ALJs and Chief ALJs. The revisions generally placed stronger emphasis on supervision, management and compliance with the Social Security Administration.

Additional changes
- The ODAR enacted "quotas" requiring each ALJ "to issue 500 to 700 legally sufficient decisions" each year[7].
- While the number of ALJs who are employed by the SSA has grown by 62 positions in four years—1,467 to 1,529 (December 2011 to December 2015)—the number of employees listed under "General Attorney" position with the SSA has grown by 624 positions—from 3,094 to 3,718 for the same time period.
- Decision data at the Appeals Council level are no longer readily made available by the agency.

Appeals Council: Current Plan

The SSA's latest initiative introduces the prospect of moving cases currently reviewed by ALJs under the purview of AAJs and AEs. Unlike ALJs, these are administratively appointed positions managed by the SSA and do not work under the same statutory requirements as ALJs. The SSA has stated it plans to use its authority to decide two broad classes of hearings: non-disability cases (404.956 and 416.1456); and supplemental hearings in cases the council would otherwise remand (404.983) and 416.1483).

Removal of these two types of cases is a concern. As Senator Lankford stated in the hearing, "temporary measures" (which is how the measure was characterized by SSA Deputy Commissioner Theresa Gruber during the hearing) have a way of becoming permanent.

Allsup's concern is that these activities eventually will be expanded to impact our claimants with disabilities unfairly. Will this be another small step toward erosion of judicial independence for individuals seeking Social Security disability or retirement benefits? It follows on a lengthy series of actions by the SSA in the past five years that appear to move adjudication and appeals programs toward agency purview and away from the fairness and decision-making role of the ALJs.

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[6] http://www.empirejustice.org/issue-areas/disability-benefits/litigation-legal-updates/court-decisions/alj-lawsuite-dismissed.html#.VzOoT7tOXMA
[7] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-15-15005.pdf

While some changes may have been necessary, some believe the federal agency's ongoing activities represent a regime shift[8] that increases the power of the agency at the cost of due process for the individual.

Three important considerations:

1. Shifting these two categories of cases has the potential to provide the administrative opening that allows the SSA to redefine these two categories of claims procedurally to include other claims, further expanding what has been described as a temporary measure that reallocates cases away from ALJ review.
2. Selecting a couple of categories of claims for sole review by Appeals Council staff alters the existing structure that was designed to fulfill due process of law. These individuals will be removed of their right to a full and fair evidentiary hearing before an ALJ appointed under the APA. This change appears to expand the role of AAJs and the Appeals Council, and creates two versions of appeal for different classes of claimants.
3. More information is needed about processes taking place at the Appeals Council level. In years' past, the SSA reported more detailed data about Appeals Council cases, including cases pending and days to a decision. The agency now only focuses on the percent of claims with delays longer than 365 days. A reduction of transparency about Appeals Council activities may indicate the presence of more concerning problems that need to be addressed. Is the increasing denial rate at the hearing level a driver of the Appeals Council backlog? Is this a factor in the higher cost of adjudication and workloads at this level? As noted above, a significantly smaller percent of claims are being awarded at the hearing level, while Appeals Council appeals have grown.

Conclusion

Allsup has functioned as an advocate for individuals with disabilities for more than three decades.

We have worked to ensure fairness, access and efficiency on the part of our customers and their interactions with the SSA. We have worked to help ensure that the individuals we represent through the SSDI program meet the program's eligibility requirements and to assemble an accurate, well-documented claim to the benefit of the judges, the agency and the individuals. This includes making operational and organizational changes, and innovative business steps and efficiencies, which are designed to help us comply with the SSA's requirements and regulations in order to serve our customers.

These decades of experience also provide our organization with insights and an understanding about the economic winds that shape and reshape the SSDI program over many years. It's important to recognize when the corrective measure become the means of damage to the taxpayers for whom a program was designed to serve.

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[8] http://www.ssab.gov/Portals/0/Technical%20Panel/2015_TPAM_Final_Report.pdf?ver=2015-09-24-113145-693

In the current environment, the SSDI hearing backlog has grown to approximately 1.1 million claims, representing 1.1 million people and their families. The Appeals Council backlog has grown to more than 150,000 claims, from approximately 88,000 claims in FY 2009. The award rates for SSDI claims at the hearing level have declined by nearly 20 percent to 45 percent in FYs 2014 and 2015 from 62 percent in FY 2010. At the same time, the delays individuals and their families are experiencing have grown from a national average of 382 days in FY 2013 to 518 days[9] as of April 2016, with many claimants now waiting who certainly won't have a hearing scheduled until 2018. In addition, the courts reviewing the claims that reach them upon further appeal, following the Appeals Council review, are raising red flags[10] and criticizing critical elements in how the SSDI determination process is administered.

Prior to making any additional changes to remove cases from the purview of ALJs, it's important that legislative representatives take a closer look at the SSA's decisions and if they affect the due process that is owed to the millions of individuals who trust their economic stability to a fair and thoughtful review of their claim by the ALJs and the agency.

Sincerely,
Mary Dale Walters
Senior Vice President
Allsup

[9] https://www.ssa.gov/appeals/#&a0=1
[10] http://www.theindianalawyer.com/disability-denials-draw-criticism/PARAMS/article/39934

NATIONAL ORGANIZATION OF
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Executive Director
Barbara Silverstone

Written Statement for the Record on behalf of the National Organization of Social Security Claimants' Representatives

Hearing before the Senate Committee on Homeland Security and Government Affairs Subcommittee on Regulatory Affairs and Government Management

Examining Due Process in Administrative Hearings May 12, 2016

Submitted by:
Barbara Silverstone, Executive Director

* * *

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR) as a statement for the hearing record for the May 12, 2016, Senate Committee on Homeland Security and Government Affairs, Subcommittee on Regulatory Affairs and Government Management hearing entitled "Examining Due Process in Administrative Hearings."

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability or Supplemental Security Income ("SSI") benefits. NOSSCR members represent these individuals in legal proceedings before the Social Security Administration and in federal court. NOSSCR is a national organization with a current membership of more than 3,200 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

Statement:

Chairman Lankford, Ranking Member Heitkamp and members of the subcommittee, thank you for the opportunity to submit this statement for the record for the hearing "Examining Due Process in Administrative Hearings."

NOSSCR appreciates you holding this hearing to examine the Social Security Administration's (SSA) Compassionate and Responsive Services (CARES) Plan component to have Administrative Appeals Judges (AAJs) assume responsibility for certain subsets of cases rather than having Administrative Law Judges (ALJ) decide those cases.

The Hearing Backlog

NOSSCR is very concerned about the number of people waiting for a hearing before an ALJ and the amount of time it takes to get decisions on disability claims. According to the SSA, there are currently more than 1.1 million people waiting for a hearing before an ALJ. The average wait time for a claimant's hearing to be held is back up over 500 days.[1] For the first time in the last 7 years, there are more than 600,000 cases that have been pending over 270 days.[2] This delay in receiving a hearing is very detrimental to claimants. People die, commit suicide, exhaust their meager savings, and become homeless waiting for hearings. Because of the dire consequences the backlog has on applicants for benefits, NOSSCR supports SSA taking action with the resources it has to address the hearing backlog.

Inadequate Administrative Funding for SSA Has Contributed to the Hearing and Other Backlogs

With an increasing number of Baby Boomers reaching retirement age or their most disability-prone years, SSA is experiencing dramatic workload increases at a time of diminished funding and staff.[3] Congress' persistent underfunding of SSA creates backlogs (including the hearing backlog), overpayments, and other inefficiencies.

SSA's administrative costs in Fiscal Year (FY) 2014 were less than 1.3 percent of benefits paid.[4] This figure is lower than SSA's previous administrative spending and much less than that of private insurance companies. SSA has received hundreds of millions of dollars less each year than the President has requested for its Limitation on Administrative Expenses (LAE). In FY 2015, SSA received $218 million less for LAE than the President requested.[5] The discrepancy for FY 2016 was $351 million. Congress has also routinely appropriated less for SSA's program integrity efforts (such as medical and work continuing disability reviews and Title XVI redeterminations) than authorized under cap adjustments.

This lack of funding has significant implications for SSA's ability to perform its program integrity and other workloads. The President's FY 2016 budget request would have allowed SSA to complete 58,000 more full medical Continuing Disability Reviews

(CDRs) and 100,000 more SSI non-medical redeterminations this fiscal year than it now plans to perform.[6]

In addition, backlogs caused by insufficient staff and funding create inefficiencies. For example, SSA has a backlog of over 14,000 work-years of post-eligibility tasks, which include earnings reports from SSI and SSDI beneficiaries who are attempting to work.[7] Delays in processing earnings reports creates overpayments. These unnecessary overpayments create substantial additional workloads for SSA staff, who must compute the correct amount of overpayments, issue notices to beneficiaries, input benefit reductions to recoup overpaid benefits, refer beneficiaries for Treasury offset, adjust auxiliary benefits, negotiate payment plans, adjudicate appeals, and handle requests to waive the overpayments. A report by SSA's Office of the Inspector General found that income-related overpayments were the most common type of overpayment, representing nearly 38% of all overpayments.[8] It took an average of 9 months for SSA to assess such overpayments,[9] often because beneficiaries declared their earnings in a timely fashion but the agency lacked the resources to promptly process the reports.

At a minimum, Congress should fund SSA at the level requested by President Obama for FY 2017 at $13.067 billion to help address these growing backlogs. Adequate administrative funding is essential to SSA decreasing the hearing and other workload backlogs.

Ensuring SSA Has a Sufficient Pool of Qualified Administrative Law Judge Candidates From Which To Hire

The inability to hire enough ALJs contributes to the hearing backlog. SSA loses more than 100 ALJs to attrition every year and must hire more ALJs than that to accommodate the growing backlog of hearing requests. As was made clear at the hearing, the current pool of candidates made available to SSA from which to hire is inadequate. Deputy Commissioner Gruber's written and oral testimony outlined the difficulty SSA has experienced due to having an insufficient candidate pool from which to hire, especially in the geographic locations where ALJs are most needed. Ms. Gruber indicated during the hearing that although there are approximately 5000 records in the ALJ database maintained by the Office of Personnel Management (OPM), there are actually only approximately 500 distinct individuals contained in the database, providing insufficient candidates for the 225 ALJs that SSA would like to hire in FY 2016.

Mr. Kennedy's testimony indicated that the recent opening of the ALJ examination resulted in approximately 5000 applications. NOSSCR is encouraged that the examination was opened and that a significant number of applications were received. However, OPM must move expeditiously to complete the examination process to make additional candidates available to SSA as soon as possible. In addition, because completing the ALJ examination process takes time (Ms. Gruber indicated that the candidates from the examination that closed on April 8 will not be available for SSA to interview and hire until sometime in 2017), OPM should open another examination in

the near future so that SSA will have enough candidates for hiring in FYs 2017 and 2018 as well.

Although only one component of SSA's CARES plan designed to reduce the backlog by 2020, ALJ hiring is an integral one. Congress should ensure that it provides SSA with sufficient funding to hire needed ALJs by funding SSA at the level requested in President Obama's FY 2017 funding request. In addition, Congress should conduct additional oversight of OPM's recruitment of ALJ candidates. Congress should also work with SSA to ensure that OPM is meeting SSA's ALJ hiring needs and continuously maintains a sufficient pool of ALJ candidates for SSA.

The Use of Administrative Appeals Judges

NOSSCR is deeply committed to ensuring that claimants for Social Security disability benefits receive the due process protections required by all statutes and regulations governing the disability determination process. NOSSCR also believes that the ability to get a fair hearing before an independent adjudicator is vital to claimants. We advocate to maintain the qualified judicial independence of ALJs in the disability determination process. Claimants for disability benefits deserve no less.

At the same time, as described above, NOSSCR is deeply concerned about the number of people waiting for a hearing and the ever-increasing amount of time it is taking for those hearings to be held. With that, and the chronic administrative underfunding that SSA has received from Congress in mind, NOSSCR supports SSA in trying to do what it can with the resources it has at its disposal to address the backlogs. NOSSCR fully supports many aspects of the CARES plan including, for example: SSA hiring additional staff to do better case screening, expanding the pre-hearing conference pilot, increasing the use of Senior Attorneys, and the 1,000 Plus Page Initiative.

NOSSCR does have concerns, however, regarding SSA's plan to use AAJS to hear the discrete subset of cases identified in its CARES plan (remands and non-disability cases). It is important to note, as Ms. Gruber indicated in responses to questions at the hearing, that AAJs will be highly qualified, receive the same training as ALJs, and be required to follow all SSA policy (regulations and sub-regulatory policy including the POMS, the HALLEX, and Social Security Rulings) when deciding cases. Implementation of this aspect of the CARES plan should be carefully monitored to ensure that AAJs are issuing policy-compliant decisions and that their decisions are not unduly influenced by SSA management. SSA must ensure that the decisions made by AAJs are based on the evidence presented and in compliance with all applicable regulations and policy guidelines.

NOSSCR staff are meeting with SSA staff regularly and carefully monitoring the implementation of the entire CARES plan, and the AAJ proposal specifically, to ensure that claimants receive the due process protections to which they are entitled and that claimants are not disadvantaged by which type of adjudicator hears their appeal.

Congress should also monitor the implementation of this plan and require SSA to collect and submit data regarding the use of AAJs. At a minimum, SSA should collect and release:

- the number and types of cases heard by AAJs;
- the processing times for those hearings;
- the dispositions of those cases (in a manner protective of personally identifiable information); and
- a comparison of the dispositions of cases heard by AAJs versus those heard by ALJs.

In addition, SSA should be required to complete quality reviews of the AAJ decisions. More specifically, SSA should do quality reviews of denials by AAJs. NOSSCR is concerned that because AAJs lack the qualified judicial independence of ALJs and are subject to SSA disciplinary policy, AAJs will feel pressure to deny meritorious cases and claimants will be harmed as a result. Requiring SSA to complete quality reviews of AAJ denials will help ensure that this does not occur. Those reviews should be done in sufficient numbers to provide evidence that claimants appearing before an AAJ are getting fair, independent policy compliant decisions.

In addition, NOSSCR believes it is important that SSA address the following issues:

- Temporary nature of the initiative: Ms. Gruber indicated in a response to a question that the initiative was temporary and scheduled to end in 2020 when the CARES initiative indicates average processing time will fall to 270 days. Is 2020 a hard deadline, or is the end date of this initiative based on hearing backlog reduction?
- What happens if a non-disability eligibility determination (such as immigration or insured status) is decided in a claimant's favor? The claim then becomes a disability claim. Does the claim then go to an ALJ for a disability determination? If not, are similarly situated individuals being treated differently?
- The merits of providing administrative-level review, potentially from another employee of the Appeals Council, for claimants who get unfavorable decisions from AAJs.

NOSSCR is aware that the hearings held by AAJs on the two subsets of cases identified in the CARES plan (approximately 13,000 per year) will not have a major effect on the backlog of more than 1.1 million cases. However, the tens of thousands of people who have their cases heard by AAJs will receive a decision much quicker, as will the people who get the hearing slots in front of ALJs that would otherwise been allocated to those individuals.

NOSSCR supports SSA in pursuing strategies to reduce the backlog and urges SSA to continue to find additional ways to address the hearing backlog (and the long wait for a hearing) with the resources it has.

Thank you for holding this hearing on this important topic for applicants for Social Security disability benefits and the opportunity to submit this statement for the record.

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[1] Social Security Administration, https://www.ssa.gov/appeals/#&sb=0&a0=1
[2] SSA, https://www.ssa.gov/appeals/#&sb=0&a0=1
[3] http://www.cbpp.org/social-securitys-administrative-funding-has-not-kept-up-with-rising-caseloads-1
[4] http://ssa.gov/budget/FY16Files/2016BO.pdf p.8
[5] http://ssa.gov/budget/FY15Files/2015BO.pdf p. 8, http://ssa.gov/budget/FY16Files/2016BO.pdf p.8, and https://www.ssa.gov/budget/FY17Files/2017BO.pdf p.8.
[6] https://www.ssa.gov/budget/FY17Files/2017BO.pdf p.8 and https://www.ssa.gov/budget/FY16Files/2016BO.pdf p.6
[7] http://democrats.waysandmeans.house.gov/press-release/ranking-member-becerra-opening-statement-social-security-subcommittee-hearing-waste
[8] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-14-24114.pdf, p.3
[9] Id. at 5.

SOCIAL SECURITY
Office of Disability Adjudication and Review

August 4, 2016

The Honorable James Lankford
Chairman, Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for the opportunity to appear before you and for your May 31, 2016 email requesting additional information to complete the record for the May 12, 2016 hearing on ODAR's Adjudication and Augmentation Strategy (AAS).

Please be aware that in light of our current budget situation, we do not now have the resources to implement the AAS as originally envisioned.

I hope that the information we are providing in response to your post-hearing Questions for the Record and my oral and written statements provide a fuller perspective of our long standing legal authority that underlies our AAS and the compelling need to explore every option to address our service crisis.

I hope this information is helpful. If I may be of further assistance, please feel free to contact me. Your staff may contact Ms. Judy Chesser, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Theresa Gruber
Deputy Commissioner
for Disability Adjudication and Review

Enclosure

Post-Hearing Questions for the Record
Submitted to Theresa L. Gruber
Deputy Commissioner, Disability Adjudication and Review
U.S. Social Security Administration
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. At the hearing, testimony was received that indicated at least as of recent years, SSA had enough funding to hire ALJs. The record also reflects that there were 600 ALJ candidates on the latest register. At the end of FY 15, 83% of all Federal ALJs were employed by SSA. Assuming that other agencies would need approximately 100 of the ALJs on the register, and SSA hires 225 this year, 275 available ALJ candidates remain.

Q: When SSA contends that there aren't enough qualified ALJ candidates and must instead augment them with AAJs, is the reality that SSA cannot find 65 ALJs out of the approximately 275 candidates left on the register? If so, are all of these 275 remaining ALJs not up to SSA's standards?

We are not stating that all of the remaining candidates will not meet our standards. Experience shows, however, that we can end up with no candidates for certain locales such that we cannot fill our need. To clarify why this is not a simple mathematical issue, let me discuss the mechanics of the process.

The current process requires the Social Security Administration (SSA), like other hiring agencies, to periodically request certificates of potential candidates, by geographic location — there must be a match between where we are hiring and where a candidate is willing to work. We are only provided a portion of possible candidates at any given time and we do not know how many total candidates are available nor do we receive a list of all available candidates. SSA and the other hiring agencies are not informed of the total number of potential candidates who currently may be on the list. For example, in March 2016 we requested certificates for 81 geographic locations from the Office of Personnel Management (OPM). In response, we received 81 certificates, with up to 75 names per location; however, these were not 75 unique candidates, because candidates may apply for multiple locations. This results in duplicate names appearing on multiple lists. After we eliminated duplicate applicants from the total of 5,894 names on the 81 certificates, we had only 264 unique individuals to consider. This number was reduced further to 221 names because we did not select 43 of these candidates three times previously. In effect, those 5,800 names—or any other total number of names provided to us on multiple certificates—are misleading in terms of the actual number of discrete eligible candidates for each location. When we work through a list of names and do not have enough candidates to complete our hiring effort in particular locations, we make a new request to OPM for more names. For example, we requested additional names for 19 of the 81 locations for which we

requested certifications in early March but did not have enough unique names to meet our hiring goals.

Before we make an offer to a candidate, we take several important steps to ensure we are making an informed hiring decision. Applicants report their license status long before they are placed on the administrative law judge (ALJ) register for selection by agencies. OPM does check license status at the beginning of the examination and immediately before applicants are placed on the register. Nevertheless, some applicants will change their bar license status after they are placed on the register, so we check bar license status again. We conduct a preliminary suitability screening on key areas including education, state and national bar affiliations, credit, motor vehicle record, criminal record, and references. We also require a personal interview to assess the skills necessary for our high volume, non-adversarial process.

The additional steps we take ensure we fill important gaps that may not be readily transparent. Our work environment is high-production, and candidates must be able to work in a non-adversarial setting, often with vulnerable claimants. In addition, successful candidates must be able to proficiently use technology and review significant volumes of medical evidence.

This process is time consuming and costly, but we have learned through experience that it is worth the investment to protect vulnerable claimants who appear before ALJs. In addition, the timeframes and cost to terminate ALJs who have significant conduct issues, do not follow agency policy, or cannot process cases timely is extraordinary.

Our goal is to hire 225 to 250 ALJs this fiscal year (FY). As of June 26, we have hired 151 ALJs, including 148 new ALJs and 3 ALJ transfers from other agencies. However, erratic and untimely funding complicates this "fits and starts" process. Running a large agency without the benefit of a timely and predictable budget year after year makes it difficult to efficiently plan. Adding to that challenge, new workloads and rules may arise, which add additional complexity to our programs and business processes. We can develop and use new tools like data analytics and clarify regulations to help—but those new tools require time and resources.

We genuinely appreciate your interest in understanding our programs and challenges and willingness to hold hearings on key public policy and service issues.

Q: If OPM's and SSA's standards for a "qualified" candidate are markedly divergent, considering that SSA is the most significant user of ALJs, what is SSA doing to ensure that OPM provides candidates that SSA would deem qualified in the future?

OPM provides eligible candidates to all Federal agencies employing ALJs, not just our agency. As discussed in response to the prior question, the nature of our high-volume, non-adversarial hearing process demands that we take additional steps to ensure that we are selecting candidates who are a fit in terms of generally-applicable qualifications like a current bar license; public trust suitability (including whether criminal and financial history is consistent with the integrity and efficiency of the service, job requirements, and business necessity); and a skillset that supports working well with others and the public in a production environment that requires analytical thinking, decision making, and comfort with medical terminology and its application to work.

We continue to work closely with OPM to balance its process with our needs. Per the President's FY 2016 budget, the Administration created a workgroup led by the Administrative Conference of the United States and OPM, along with SSA, DOJ, and the Office of Management and Budget (OMB) to review the process of hiring ALJs and recommend ways to eliminate roadblocks. In addition, Chief ALJ Debra Bice and other management ALJs have personally participated in many meetings at OPM serving as subject matter experts and providing feedback on the ALJ examination. Currently, we meet with OPM on a bi-weekly basis to discuss the ALJ hiring process, and plan to meet with them later this month to explore additional initiatives to both streamline and improve our collaboration in hiring ALJs for SSA.

2. Aside from the 1.1 million backlogged cases at the ALJ level, the Appeals Council currently has its own significant backlog and prolonged processing times.

Q: As the ALJ corps produces more decisions by working down their backlog, doesn't the agency need to hire more AAJs to do the increased Appeals Council work downstream?

The Appeals Council (AC) does not have a growing backlog. Its workload continues to decrease by approximately 1,000 cases per month, down to below 140,000 (and down from a historic high of approximately 162,000 cases in FY 2012). We considered the impact on the AC in developing our proposals, and folded expected additional requests into the staffing projections for the adjudication augmentation strategy (AAS).

Q: If the Appeals Council can't handle its own caseload, shouldn't new AAJ hires be deployed to reduce this backlog before repurposing them to tackle other workloads?

As noted in the previous response, the AC does not have a growing backlog, and its workload is down to below 140,000. The AC has implemented a number of practices from award-winning training to productivity standards to the use of data analytics and technologies like natural language processing and clustering to maintain a reasonable workload even in the face of budget cuts and increasing receipts.

3. ALJs and AAJs pay scales are the same. However, the AAJ position description was updated in March 2016 to include a new requirement for "significant travel."

Q: Approximately 30% of claimants refuse Video Teleconference hearings; how can the additional costs of AAJs traveling to locations to hold the hearing – and performance bonuses AAJs can receive that ALJs cannot – be an efficient use of resources?

Our ALJs already travel for some hearings where claimants decline video hearings; thus, our decision to have administrative appeals judges (AAJs) hold hearings will, to a large extent, result in a shift of expected travel costs. While AAJs can receive performance awards, these awards have not been significant relative to the AAJs' overall salary. For example, last fiscal year the Appeals Council's AAJs received a total of $75,000 in awards, or about $1,200 per AAJ. This year, in light of budget constraints, we will not issue awards this fiscal year.

The AAS calls for AAJs to hold video hearings in all cases where it is not refused. When AAJ travel is necessary, data analytics will be used to select cases to reduce travel. Moreover, the AC has business process efficiencies, including how cases are prepared for AAJ review, which will allow us to realize additional savings.

Hiring enough qualified ALJs in a timely manner remains our best strategy to reduce the workload pending at the hearing level. This strategy comes with its own set of upfront costs as OPM has charged us $6.6 million this year for its ALJ hiring services, which included the increased cost of expanding the pool of applicants who were permitted to go through the examination in order to provide additional candidates for the ALJ register. However, while we try to accomplish this goal, we need to do what we reasonably can to reduce wait times. We were deliberate in our approach to how the AC could help. We intentionally identified two workloads: non-disability appeals currently pending in hearing offices and disability cases already before the AC on appeal.

Non-disability cases account for approximately 10,000 cases pending at the hearing level each year. Due to the small number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; the AC currently takes corrective action in 36 to 48 percent of these cases in a given fiscal year. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect the AC's expertise to result in more policy- compliant decisions.

The disability cases we included in the AAS are cases already before the AC on appeal—the claimant has already had a hearing before an ALJ and we are asking the AAJs to take additional actions rather than return the case to the hearing level. AAS simply extends the cases the AC can complete by having it take certain development actions and hold hearings.

4. As AAJs begin to perform a significant number of hearings, there are bound to be questions and comparisons of their quality and productivity compared to ALJs.

Q: Would the proposed AAJ hearing decisions be subject to quality review?

Yes, cases heard by AAJs would be subject to the same quality review as ALJ decisions.

Q: How would you mitigate concerns with the quality review of an AAJ being performed by another AAJ from the same office?

Our focus is on the policy compliance of decisions to ensure that individuals who qualify for benefits receive them, and that those claimants who do not qualify do not receive benefits. Reviewing work of another adjudicator, including another AC adjudicator, is a normal part of the AC business process. The AC's remand process requires more than one adjudicator to review the case before it is remanded. The fact that it acts as a Council supports its engrained culture of arriving at a fair and policy compliant decision. In addition, AAJs in the Division of Civil Actions routinely review actions by other AAJs to determine whether request for voluntary remand from Federal court is appropriate and AAJs in the Division of Quality routinely review

actions by other AAJs to identify areas of policy noncompliance and opportunities for feedback on quality.

AAJs already currently decide cases as the final level of administrative review and review the work of ALJs through the appeals and quality review processes. There is no reason why taking on AAS work would change the AC's already robust and interactive case review process.

Q: What productivity does Social Security expect from these new AAJs, especially considering the significant amount of travel required of them?

The AC is an experienced component that has a division that specializes in non-disability work. The disability work is an extension of actions on cases already pending before the AC on appeal—the AC as part of its non-AAS function has already invested significant time on these cases and under AAS would take additional actions, which is more efficient than returning them to an ALJ for completion. As mentioned above, we believe travel will be minimal, and where an AAJ does need to travel, we will minimize travel dockets through geographic clustering. We are confident that AAJs will hold at least as many hearings as ALJs would handling the same docket of cases.

5. Non-disability claimants who have their hearing by an AAJ will lose the 4th step of the Appeals Process. Appealing to the Federal Court level is a daunting undertaking for anyone, least of all claimants who are unlikely to have access to attorney representation due to the lack of financial incentive.

Q: When some claimants have the opportunity to appeal to the Appeals Council and others do not, how do you address the natural equal protection and due process concerns?

Due to the small total number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; the AC currently takes corrective action in 36 to 48 percent of these cases. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect the AC's expertise to result in improved policy compliance.

Our claimants will continue to receive a hearing by a judge. AAJs are licensed attorneys recognized by Congress as judges under 5 U.S.C. § 5372b. AAJs will hold hearings and apply due process requirements for adjudication under the Social Security Act (42 U.S.C. §§ 405 and 1383), which the Supreme Court has recognized are consistent with those required by the Administrative Procedure Act (APA) (5 U.S.C. §§ 556(d) and (e)). In addition, AAJs will hold hearings and apply due process under the requirements set forth in agency statutory (42 U.S.C. §§ 405 and 1383) and regulatory guidance (20 C.F.R. § 404.956), as well as sub-regulatory guidance written by AAJs at the AC (Hearings Appeals and Litigation Law (HALLEX) manual chapters I-2-3 through I-2-9). Our process will still provide that: any material evidence may be received; a party is entitled to present his or her case by oral or documentary evidence and conduct cross-examination; the record will be made available to all parties; and, where an agency decision rests on official notice of a material fact, a party is entitled the opportunity to show the contrary. In addition to these guidelines, HALLEX also prescribes further requirements,

including, but not limited to: the proper form and timelines required in giving notice of the time, place and issues to be considered at a hearing; access to interpreters and other assistive resources; specific requirements for when the adjudicator must develop the record or obtain testimony; explanations of the hearing and decisional process; notification of the right to representation and postponement of the hearing to obtain representation; and, proffer of post-hearing evidence and the offer of a supplemental hearing.

We are still developing our final business process, and we would be happy to discuss options to address further any concerns about administrative review.

SOCIAL SECURITY
Office of Disability Adjudication and Review

August 4, 2016

The Honorable Heidi Heitkamp
Ranking Member, Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Senator Heitkamp:

Thank you for the opportunity to appear before you and for your May 31, 2016 email requesting additional information to complete the record for the May 12, 2016 hearing on ODAR's Adjudication and Augmentation Strategy (AAS).

Please be aware that in light of our current budget situation, we do not now have the resources to implement the AAS as originally envisioned.

I hope that the information we are providing in response to your post-hearing Questions for the Record and my oral and written statements provide a fuller perspective of our long standing legal authority that underlies our AAS and the compelling need to explore every option to address our service crisis.

I hope this information is helpful. If I may be of further assistance, please feel free to contact me. Your staff may contact Ms. Judy Chesser, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Theresa Gruber
Deputy Commissioner
for Disability Adjudication and Review

Enclosure

Post-Hearing Questions for the Record
Submitted to Theresa L. Gruber
Deputy Commissioner, Disability Adjudication and Review
U.S. Social Security Administration
From Senator Heidi Heitkamp

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. **One of the key issues highlighted at the hearing was SSA's continuing efforts to reduce both the hearing backlog and average wait time for decisions. However, SSA explained at the hearing that the adjudication augmentation strategy contained in the CARES Plan will only go so far in alleviating those challenges.**

   - **How exactly will ALJ workloads be alleviated by shifting non-disability cases to the Appeals Council? Can any such increase in decisional capacity be precisely quantified?**

The Appeals Council's long-standing role is to handle the agency's final administrative appeal, reviewing approximately 160,000 ALJ decisions each year, including non-disability issues.

While we strive to hire enough qualified ALJs, we need to consider what more we can do to help the more than one million people waiting for a decision. We were deliberate and refined in our approach to how the Appeals Council (AC) could help reduce the number of pending hearings. We intentionally identified two workloads: non-disability appeals currently pending in hearing offices, and disability cases already before the AC on appeal.

We chose the non-disability workload because the AC already centralizes this type of work, and has developed expertise in this area. There are very few of these cases, and ALJs rarely see enough non-disability work to become experts. During the last 5 years, the AC has taken corrective action on between 36 and 48 percent of the appealed non-disability cases currently adjudicated by ALJs. Often this corrective action is in the form of a remand order, requiring an ALJ to handle the case a second time, adding to the backlog and wait times. It also adds to the wait time for each claimant whose case was next in line to be handled by the ALJ and who must now wait longer while the ALJ handles the original case a second time.

We identified approximately 10,000 non-disability cases per year that the AC could handle, which directly reduces the hearing level's pending workload by that number, helping those claimants get accurate decisions more quickly and freeing ALJs to focus on disability cases. In addition, shifting these cases with high rates of corrective action will also reduce the pending workload by reducing the number of cases remanded to the ALJs. In selecting non-

disability cases, our reasoning is that we can help claimants receive an accurate decision in a timely manner.

- **Did the agency evaluate the costs of various alternatives? If so, is the cost of this proposal greater or less than providing ALJs additional administrative and clerical support?**

The Adjudication Augmentation Strategy (AAS) is only one of several components to our CARES plan, as we have taken a multi-faceted approach to reducing our hearing level's pending workload. We are exploring all alternatives from a resource, business process, automation, and structural standpoint. That said, hiring enough qualified ALJs in a timely manner remains our best strategy to reduce the hearing level's pending workload. In addition, extra support staff is necessary to support the ALJs we hire, although hiring additional support staff alone would not reduce the high wait times and pending requests that stem from logjams in holding hearings and making decisions. We need decision makers, such as ALJs and AAJs.

- **Does SSA have any empirical basis or evidence demonstrating that an attorney examiner (AE) will issue an equally valid decision more quickly or efficiently than an ALJ would?**

Our Adjudication Augmentation Strategy does not favor ALJs over AAJs or AAJs over ALJs. It is simply a strategy to help claimants.

It is important to focus on the substance and skills of the Administrative Appeals Judge function rather than on a title—using the functional title of *Attorney Examiner* or the official organizational title of *Administrative Appeals Judge*, as they have long been referred to, does not change the underlying qualifications. AAJs handle the final level of administrative appeal for the agency, after a case has already been decided by an ALJ. This is not a new position created as part of the Compassionate and Responsive Service (CARES) plan. Appeals Council AAJs are licensed attorneys recognized by Congress as judges, under 5 U.S.C. § 5372b.

The authority to hold hearings rests with the Commissioner, who lawfully delegated this authority to the AC pursuant to section 205(l) of the Social Security Act when the AC was established in 1940, and has continued to do so through subsequent delegations of authority. The AC members, along with the "referees" – ALJs, in the classification vernacular of the time – were delegated "all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt." The Administrative Procedure Act (APA), enacted six years later, in 1946, specifically does not remove any prior delegations of authority, including the AC's delegated authority to hold hearings. PL 79-404, 60 Stat. 237 (1946) ("Nothing in this Act shall be construed to repeal delegations of authority as provided by law."). Nor is this authority a recent phenomenon. In an analysis of the Social Security System in 1953 and 1954, the Subcommittee on Social Security of the House Committee on Ways and Means included a memorandum from the Chief of the American Law Division of the Legislative Reference Service of the Library of Congress. The

memorandum stated that while the referee for any hearing shall be appointed by the Chairman of the Appeals Council, the Chairman also "may designate as referee a member of the Appeals Council." In 1959, Congress further investigated this issue and received an opinion from the law firm of Covington & Burling stating that essentially the Appeals Council retains full authority to hold hearings, and ALJs may be used when the Appeals Council does not have the time or resources to hold hearings. The authority of the Appeals Council to hold hearings has also been historically memorialized throughout regulations (20 CFR 403.709(d) (1938-1943 Cum. Supp.); 20 CFR 403.710(b), (c) (1944); 20 CFR 403.709(m), 403.710(d) (1947); 20 CFR 404.941, 404.943, 404.950 (1961); 20 CFR 404.941, 404.948(c), 404.949 (1976); 20 CFR 404.956, 404.976(b), (c) (1981)).

As members of the AC, AAJs review ALJ work and may take corrective action. Corrective action may include AAJs issuing the final agency decision on a claim under 20 CFR 404.979 and 416.1479; in fact, the AC already issues approximately 3,000 final decisions each year. To date neither the Federal courts nor Congress have ever questioned the ability of the AC to issue decisions.

As mentioned above, non-disability cases account for approximately 10,000 cases pending at the hearing level each year. Due to the small number of cases spread throughout the nation, ALJs may only receive a few, if any, non-disability cases each year; over the past five years, the AC took corrective action in 36 to 48 percent of these cases each year. The AC already centralizes non-disability cases, providing specialized training and developing expertise that most ALJs do not have the opportunity to build. We expect that the AC's expertise will further reduce the overall workloads of both AAJs and ALJs.

Since its inception in 1940, the AC has served as the final safeguard of review and assurance of due process for all cases adjudicated under the Social Security Administration's programs. With respect to timely decisions, the AC manages its resources effectively, therefore keeping its pending workload manageable, while also handling the oldest cases. The AC is committed to ensuring policy compliance so that claimants receive fair and accurate decisions. The AC established a Division of Quality to perform quality reviews that not only address issues in individual cases, but also identify areas of global policy compliance issues as well as fraud. The AC uses data analytics to look for trends affecting due process and policy compliance that otherwise may be overlooked. We welcome the opportunity to brief you on the quality review process and share examples of our findings, which we are confident will increase your level of security with the AC's emphasis on rendering a legally sufficient decision. Every day, AAJs handle the agency's final administrative appeal actions, with subsequent review only through the federal courts.

In summary, the AC's AAJs have developed specialized experience in non-disability case work and their role in the appeals process and quality review work emphasizes and reinforces policy compliant decisions. These qualities promote efficiency and accurate decisionmaking. Taking action on a case that would otherwise be remanded back to an ALJ to handle a second time also promotes administrative efficiency and more timely service to claimants.

- **If this adjudication augmentation strategy proves successful, would SSA consider transferring any other types of cases away from ALJs to AEs? How would SSA determine what other sort of cases would be transferred to AEs?**

We have no plans to refer additional cases to the AC. We prudently selected non-disability cases for the reasons discussed above. The disability cases we included in the AAS are cases already before the AC on appeal—the claimant has already had a hearing before an ALJ, and we are asking the AAJs to take additional actions rather than return the case to the hearing level. We want to stress again that the only objective for this plan is to help people who deserve timely decisions from our agency. The goal of the augmentation strategy and other CARES initiatives is to reduce wait times to an acceptable level of 270 days and eliminate the backlog of cases. In addition, the CARES plan envisions that SSA will have more ALJs than ever before, provided we have adequate funding and the necessary candidates.

2. **It appears that the business process, information technology, and facility components of the CARES initiative hold promise to help achieve the stated goals.**

- **Does SSA have sufficient resources to implement the IT and business process improvements set forth in the CARES initiative in a full and timely manner? What internal control and accountability mechanisms are in place to assure their proper execution?**

Adequate and sustained funding is necessary to pursue and implement the initiatives in our plan. Only if the agency is provided enough funding to fully fund the CARES plan, will we be able to implement it in a timely manner and properly.

3. **Lost in the debate over the proposed transfer of non-disability cases from ALJs to AEs on the Appeals Council is the role that other SSA employee groups and unions play in managing the efficient workflow of appeal and hearing requests.**

- **What is SSA's strategy to successfully meet any other human resource management challenges related to the training, efficiency and morale of non-ALJ, non-AAJ/AE, non-AC administrative and clerical support personnel that could be impacted by this proposal?**

As Deputy Commissioner for the Office of Disability Adjudication and Review, I have implemented several programs designed to provide development opportunities and improve employee morale. For example, our Compass program is designed to enhance career and leadership development. I implemented leadership training to ensure managers have the opportunity to raise concerns and participate in finding solutions. We work diligently with the labor unions, including participating in labor management forums on a monthly basis. An important aspect of the CARES plan is the implementation of our communications plan. Our communications plan actively engages all staff via conference calls, emails, video on demand, personal visits, as well as a website dedicated to the CARES plan. In addition, we are continuing to expand two-way communication and recently developed and implemented an online portal for employee suggestions.

4. **I remain concerned about the due process rights of claimants involved in non-disability cases being transferred to the Appeals Council. It certainly appears from an individual citizen's perspective that a claimant loses an existing appeal right under this proposal whereby cases are being referred directly to the Appeals Council.**

   - **Please explain in layman's terms exactly how this change will affect an individual seeking a non-disability appeal.**

   We are still developing our final business process, and we would be happy to discuss options to address further any concerns about administrative review.

   - **How does this plan not unfairly disadvantage or penalize claimants simply for a small net gain in efficiency?**

   Our claimants will continue to receive a hearing by a judge. Appeals Council AAJs are licensed attorneys recognized by Congress as judges under 5 U.S.C. § 5372b. AAJs will hold hearings and apply due process requirements for adjudication under the Social Security Act (42 U.S.C. §§ 405 and 1383), which the Supreme Court has recognized are consistent with those required by the APA (5 U.S.C. §§ 556(d) and (e)). In addition, AAJs will hold hearings and apply due process under the requirements set forth in agency statutory (42 U.S.C. §§ 405 and 1383), and regulatory guidance (20 C.F.R. § 404.956), as well as sub-regulatory guidance written by AAJs at the AC (Hearings Appeals and Litigation Law (HALLEX) manual chapters I-2-3 through I-2-9).

   Our process will still include all of the following protections: any material evidence may be received; a party is entitled to present his or her case by oral or documentary evidence and conduct cross-examination; the record will be made available to all parties; and, where an agency decision rests on official notice of a material fact, a party is entitled to the opportunity to show the contrary.

   In addition to these guidelines, HALLEX also prescribes further requirements, including, but not limited to: the proper form and timelines required in giving notice of the time, place, and issues to be considered at a hearing; access to interpreters and other assistive resources; specific requirements for when adjudicators must develop the record or obtain testimony; explanations of the hearing and decisional process; notification of the right to representation and postponement of the hearing to obtain representation; and, proffer of post-hearing evidence and the offer of a supplemental hearing.

5. **While the subject was to be covered during the hearing, we did not devote much time to discussing Adjudication Process Reform.**

   - **What is the most important reform that can be undertaken today without an Act of Congress? What assistance do you need from Congress to improve adjudication?**

The most important reform we can undertake is to implement the CARES plan, which will help people who deserve timely decisions from our agency. Congress can help us by ensuring we receive the adequate and sustained funding necessary to pursue and implement the initiatives in our plan.

We genuinely appreciate your interest in understanding our programs and challenges and willingness to hold hearings on key public policy and service issues.

6. **It appears the unprecedented percentage of denied claims by ALJs has contributed to the growing Appeals Council backlog. It seems to me that transparency is needed to allow for evaluation of the backlog, the rising number of cases before the Appeals Council, and the time spent by claimants enduring this additional stage in the adjudication process.**

   - **What is the rationale behind the Agency's present Appeals Council disclosure policy? How does the data compare to what has been released previously by SSA?**

The AC does not have a growing backlog. Its workload continues to decrease by approximately 1,000 cases per month, down to below 140,000.

We are not clear on what the reference to the AC disclosure means, as the AC does not have its own separate disclosure policy; the information in the hearing process is subject to the same disclosure rules as other parts of the agency. The Appeals Council has met frequently with Congress and the Government Accountability Office (GAO) to share data and information. GAO is currently conducting a number of audits and reports using data prepared by and shared from the AC. The AC has routinely made its leaders and judges available for questioning in numerous public forums.

   - **What would need to occur for SSA to consider a change in the Appeals Council disclosure policy?**

The AC does not have a separate disclosure policy. Its information is subject to the same rules as other parts of the agency.

Post-Hearing Questions for the Record
Submitted to Marilyn D. Zahm
Administrative Law Judge
Buffalo, New York Office of Disability Adjudication and Review
U.S. Social Security Administration
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Your written testimony offers alternatives to SSA's proposal to transfer these entire classes of cases from ALJs to non-APA adjudicators.

Q: What about AALJ's plan makes it a better solution in terms of the backlog, efficiency, costs and due process concerns?

A. The Agency has stated that it cannot hire enough ALJs this fiscal year because of OPM's lack of available applicants; as a result, the Agency asserts, it must turn to another source to obtain adjudicators to handle the backlog of hearings.

AALJ's plan envisions using a cadre of approximately 30 ALJs located throughout the country to specialize in non-disability cases. The cadre can be composed of current ALJs and Senior ALJs.

There is an available source of experienced ALJs that the Agency is ignoring – retired ALJs who would welcome the opportunity to return to the Agency for part time, temporary employment as Senior ALJs and make it unnecessary to hire Attorney Examiners/AAJs who would need extensive training to do this work.

At a recent meeting, management representatives stated that there was money budgeted for employing only the usual 20 Senior ALJs. However, the Agency could switch the funds it intends to use to hire its proposed additional Attorney Examiners/AAJs to the Senior Judge account and thus be able to hire additional Senior Judges.

Reasons why AALJ's plan is a better solution:

Unlike the Attorney Examiner/AAJs that the Agency plans to hire, ALJs are already trained to handle non-disability hearings; no significant additional training would be required for the cadre.

The Agency will have to buy and install expensive equipment at the Appeals Council to accommodate the video hearings that the Attorney Examiners/AAJs would be holding. Under the AALJ's plan, no additional equipment would needed, as ALJs are already located in hearing offices that are equipped with all necessary infrastructure to facilitate video hearings.

Attorney Examiners/AAJs, all of whom will be located in the Washington, DC area, will have to travel to hold hearings for those claimants who decline to have their hearings held by use of video technology. As these cases will be scattered across the country, these claimants may wait a longer time if an Attorney Examiner/AAJ needs to accumulate a docket of cases in order to make travelling efficient; if the Attorney Examiner/AAJ has to make a separate trip for each individual case, the time and resources to hear this caseload will be substantial. Travel for ALJs, who are already located in field offices, will not be as burdensome. In addition, ALJs in the cadre can add these non-disability cases onto a docket of regular disability cases and hear them quicker. It is more efficient to use the current ALJ structure than to build a new, parallel program operated out of headquarters in the Washington, DC area.

As Dean Krent's legal analysis provided to the Subcommittee sets out, the Attorney Examiner/AAJ plan does not follow the Agency's own regulations. Moreover, its plan violates the Administrative Procedure Act (APA), which requires that APA judges hear APA cases. Although the Agency has, at times, taken the position that the APA does not apply to Social Security cases, there is a substantial body of law and opinion that establishes otherwise. Finally, the claimants whose cases are adjudicated by Attorney Examiners/AAJs will lose their right to appeal an adverse decision to the Appeals Council.

2. The recent proposal to transfer classes of ALJ cases appears to be just the latest of several attempts by SSA management to gradually erode ALJ independence as a short cut to solving the hearings backlogs, instead of doing the hard work of hiring more ALJs. Other examples include: the expansion of the Attorney Examiner position description to include holding hearings and significant travel in March 2016; the removal of references to the APA and independence in the

latest ALJ position description update in 2013; and SSA management pleading an inability to find enough qualified ALJ candidates while leaving ostensibly qualified ALJ candidates on the register.

Q: Is there a long-standing, sustained effort by SSA management to gradually erode ALJ independence and/or replace them with non-APA adjudicators more susceptible to management influence? Please explain.

Replacement of ALJs

A. With regard to replacing ALJs with non-ALJs in adjudicating cases, the only instance where the Agency has taken any concrete, public steps to do so has been the recent attempt to have Attorney Examiners/AAJ hear and decide cases. However, about ten or twelve years ago, the Agency did have the intention to replace the ALJs with non-ALJs to adjudicate cases, but abandoned the plan, because of opposition, before it was made public.

Judicial Independence

There has been a sustained effort by SSA management, particularly over the past few years, to erode ALJ independence. One of the most telling actions was the change in the ALJ Position Description (PD) in 2013, referenced above, when the Agency, without notice to AALJ, petitioned OPM for significant changes to the PD, including removing all references to the APA, having Hearing Office Chief Administrative Law Judges provide "supervision" to ALJs regarding their adjudicatory work (as opposed to previously providing only administrative oversight), and requiring ALJs to comply with ill-defined "agency policies" that have not been properly promulgated through the notice and comment rulemaking procedure required by the APA.

The Agency has compromised judicial independence in other significant ways. A few examples are set out below:

- Pressuring ALJs to schedule an unreasonably high number of hearings, more than can be adjudicated properly; this requires many ALJs work at an unreasonable pace to meet the quota. The new "expectation" we believe to be under consideration now is for each ALJ to issue a minimum of 600 dispositions annually – which would allow for a Judge to spend about two hours per case, including reading and developing the record (which may contain 1000 or more pages of medical evidence), holding a hearing and questioning witnesses,

drafting decisional instructions, and editing the decision. Because of the "expectation," the potential for incorrectly decided cases has been created.

- Requiring ALJs to adhere to policies that have not been promulgated through the APA's notice and comment rulemaking procedures;
- Failing to rotate case assignments among ALJs in violation of the APA;
- Reducing staff support, which negatively impacts the ALJ's ability to develop the record fully by, among other things, obtaining documentary evidence and issuing interrogatories and subpoenas;
- Intercepting, reviewing and critiquing the ALJ's decisional instructions and returning them to the ALJ for substantial revisions;
- Allowing decision writers to change the ALJ's findings of fact;
- Removing cases from ALJs without good cause; e.g., reassigning a case from an ALJ (who wanted a medical expert to testify at a hearing) to a management judge, who paid the claim without any hearing or expert witness testimony at all, in order to dispose of the case before the end of the fiscal year.

I cannot emphasize enough the negative impact that the lack of time and resources to perform adjudicatory duties has on judicial independence. ALJs are a highly skilled and motivated group who take seriously their oath of office, strive to do their best for the American public, and put in many hours of uncompensated time to accomplish their work. It is impossible to have judicial independence, which presupposes the Judge making an informed decision based upon fully examining the record, holding a full and fair hearing, and applying the law, regulations and rulings, in an environment that does not permit the ALJ adequate time or staff assistance to handle an overwhelming caseload. The cost to the American public for an incorrect decision as a result of this environment is enormous. Each case paid has a potential price tag of approximately $300,000. Equally as important is the failure to award benefits to deserving claimants.

Post-Hearing Questions for the Record
Submitted to Marilyn D. Zahm
Administrative Law Judge
Buffalo, New York Office of Disability Adjudication and Review
U.S. Social Security Administration
From Senator Heidi Heitkamp

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Your testimony was very helpful in explaining the "who, what, when, and where" elements of SSA's proposed action, but was not as clear on the underlying "why and how" of this development. You and those you represent are clearly opposed to this proposal for several reasons. We share your concerns about due process.

   - **What are the underlying tensions between SSA management and ALJs? What are the major points of disagreement between SSA and the AALJ in relation to decisional autonomy, productivity, efficiency? In your opinion, what steps should your organization and SSA take to resolve these issues?**

     The underlying tensions between SSA management and the ALJs have existed for decades and, in general, involve judicial independence, inefficient operation of the adjudicatory system and unrealistic and onerous caseload quotas.

     The Office of Disability Adjudication and Review (ODAR), the component of SSA that houses ALJs and the Appeals Council, is an adjudicatory system that is not, but should be, run as an adjudicatory system or court. Management officials who are not adjudicators do not have the same appreciation for due process or the proper workings of an adjudicatory system as ALJs have, which leads to administrative expediency trumping legality.

     Judicial independence

     ALJs have judicial independence within the framework of the law, regulations and rulings. Management ignores the Administrative Procedure Act's requirements for Notice and Comment Rulemaking and instead implements policies without going through those procedures, and then improperly seeks to bind ALJs to those policies.

     Consistent with the APA's provisions guaranteeing judicial independence, an agency is not permitted to subject ALJs to performance evaluations or appraisals, nor can ALJs be awarded bonuses.

In late 2013, without notice to the AALJ, management changed the ALJ Position Description so as to direct ALJs to adhere to Agency policies, which included those that had not been promulgated pursuant to APA procedures. In addition, ALJs now, for the first time, were to be "supervised" in their adjudicatory duties by Hearing Office Chief Administrative Law Judges. In its submission of the proposed amended Position Description to the Office of Personnel Management (OPM), management had removed all references to the APA, clearly signaling its intent to subordinate ALJs to Agency managers. However, and to its credit, OPM restored the APA reference.

There is ongoing tension between the Agency and its ALJs, with the Agency constantly seeking to control the decision-making process. The following are examples:

- Pressuring ALJs to schedule an unreasonably high number of hearings, more than can be adjudicated properly; this requires many ALJs to work at an unreasonable pace to meet the quota. The new "expectation" we believe to be under consideration now is for each ALJ to issue a minimum of 600 dispositions annually – which would allow for a Judge to spend about two hours total per case, including reading and developing the record (which may contain 1000 or more pages of medical evidence), holding a hearing and questioning witnesses, drafting decisional instructions, and editing the decision. Because of the "expectation," the potential for incorrectly decided cases has been created.
- Requiring ALJs to adhere to policies that have not been promulgated through the APA's notice and comment rulemaking procedures;
- Failing to rotate case assignments among ALJs in violation of the APA;
- Reducing staff support, which negatively impacts the ALJ's ability to develop the record fully by, among other things, obtaining documentary evidence and issuing interrogatories and subpoenas.
- Intercepting, reviewing and critiquing the ALJ's decisional instructions and returning them to the ALJ for substantive revisions;
- Allowing decision writers to change the ALJ's findings of fact;
- Removing cases from ALJs without good cause; e.g., reassigning a case from an ALJ (who wanted a medical expert to testify at a hearing) to a management judge, who paid the claim without any hearing or expert witness testimony at all, in order to dispose of the case before the end of the fiscal year.

I cannot emphasize enough the negative impact that the lack of time and resources to perform adjudicatory duties has on judicial independence. ALJs are a highly skilled and motivated group who take seriously their oath of office, strive to do their best for the American public, and put in many hours of uncompensated time to accomplish their work. It is impossible to have judicial independence, which presupposes the Judge

making an informed decision based upon fully examining the record, holding a full and fair hearing, and applying the law, regulations and rulings, in an environment that does not permit the ALJ adequate time or staff assistance to handle an overwhelming caseload. The cost to the American public for an incorrect decision as a result of this environment is enormous. Each case paid has a potential price tag of approximately $300,000. Equally as important is the failure to award benefits to deserving claimants.

Also of great concern is the failure of Agency management to engage in meaningful discussion with ALJs before implementing new programs. Often these programs are developed and implemented by individuals who have little, if any, experience adjudicating cases. Some of these failed initiatives come at a great cost to the American public; a recent example is the electronic bench book, which cost twenty-five million dollars and is only used by about 300 ALJs.

Inefficient Operation

A normal adjudicatory system is organized so as to provide support to the Judge, as it is the Judge who is the point of production. However, ODAR operates for the benefit and convenience of the clerks and representatives and requires Judges to perform clerical and other non-judicial acts. Only Judges can hear and decide cases. They should not be encumbered with other duties and assignments if the Agency's primary goal is to have them issue decisions and reduce the backlog.

Every ALJ needs dedicated clerical and attorney support in order to be productive. In many hearing offices, management has stripped the ALJs of their assigned clerical support, causing them to have to spend time and energy following up on case-handling directives and searching for a staff member to provide needed assistance with such matters as equipment malfunctions. Moreover, management has reduced the number of attorneys and decision writers assigned to the hearing offices and placed this support in centralized locations. As a result, ALJs do not know who is drafting their decisions, have little to no contact with them, and must spend hours, at times, editing poorly crafted decisions.

The lack of rules of practice (see the answer to question three below) impedes the smooth operation of the adjudicatory process. SSA holds more adjudicatory hearings than any other court system, yet has no rules of procedure for those who practice before it. The submission of evidence in a timely fashion to permit the Judge and expert witnesses proper time to review the evidence and the closure of the record are two critical measures that are missing. There are no rules that preclude a representative from appearing at the hearing with new documentary evidence (often hundreds to thousands of pages). The ALJ must take the time to review that evidence prior to the hearing – which causes a backup with all of the other hearings scheduled for that day – or adjourn the hearing, which means that the case cannot be adjudicated for many more months, until an opening

in the Judge's docket is available. If a medical expert has been scheduled, it will be difficult or impossible to provide the new evidence to the doctor in a timely fashion, again, requiring that the hearing be continued to a future date in order to take the doctor's testimony after the new evidence has been reviewed. Even worse, representatives can, and do, submit medical documents and other evidence after the hearing, which delays the case and sometimes requires a supplemental hearing. All of these problems hinder ALJs in reaching and rendering decisions and could be resolved if the Agency would only enact regulations requiring both the submission of all evidence substantially prior to the hearing date and the closing of the record at the conclusion of the hearing.

In addition, representatives should not be permitted to submit duplicative documents or exhibits that are not organized in chronological order. Sometimes as much as twenty percent of the medical evidence consists of duplicate documents. Because medical evidence in a case may consist of thousands of pages, duplicates bulk up the record and lengthen the ALJ's review. Representatives are paid for their work; they should assist the claimants and the adjudicatory process by making it easier for the ALJ to quickly review the record.

If the adjudicatory system were to be organized in a way so as to improve case processing, more cases could be heard, more claimants served, and more decisions issued in a timely fashion. The above are simple solutions that will enhance the ability of the ALJs to perform their duties.

Improper Quotas

The Agency currently has a de facto caseload quota – called an "expectation" or "goal" – of having each ALJ issue 500 to 700 dispositions per year. The quota is based not on any empirical data regarding the length of time it actually takes to adjudicate a case, but, rather, on the need to dispose of pending cases given the available number of ALJs employed. There is now some indication that the minimum "expectation" may rise from 500 to 600 dispositions annually because of the increasing backlog, even as the size of case files grows and management imposes ever greater demands for decisional quality.

In the past, the quota and the push for numbers created an environment where it was more important for ALJs to issue large numbers of decisions as opposed to applying the law and rendering correct decisions. The fall-out from that period continues to be felt and has tarnished the reputation of the Agency.

The AALJ commissioned a work study analysis conducted by an internationally known expert, Leaetta M. Hough, Ph.D., to determine the time needed to adjudicate a case if the ALJ follows all Agency policies and requirements. Dr. Hough concluded that the figure of even 500 dispositions per year was unrealistic. The Executive Summary of the study is attached.

(attached)

The Agency needs to reduce its quotas and provide sufficient clerical and attorney support for ALJs so that they may adjudicate cases ethically and fairly.

Steps to resolve these issues

Greater attention needs to be paid by the Agency to the suggestions and recommendations of its ALJs. We are highly educated and highly skilled. Many of us have held management positions with government and non-government agencies and with private businesses. As lawyers and Judges, we know how an adjudicatory system should work and we would like to make our system work properly and for the benefit of the American people.

- Are you aware of *any* SSA plan to transfer any other type of cases away from ALJs to AAJs/AEs on the Appeals Council? Can you identify any specific actions SSA has taken to undermine ALJ independence?

  I am not aware of any SSA plan to transfer any other types of cases – besides the non-disability and remanded cases at issue now - away from ALJs to AAJs/AE on the Appeals Council.

  Specific actions taken by SSA to undermine ALJ independence are set forth above in response to the prior question.

2. Let's assume SSA were to accept and implement your recommendation to establish a cadre of ALJs nationwide to handle non-disability cases and divert all of the Appeals Council administrative and clerical support resources towards that cadre of 3 ALJs per region.

- How would such a proposal reduce appeal hearing backlogs and decision average wait times?

  A specialist cadre would be more efficient and speed up the processing of the non-disability cases, thus leaving more time for other Judges to handle the disability caseload. Travel expenses and time would be reduced as these Judges are already out in the field and not all located in the Washington, DC area.

  Unlike the Attorney Examiner/AAJs that the Agency plans to hire, ALJs are already trained to handle non-disability hearings; no extensive additional training would be required for the ALJ cadre.

The Agency's plan requires it to buy and install expensive equipment at the Appeals Council offices to accommodate the video hearings that the Attorney Examiners/AAJs would be holding. Under the AALJ's plan, no additional equipment would need to be purchased and installed, as ALJs are already located in hearing offices that are equipped with all necessary infrastructure to facilitate video hearings.

Attorney Examiners/AAJs, all of whom will be located in the Washington, DC area, will have to travel to hold hearings for those claimants who decline video hearings. As these cases will be scattered across the country, these claimants may wait for a longer time if an Attorney Examiner/AAJ needs to accumulate a docket of cases in order to make travelling efficient; if the Attorney Examiner/AAJ has to make a separate trip for each individual case, the time and resources to hear this caseload will be substantial. Travel for ALJs, who are already located in field offices, will not be as burdensome. In addition, ALJs in the cadre can add these non-disability cases onto a docket of regular disability cases and hear them more quickly. It is more efficient to use the current ALJ structure than to build a new, parallel program operated out of headquarters in the Washington, DC area. Finally, there is a significant risk of a class action lawsuit resulting in the return of all of these cases to ALJs for hearing. This, of course, will further increase the backlog.

3. What is the most important adjudicatory process reform that can be undertaken today without an Act of Congress?

The Agency must enact rules of practice by regulation that, among other things, would require representatives to:

- provide evidence substantially prior to the hearing;
- submit documents in chronological order;
- restrict exhibits to those documents which are related to the claimant's disability;
- remove duplicate documents;
- submit a memo outlining all severe and non-severe impairments, specifying the limitations arising from each, citing the exhibit number and page which supports these assertions, and outlining all opinion evidence in the record;
- set forth a specific prayer for relief, well in advance of the day of the hearing, so the ALJ does not have to spend time studying records in the file that are no longer relevant to the time period in issue;
- stop re-opening and re-litigating prior closed and non-appealed prior decisions; the same periods of time can be re-litigated multiple times under current rules.
- And, absent extraordinary circumstances, the record should be closed as of the day of the hearing.

2015 No. 052 Executive Summary

HumRRO
HUMAN RESOURCES RESEARCH ORGANIZATION

Administrative Law Judge Work Analysis Study

Executive Summary

Prepared for: The Association of Administrative Law Judges

Prepared under: Contract Agreement dated Nov 7, 2014
Work Order 3 dated Oct 14, 2015

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HumRRO

Administrative Law Judge Work Analysis Study

Executive Summary

Social Security Administration (SSA) Administrative Law Judges (ALJs) are expected to process adult disability cases as efficiently as possible to reduce the Agency's case backlog and produce timely decisions for claimants. ALJs are also expected to render *high quality legally sufficient decisions.* Numerous Agency policies and memoranda from the Office of the Chief Administrative Law Judge (OCALJ) emphasize that ALJs must carefully read all case materials, make every reasonable effort to obtain relevant evidence for each case, and write well-documented decisions explaining their ruling.

These are not unreasonable expectations. However, the SSA's Office of Disability and Adjudication Review (ODAR) has implemented production quotas that appear to be based entirely on reducing the case backlog and reducing the number of days it takes for claimants to receive a ruling on their case. The quotas appear to have been set without regard to the amount of time (hours) required for an ALJ to carefully process adult disability cases.

One benchmark that ODAR has set is the requirement that each ALJ schedule a certain number of hearings per month. This benchmark is enforced by linking it with the opportunity for the ALJ to telework.

A February 18, 2014 memo from Chief Administrative Law Judge Debra Bice provided this rationale for the benchmark:

> *Considering the necessity for quality, timely, and policy compliant hearings and decisions, and historical data,* ***scheduling*** *an average of at least fifty (50) cases for hearing per month will* ***generally*** *signify a reasonably attainable number for the purposes of this contractual provision. I want to emphasize that this provision concerns the number of hearings* ***scheduled****, not cases heard or dispositions issued. Accordingly, if you* ***schedule*** *at least an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management generally will determine you have scheduled a reasonably attainable number of cases for hearing for the purposes of this contractual provision. Conversely, if you schedule fewer than an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management likely will determine you have not scheduled a reasonably attainable number of cases for hearing, unless there are extenuating circumstances.* [Author note: Bold, underlined print appeared in the original.]

The **scheduled hearings benchmark** was officially implemented on October 1, 2015. It is being phased in across 3 successive 6-month telework cycles. For the first 6-month cycle, ALJs who wish to telework must schedule 40 hearings per month, on average, or face restrictions on their eligibility to telework. The benchmark increases to 45 scheduled hearing per month, on average, for the 2nd telework cycle, then to 50 scheduled hearings per month, on average, for the 3rd and all subsequent telework cycles.

Another performance standard ODAR established relates to **case disposition**. Specifically, since 2007, each ALJ is expected to achieve 500-700 case dispositions per year. Dispositions include cases that are dismissed and cases for which the ALJ renders a decision (favorable/award or unfavorable). The SSA's public data archive shows that, for the past three

fiscal years, 18% of cases were dismissed, leaving 82% requiring an ALJ's decision. Some portion of case decisions can be made on-the-record (OTR) which means that the ALJ is able to render a favorable decision based entirely on reading the case file without conducting a hearing although the ALJ must still read the entire case file and write a decision. (Data on the percentage of OTR decisions issued per fiscal year is not, apparently, publically available although experienced ALJs report that the percentage of OTR decisions issued per fiscal year is very small.)

Each of the preceding metrics may be very relevant for tracking and monitoring organizational- or unit-level performance, but the process by which the quotas were established for individual ALJs appears not to relate to actual ALJ work requirements. Performance standards for ALJs should take into account the amount of time realistically required to do all of the activities involved in adjudicating cases such as reading the case file, conducting a hearing, developing additional needed information about the case, drafting decision instructions for a decision writer, and editing the draft decision. Performance standards should also take into account other work activities, such as engaging in professional development and training, and performing general case management and office duties, that ALJs must do in addition to processing adult disability cases.

The Association of Administrative Law Judges (AALJ) contracted with Human Resources Research Organization (HumRRO) and its subcontractor, the Dunnette Group, Ltd., in the fall of 2014 to study the amount of time and factors involved in adjudicating adult disability cases. We designed and completed a *work analysis* study to capture the type of information necessary to create performance standards for ALJs. It is the only study to date that uses a work analysis approach to gather information about the amount of time required for ALJs to process adult disability cases.

Work analysis has a long tradition in the fields of industrial-organizational psychology, industrial engineering, human factors, and human resources. It provides the foundation for personnel performance management systems. The design involved identifying the many work activities that ALJs must perform – experienced ALJs helped us identify activities that ALJs do when adjudicating adult disability cases and to identify other work activities ALJs perform. One commonly used work analysis approach is to simply survey job incumbents about time spent on various work activities. In this study, it was important to estimate time spent for a range of easy to difficult cases. Therefore, we designed a simulated case processing task and accompanying survey to collect information from ALJs about how long it takes to perform case processing and other activities. To standardize ALJs' frame of reference in rating time spent on case processing, we asked them to read and render a decision on each of three recent closed cases that varied in length. Thirty-one (31) ALJs read the entire case files, rendered a decision, wrote decision instructions and recorded their time. They then estimated the amount of time they spend on the other adult disability case processing phases as well as professional development and training, general case management, and office duties.

Assuming that the ALJ carefully complies with SSA directives regarding legally sufficient decisions, our study shows that it takes 5.69 hours of ALJ labor, on average, to render a decision for a case that is 206 pages in length. As shown in the Executive Summary Table 1, it takes 7.09 hours to render a decision for a case that matches the FY2014 national case size average of 652 pages. Finally, it takes 8.60 hours, on average, to render a decision for a lengthy case (1,065 pages). As a point of comparison, in FY2014, the majority of adult disability cases consisted of more than 500 pages and 12% of them consisted of more than 1,000 pages.

We calculated the number of hours ALJs could spend processing each case if they rendered 500 decisions per year. Our study indicates that, after subtracting authorized rest breaks, holidays, and annual leave, and the average number of work hours ALJs spend on activities such as professional development and training, ALJs have about 2.5 hours, on average, to spend on each case if they render 500 decisions per year. This seems nearly impossible given that it takes on average a little more than 5½ hours for ALJs to render a legally sufficient decision for a short case (206 pages), slightly more than 7 hours to render a legally sufficient decision for a case of average size (655 pages), and a little more than 8½ hours to render a legally sufficient decision for a long case (1065 pages).

We understand that the annual quota of 500-700 case dispositions includes both dismissals and decisions, and that about 18% of cases are dismissed. Clearly, dismissals would require less than 5.69 (or 7.09 or 8.60) hours to process. Still, the dismissal rate would have to be much higher than 18% to reduce the average time available per case for those that require a decision to only 2.5 hours.

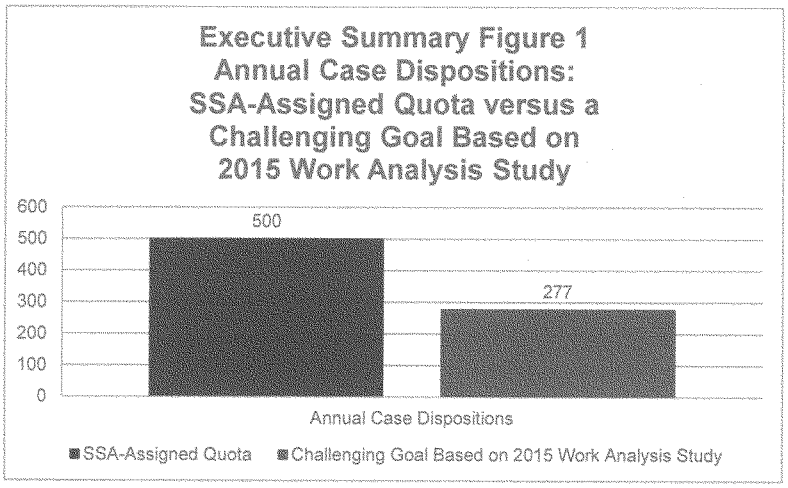
Executive Summary Table 1. Amount of Time Needed to Render a Decision per Case Based on 2015 Work Analysis Study versus Amount of Time Available per Case to Render 500 Decisions in a Year

	Case Size		
	Short (206 pages)	Average (655 pages)	Long (1065 pages)
Time required, on average, to render a decision in accordance with SSA directives regarding legally sufficient decisions	5.69 hours	7.09 hours	8.60 hours
Time available per case, on average, for full-time ALJ after accounting for rest breaks, holidays, leave, and other work activities that ALJs perform	2.5 hours	2.5 hours	2.5 hours

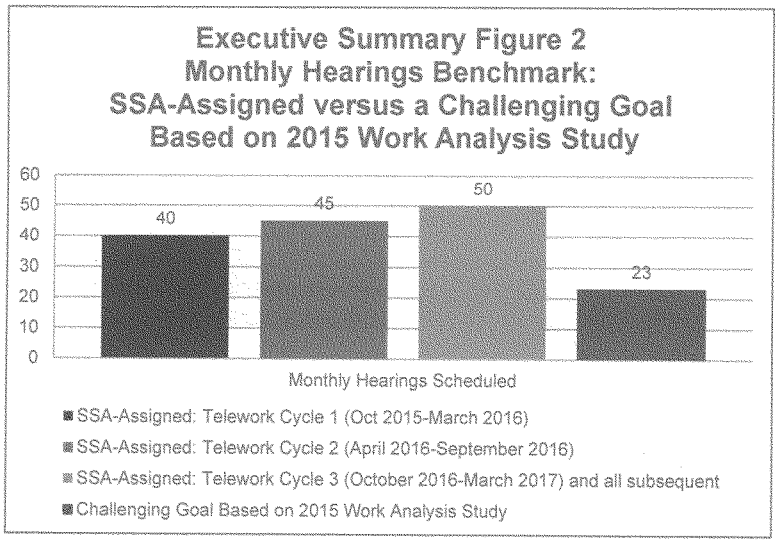
Note. Data in first row are based on work analysis study in which 31 ALJs adjudicated the same three closed case files. Data in the second row was calculated by subtracting time spent on authorized rest breaks, federal holidays, authorized annual leave, and work activities unrelated to adjudicating specific cases from the 2,087 work hours available in a year for full-time federal government employees.

Next, we calculated the number of adult disability cases of average size that each ALJ could reasonably decide in a year, after taking into account that ALJs, like other federal government employees, have authorized rest breaks, holidays, and annual leave time, and spend work time on activities such as professional development and training, general case management activities, and general office duties – activities separate from processing individual cases.

The work analysis study data indicate that the number of case decisions that an ALJ could render ranges from 70 to 342 per year (with an average of 191 and a median of 195), assuming a case of average size and following SSA policy directives regarding legally sufficient decisions. A challenging goal could be set higher than the average decision rate, but not so high that most ALJs could not reach it. Among the ALJs in the work analysis study, 25% could render decisions for at least 233 cases per year (this is the 75th percentile in the distribution). Thus, a challenging annual goal for ***case decisions*** is 233 cases per year. A challenging goal for ***case dispositions*** is 277 per year, assuming that the national dismissal rate continues to be 18% of all cases. Executive Summary Figure 1 illustrates the results.



Our work analysis study also provides data relevant to the monthly benchmark for scheduling hearings. Using an annual case disposition goal of 277, a challenging *monthly benchmark for scheduling hearings* would be 23 hearings on average per month (277 ÷ 12) as shown in Executive Summary Figure 2.



The challenging goals we describe are lower than current SSA-assigned quotas which are (a) 500-700 case dispositions per year and (b) an average of 40 scheduled hearings per month (with the amount increasing to 50 hearings per month within 18 months). Our work analysis study suggests that the ***SSA scheduling benchmark of 40 hearings per month, on average, is not reasonably attainable if SSA policy directives regarding legally sufficient decisions are followed.***

We understand that some ALJs are able to achieve the annual case disposition quota and the hearings scheduled benchmark. They are powerfully motivated to do so for a variety of reasons, including the following:

- SSA management *expects* ALJs to meet the case disposition production quota unless, in conjunction with their manager, it is determined that there are good reasons why an ALJ should not be required to meet it (e.g., *Social Security Disability Programs,* May 17, 2012*; Social Security Disability Programs,* September, 13, 2012; U.S. SSA OIG, 2010).
- ALJs can be counseled or disciplined if their performance does not meet management expectations for the number of case dispositions they should be able to achieve.
- Productivity data for each ALJ is available to the public through SSA data archives. ALJs with lower productivity levels may be subject to negative publicity or public pressure. (For example, see http://www.ssa.gov/appeals/DataSets/archive/03_FY2015/03_September_ALJ_Disposition_Data.html.)
- ALJs who wish to telework must meet monthly case scheduling benchmarks or they may face restriction on their ability to telework. (See memos from Chief Administrative Law Judge Bice [February 18, 2014; Appendix C] and from HOCALJ Walters [July 17, 2015; Appendix D])

Years of research on goal setting clearly shows that, in many different types of jobs and educational settings, people accomplish more when they work toward specific, difficult goals, as opposed to having no goals at all or only broad, ambiguous goals such as "do your best" (Locke & Latham, 2013). Certainly, SSA has established specific, difficult production and hearings scheduled goals for ALJs. However, goal attainment is also strongly impacted by the extent to which individuals commit to achieving the goals and believe they have the ability and the resources necessary to accomplish them.

Our work analysis study indicates that the SSA's goals would be very difficult for many ALJs to meet. Kerr and LePelley (2013) report that stretch goals can have a positive impact on performance, but only if people accept them and believe they can be accomplished. If people do not believe they can achieve stretch goals, their motivation and performance often decreases.

Another danger associated with establishing easily counted goals, such as the number of case dispositions and number of hearings scheduled, is that these goals may conflict with an equally important but harder to count goal, namely, decision quality. This is the classic speed-quality tradeoff. SSA requires ALJs to maximize both speed and quality goals. As far back as 1975, Steven Kerr published an article in the Academy of Management Journal entitled, "*On the folly of rewarding A, while hoping for B*" (Kerr, 1975). For ALJs, it appears that the SSA is rewarding case processing production (A) while hoping for high quality decisions (B).

In an article entitled "*Goals gone wild: The systematic side effects of overprescribing goal setting,*" Ordóñez, Schweitzer, Galinsky, and Bazerman (2009) showed that goal setting can

lead to unintended side effects such as neglect of all nongoal areas, increasing the incidence of unethical behavior, corrosion of organizational culture, and reduced motivation among employees, among others. It appears that, over the past few years, the SSA has already experienced some of these unintended side effects including excessively high allowance rates for some ALJs, too many decisions containing errors or of low quality, and low morale among ALJs.

Our study also sheds some light on one likely way in which ALJs accomplish the monthly hearings scheduled benchmark and annual case disposition quota – by working uncompensated hours. According to two independent samples of 31 and 98 ALJs, many ALJs work outside of normal work hours, on holidays, and in lieu of using their authorized annual leave. Most use less than ¼ of their authorized sick leave. Why would they do this? Likely because they care deeply about producing high quality decisions and because they are under tremendous pressure to meet the annual case disposition production quota and the monthly scheduled hearings benchmark.

In conclusion, our study indicates that the requirement to schedule 40 cases per month, on average, is not reasonably attainable, nor is it reasonable to expect ALJs to achieve 500-700 case dispositions annually while also complying with SSA directives on legally sufficient decisions. Obviously, opinions could vary about how challenging "reasonably attainable" goals should be, and some might prefer more or less stringent challenges. The point is that a ***work analysis approach*** **can provide the necessary foundation for an informed discussion about where benchmarks and goals should be set.**

Our study developed and piloted a solid methodology for ALJ work analysis. While our data are based on responses from a relatively small number of ALJs, it is the only study to our knowledge that attempts to establish production goals *based on the amount of labor required to actually adjudicate cases.*

If the SSA conducts its own work analysis study, it could:

- Perform a qualitative study of case processing practices used by the most productive ALJs *who are also producing legally sufficient decisions.*
- Carry out a simulated case processing study similar to the one we designed only with a larger sample of ALJs.
- Develop a modeling tool to estimate the number of cases that ALJs can reasonably process taking into account (a) proportion of cases likely to be dismissed, (b) proportion of likely OTR decisions, (c) case size, (d) case complexity, (e) competence of available decision writers, and (e) assumptions about the number of work hours available for case processing.

We understand that this study would not be easy, but the necessary research could be done. It could start with the variables that we examined, and then add more as they become available. Importantly, the modeling tool should be dynamic, because the factors listed in the third bullet above can and do vary over time and differ across regions and HOs.

Finally, our study also generated ideas and changes in the current SSA ALJ work situation that would reduce the amount of ALJ time needed to adjudicate adult disability cases. SSA could pursue these and other ideas to increase the efficiency of ALJs.

Post-Hearing Questions for the Record
Submitted to Joseph Kennedy
Associate Director for Human Resources Solutions
U.S. Office of Personnel Management
From Chairman James Lankford

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Based upon the information you have provided, there were over 5,000 applicants in the spring 2016 round of ALJ hiring. Your testimony noted that there is a year-long, rigorous process ALJ candidates must go through before qualifying for the register and noted the stringent standards of which are evident in there being only 600 candidates currently on the ALJ register.

Q: Is OPM's selection process in fact so rigorous that only about a tenth of applicants make it on to the final register? If not, what percent of applicants are ultimately successful?

OPM: No. Regarding the number of Administrative Law Judge (ALJ) candidates, the number discussed at the hearing was the number of candidates *currently* on the register, not the total number of individuals who have been on the register since the first administration of the exam. As a result, the number does not include the candidates who have already been hired by agencies since the register opened. The ALJ register is not static. As noted, candidates go off the register when they are appointed to an actual ALJ position. Also, certain applicants eligible for veteran's preference may reopen the examination upon demand between general administrations; those who successfully complete the examination and receive a final numerical rating are then added to the register. The number provided at the hearing was a snapshot in time, after two full years of hiring by ALJ-employing agencies. When the administration and scoring of the examination that opened in March 2016 has been completed, many new candidates will be added to the register.

The selection process that the U.S. Office of Personnel Management (OPM) uses in evaluating ALJ applicants is based on the competencies that are needed for ALJ positions, which we feel is appropriately rigorous. However, there are several other factors that affect the number of applicants who make it on to the final register.

Initially, OPM reviews the preliminary qualifications of the applicants, many of whom do not meet those preliminary qualifications or do not provide information to substantiate them. This is not a question so much of the rigor of the examination as it is of applicants' failure to note and follow the requirements of the position. For example, we get applications from individuals who

have no legal training. Some applicants choose not to complete the required assessments at each stage of the selection process and are excluded from further consideration of their own volition.

In addition, we use a cut score to screen out applicants after the online component has been administered. Only those applicants in the higher-scored group at the time of the online component are allowed to move on to the other components. The proportion permitted to move forward is based on the projected hiring estimates OPM collects from ALJ-employing agencies. This screening is undertaken so as to avoid having many more candidates on the register than agencies will ever need, which is costly and could also discourage some applicants from continuing to compete for ALJ positions. OPM can adjust this factor if agency projections change in the interim.

In 2015, Social Security Administration (SSA) advised OPM of its need to accelerate their ALJ hiring to manage their growing backlog. When OPM became aware of this change, we adjusted the initial cut score and permitted many additional candidates to move past the online component and be assessed for inclusion on the register. This adjusted cut score serves as the threshold for the general administration of the examination that opened in March 2016. That change should net proportionately more candidates than were initially allowed to go forward in 2013.

Q: What strategies has OPM considered to recruit applicants who are more likely to make it through the ALJ qualifying process?

OPM: Please see the response above – OPM has the ability to permit more candidates to make it through the process because it can adjust the initial cut score, and has already done so.

Regarding recruitment strategies, prior to opening each ALJ Job Opportunity Announcement for a general administration of the examination, OPM issues a press release, posts a notice for public viewing on its website, and transmits a memo to all Chief Human Capitol Officers (CHCO) announcing that the ALJ examination will open in the near future. In addition, the CHCO memo is sent to all Chief ALJs/Designees, ALJ Associations, National Bar Associations, women and minority bar associations, and various veterans' organizations. Applicants on expiring registers are also notified of the need to reapply if they want to continue to be considered.

The qualifications for the position are detailed in the Job Opportunity Announcement and in the *Qualification Standard for Administrative Law Judge Positions.* The Qualification Standards and other information for potential applicants are readily accessible on our ALJ Web page, https://www.opm.gov/services-for-agencies/administrative-law-judges. This Web page includes information for 10-point preference eligible veterans on how to apply for a quarterly examination at any time, which is their right under the Veterans' Preference Act.

OPM also reviewed materials that SSA provided on its website to share information about the ALJ process, examination, and becoming a SSA ALJ. SSA developed materials and videos to promote the job announcement.

2. Ms. Gruber's testimony indicated that in 2016 SSA only received 260 unique names for 81 locations. While we understand that there are other Federal agencies that use ALJs, at the end of FY 2015 they employed only 17% of all Federal agencies.

Q: After approximately 250 ALJs are allocated to SSA and potentially 100 are allocated to other agencies, what happens with the approximately 275 other ALJs?

OPM: The register is a list of candidates for an ALJ position, not current ALJs. Candidates cannot become ALJs until and unless they have been selected, been adjudicated suitable for Federal employment, and been appointed to the position by an agency appointing official.

In addition, OPM does not allocate candidates to specific agencies. Applicants who receive a final numerical rating are placed on the ALJ register. The ALJ register is a list of candidates eligible for selection and used to make referrals (certificates) to agencies for employment consideration when they have entry-level ALJ vacancies to fill. When an agency requests a certificate for a particular location, the names of candidates who indicated they were willing to be considered for that location are drawn from the top of the register and added to a certificate, in descending rank order. Candidates can be concurrently referred on more than one certificate at a time to different agencies and locations if their names are within reach for certification at each location. Candidates who have not yet been referred or who have been referred but not selected yet remain on the register until either they have been selected or OPM creates a new register (when a new examination instrument is created and administered).

On March 7, 2016, SSA requested certificates to fill approximately 120 vacancies at 81 locations, which OPM provided. On each of those 81 certificates, OPM sought to provide adequate names to fill the vacancy or vacancies at that location. This number of candidates was provided in light of the fact that top-ranked candidates have the right to be considered ahead of other candidates in as many locations as they are willing to work, which means that many of the candidates *across* certificates are the same people. Also, OPM sought to account for other contingencies, such as declinations.

We aimed to provide SSA with enough names per location to allow it to appropriately apply the statutory rule of three (and veterans' preference), as it selected for each vacancy, without running out of names, at least at most locations. As it turned out, there were about 264 unique names on the 81 certificates. Because the two candidates in the top three not selected for a particular vacancy at a particular location roll over and become two of the top three for the next selection,

we believe 264 names are a sufficient number of candidates for 120 vacancies. But we also understood that SSA was concerned about having enough names to fill all the positions, and informed them that additional names were available for any location where SSA could demonstrate that the certificate was running low on candidates.

Q: Are there roughly 275 ALJ candidates that OPM considers eligible but SSA does not? Is that figure consistent with past hiring cycles?

OPM: Every ALJ candidate on the register has passed the ALJ examination. By law (5 U.S.C. 3313), all of these candidates are fully "qualified" and "eligible" to work as ALJs.

Q: Has SSA made its criteria available to OPM so that OPM can better recruit the type of candidates SSA deems to meet its own standards?

OPM: The ALJ position is a unitary position. An ALJ at one agency may be transferred or loaned to another agency precisely because the qualifications for the position are the same across agencies. The ALJ examination, which was developed through significant participation from SSA subject matter experts (sitting ALJs) is designed to meet the needs of all ALJ-employing agencies. However, OPM has periodically informed SSA, most recently in 2015 and 2016, that if SSA can empirically support the need for additional testing criteria specifically related to high-volume case processing through an occupational analysis, OPM would consider a selective factor to screen applicants based on such criteria. In all competitive exams, including the ALJ exam, assessment elements or selective factors have to be professionally developed, supported by a job analysis, job-related and based on business necessity.

3. OPM has purportedly changed its criteria for ALJ selection in the recent past to value litigation experience over administrative law experience. As SSA hearings are investigatory and not adversarial, this may be a source of SSA's dissatisfaction with the candidates on the register that it declines to hire.

Q: Judging by the candidates that SSA interviews and later declines to hire, what appears to be the disconnect between the criteria by which OPM considers ALJ candidates qualified, and SSA does not?

OPM: OPM conducted an occupational analysis in 2012/2013 in which the subject matter experts (sitting ALJs, many of whom were from SSA) determined what qualities were important in an ALJ. This analysis concluded that both litigation and administrative law experience can be qualifying for ALJ applicants. As required by 5 U.S.C. 3313, all of the candidates on the ALJ register have qualified in a competitive examination and been rated eligible.

Q: Do you have this issue with other agencies that use ALJs?

OPM has received no information to suggest that is the case.

Q: What percent of their ALJs do the other agencies hire directly from the register? What percent do they hire away from SSA?

Selections from ALJ Register by Non-SSA Agencies
FY 2014 -2016

Fiscal Year	Number of Selections
2014	8
2015	3
2016 (as of June 6, 2016)	10
Total	21

The number of transfers per year from SSA to other agencies is on average 14 per year.

Transfers from SSA to Other agencies
FY 2010 -2016

Fiscal Year	Number of Transfers
2010	15
2011	15
2012	17
2013	17
2014	11
2015	12
2016 (as of June 6, 2016)	10
Total	97

Q: Has OPM considered reworking ALJ criteria to help a greater number of approved ALJs on the register to meet SSA standards?

OPM: SSA ALJs, including chief ALJs, were closely involved in the occupational analysis upon which the ALJ examination is based. We note that the use of agency specific selective factors is not currently supported for the position of ALJ, which Congress created as a government-wide position. However, OPM has suggested to SSA that it can submit an occupational analysis, supported by empirical data, if SSA believes that it needs selective certification of candidates to meet any agency-specific needs.

Q: Could this be accomplished without a several-year period of notice and comment suspending the refreshing of the register?

OPM: There is no need for notice and comment or a suspension of the refreshing of the register in order for OPM to consider redesigning the ALJ examination. OPM periodically undertakes a redesign of the examination, while still issuing certificates from an existing register, in order to take advantage of new knowledge, techniques, and technology, and avoid overuse of an existing instrument, which makes the existing instrument less predictive of success in the position.

The 2013 and 2016 ALJ examinations are based on the same occupational analysis. Therefore, applicants from these examinations, as well as the quarterly exams, can be placed on the same ALJ register. If SSA conducts an occupational analysis that demonstrates the need for a selective factor, then OPM can incorporate that change into a future iteration of the ALJ examination.

4. It is OPM's joint responsibility along with the agency employing the hearing officer to ensure that hearings described as de novo under the Administrative Procedure Act (APA) are heard before an ALJ.

Q: How do you determine when to use an ALJ and when a non-APA hearing officer is acceptable for a new position created by an agency?

OPM: OPM's responsibility in this area relates to issuing regulations, ensuring that the position descriptions for the ALJs do not include conditions that interfere with the qualified independence of ALJs, and determining that reassignments are made in an appropriate manner. Specifically, to protect the qualified independence of ALJs, Congress has provided in 5 U.S.C. 3105 that ALJs "may not perform duties inconsistent with their duties and responsibilities as administrative law judges." OPM's regulations therefore restrict the length of time that an ALJ can be internally assigned to non-ALJ duties and require the assignment to be consistent with ALJ duties and responsibilities. (5 CFR 930.201(e), 930.207(c)) OPM's regulations permit the interagency detail of an ALJ only to another ALJ position. (5 CFR 930.201(e), 930.208). The regulations also prohibit the detail of a non-ALJ to an ALJ position. (5 CFR 930.201(b)). These provisions, however, do not preclude an agency from assigning a hearing officer other than an ALJ from conducting proceedings where the agency's governing statute does not require the hearing to be conducted by an ALJ.

Agencies are responsible for ensuring that they follow their originating statutes or other authorities that determine under what circumstance the public is entitled to a hearing before an

ALJ. For example, some agencies operate under a statutory requirement to conduct a proceeding under 5 U.S.C. 556 and 557. Other statutes require or expressly permit other classes of adjudicators to conduct proceedings, or leave a gap for agencies to fill through rulemaking.

Q: Your testimony reflects that OPM had no involvement in SSA's March 2016 change to its Administrative Appeals Judge position description to include holding de novo hearings and significant travel. Isn't it OPM's responsibility to weigh in on such changes to ensure that APA hearings continue to be held by ALJs as required by the APA?

OPM: As noted above, the question of whether an agency is required to use an ALJ or permitted to use an adjudicator other than an ALJ for a particular matter is normally resolved by the agency's originating statute or some other authority, not the APA itself. Administrative Appeal Judges are not the same as ALJs. As an exercise of its regulatory authority over the ALJ program, OPM reviews agencies' ALJ position descriptions and the vacancy announcements that agencies use to hire incumbent ALJs. Agencies do not need to consult with OPM when making a change to position descriptions for non-ALJ positions, however.

Q: There are over 3,000 non-APA adjudicators throughout the Federal Government; has OPM ever undertaken a survey of the usage of ALJs vs non-APA hearing officers government-wide with a view towards ensuring conformity with the APA?

OPM: No. We are not charged with surveying the universe of adjudicative, rulemaking, and licensing programs in the Executive branch, which are governed by a myriad of agency-specific authorizing statutes and regulations.

As we previously noted, some agencies operate under a statutory requirement to conduct a proceeding before an ALJ under 5 U.S.C. 556 and 557. Other statutes require or expressly permit other classes of adjudicators to conduct proceedings, or leave a gap for agencies to fill through rulemaking. An agency's decision to "designate[] under statute" a class of proceedings to be heard by non-ALJ hearing officers may be a policy judgment of how to fill a gap in an ambiguous statute. It would be inappropriate for OPM to sit in review of the propriety of such policy judgments.

Post-Hearing Questions for the Record
Submitted to Joseph Kennedy
Associate Director for Human Resources Solutions
U.S. Office of Personnel Management
From Senator Heidi Heitkamp

"Examining Due Process in Administrative Hearings"
May 12, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Your testimony was very helpful in explaining the systemic challenges OPM and SSA face in recruiting and hiring enough ALJs to keep pace with attrition and the increasing hearing backlog.

   - SSA has testified about the difficulties it's having in hiring enough ALJs from OPM's registry of eligible and qualified candidates. Drawing upon your experience with other Federal agencies employing ALJs, does OPM have any specific recommendations for SSA to overcome this challenge?

     OPM: The Social Security Administration (SSA) is doing a substantial amount of ALJ hiring. We are providing additional candidates both to meet SSA's and other agencies' short-term hiring needs and to meet SSA's projected hiring needs for the next few years. We have added staff in order to be able to keep the examination open longer and process more candidates. Also, we have discussed with SSA ways to better streamline the process. We have made a number of suggestions that may help quicken the process of bringing new ALJs on board and has helped to decrease the loss of ALJs soon after their arrival at SSA to other agencies.

     In addition, during 2015, OPM took steps to expand the group of candidates who had been permitted to take the remainder of the 2013 administration of the ALJ examination, based on their performance on the Online assessment, which allowed several hundred more applicants to complete the first general administration of the current version of the examination. Applicants who successfully completed the balance of the examination were then added to the register.

     Prior to opening the second general administration of the current ALJ exam, in the spring of 2016, OPM worked with SSA and the other ALJ-hiring agencies to revise the list of locations where agencies have offices and to permit SSA to define a location as a full county, providing greater flexibility in the location of new offices. We also applied those changes to those applicants already on the register. This process will enable agencies to fill positions where they have actual need while also providing updated notice to applicants as to where the ALJ positions are located.

We also are reviewing past hiring actions to determine whether there are further efficiencies that could be achieved in the hiring process and whether there might be ways to improve upon the design of the examination when the current examination is retired.