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LACKING A LEADER: CHALLENGES FACING THE SSA AFTER OVER 5 YEARS OF ACTING COMMISSIONERS

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

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LACKING A LEADER: CHALLENGES FACING THE SSA AFTER OVER 5 YEARS OF ACTING COMMISSIONERS

WEDNESDAY, MARCH 7, 2018

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:02 a.m., in Room 1100, Longworth House Office Building, Hon. Sam Johnson [chairman of the subcommittee] presiding.

[The advisory announcing the hearing follows:]

WAYS AND MEANS
CHAIRMAN KEVIN BRADY

Chairman Johnson Announces Hearing on Lacking a Leader: Challenges Facing the SSA after over 5 Years of Acting Commissioners

House Ways and Means Social Security Subcommittee Chairman Sam Johnson (R-TX) announced today that the Subcommittee will hold a hearing entitled "Lacking a Leader: Challenges Facing the SSA after over 5 Years of Acting Commissioners." The hearing will focus on the need for a Senate-confirmed Commissioner to lead the Social Security Administration (SSA), the challenges and limitations faced by the SSA when it is led by an Acting Commissioner, and the legal framework that governs a vacancy at the SSA. **The hearing will take place on Wednesday, March 7, 2018 in 1100 Longworth House Office Building, beginning at 10:00 AM.**

In view of the limited time to hear witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, http://waysandmeans.house.gov, select "Hearings." Select the hearing for which you would like to make a submission, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Wednesday, March 21, 2018**. For questions, or if you encounter technical problems, please call (202) 225-3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission not in

compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

All submissions and supplementary materials must be submitted in a single document via email, provided in Word format and must not exceed a total of 10 pages. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. The name, company, address, telephone, and fax numbers of each witness must be included in the body of the email. Please exclude any personal identifiable information in the attached submission.

Failure to follow the formatting requirements may result in the exclusion of a submission. All submissions for the record are final.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-1721 or 202-226-3411 TTD/TTY in advance of the event (four business days' notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available at http://www.waysandmeans.house.gov/

Chairman JOHNSON. Good morning and welcome to today's hearing.

Americans count on Social Security to provide important benefits. In fact, Social Security pays benefits to more than 60 million people a year, totaling nearly $1 trillion. It is the largest single program in the Federal budget responsible for a quarter of all Federal spending.

When Social Security became an independent agency in 1995, Congress created the position of a Social Security Commissioner to run the agency. This position has a fixed 6-year term that must be Senate confirmed, just like the Department Secretaries and heads of other high level Federal agencies. But Social Security has been without a Senate-confirmed Commissioner since the most recent term expired on January 19, 2013. That is more than 5 years. This is the largest single period of vacancy for the head of a department or major Federal agency since Social Security became independent. And that is not right. Not only has Social Security been led by Acting Commissioners, but for over 3 years we haven't even had a nominee for the Senate to consider. The President needs to nominate a Commissioner without further delay. And once he does, the Senate should move quickly because the American people have waited too long.

Yesterday GAO announced the Social Security Administration is in violation of the Vacancy Reform Act. Without objection, the opinion will be made a part of the record.

Chairman JOHNSON. This is a big deal and a reminder that Social Security needs a nominee now. Acting Commissioners can keep an agency on a course that is already set, but they don't have the

same authority to lead as a Senate-confirmed Commissioner. You will hear today an Acting Commissioner just isn't empowered to make strategic decisions regarding the long-term operation of the agency. The Social Security Administration needs the strong and consistent leadership of a Senate-confirmed Commissioner to keep the agency focused on providing the service Americans expect, need, and deserve.

We are now more than 5 years into a 6-year term. The American people can't afford to wait any longer. Mr. President, we need you to nominate a Commissioner now.

I want to thank our witnesses for being here today, and I look forward to hearing your testimony.

I now recognize Mr. Larson for his opening statement.

Mr. LARSON. Thank you, Mr. Chairman. And I want to thank our witnesses as well for joining us here today. And I want to associate myself with the remarks of our chairman.

This is a travesty that this position with so vital an agency hasn't been filled. And as I think everyone will remember—and I want to commend the President. I recall vividly when he stood among 16 other candidates for office in his own party and spoke forthrightly about the need to not only preserve but to expand Social Security. So we know where his heart and his sentiment lies. But what we need, I think, as the chairman has underscored, is the need for us to take action and a need for us to put a commissioner in that position.

I think what makes the sense of urgency for this, and I think as everyone in the audience knows, and certainly the people on this committee, that 10,000 baby boomers a day—let me repeat that, 10,000 fellow Americans a day become Social Security eligible. So with 10,000 becoming eligible a day, it is paramount that we put somebody in charge at the head of an agency, an agency where we have seen a 15 percent increase, almost, of the number of people who are in need of Social Security and prevailing upon it while it has been cut 11 percent. We need to address that as well. And this committee is the appropriate place to do that.

Both Mr. Johnson and myself have bills to address this. It is my hope that we will be able to have had a hearing on those bills and be able to address the underlying concerns that so many Americans who depend upon Social Security and for way too many the only source of retirement that they have.

And so this is a vital lifeline to the American citizens. This is why it is paramount. I commend the chairman for calling this meeting. And I further commend him for his call of urgency to make sure that we install and confirm—nominate and confirm. Now, I have several suggestions as well for the President including amongst them Max Richtman, who is—you are going to hear from today, who heads-up the national committee that preserves Social Security and Medicare.

And Nancy Altman, or Judith Stein, or Bill Archer, the former fellow Texan who is still quite active himself. Earl Pomeroy the former insurance commissioner from South Dakota. John Tanner. Or my predecessor Barbara Kennelly.

I want to commend Nancy Berryhill for her work that she has been doing in an acting capacity. But truly, as the chairman has

indicated and underscored, we need to make sure that we both nominate and confirm and put somebody at the head of this vital agency for all of America.

With that, Mr. Chairman, I will yield back and anticipate the—glad to participate in the questioning and listening to what our witnesses have to say.

Chairman JOHNSON. Okay. Thank you so much. I appreciate your statement.

As is customary, any Member is welcome to submit a statement for the hearing record. And before we move on to our testimony, I want to remind our witnesses to please limit your statements to 5 minutes. However, without objection, all of the written testimony will be made a part of the hearing record.

We have four witnesses today. Seated at the table are Elizabeth Curda, Director of Education, Workforce, and Income Security, Government Accountability Office. Valerie Brannon, Legislative Attorney, American Law Division, Congressional Research Service. Max Richtman, President and CEO, National Committee to Preserve Social Security and Medicare. And Max Stier, President and CEO, Partnership for Public Service.

Ms. Curda, welcome. Thanks for being here. Please proceed.

STATEMENT OF ELIZABETH CURDA, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY, GOVERNMENT ACCOUNTABILITY OFFICE

Ms. CURDA. Chairman Johnson, Ranking Member Larson, and members of the subcommittee, I am pleased to be here to discuss the significant demographic, technological, and management challenges facing the Social Security Administration's leadership as they seek to deliver timely and accurate services to Americans.

In fiscal year 2017, SSA paid out nearly 1 trillion dollars in retirement and disability benefits to 67 million beneficiaries, and an average of 420,000 people call or visit one of its 1,200 field offices every day. However, with the baby boom generation entering their disability prone and retirement eligible years, workloads will continue to increase just as SSA faces a depletion of institutional knowledge and leadership from waves of retiring employees.

SSA also faces rapidly changing demands from Americans increasingly seeking virtual access to services while it continues to rely on antiquated systems to process claims. GAO has issued numerous reports on these challenges with recommendations to address them and placed SSA's disability programs on GAO's high risk list.

A common theme that cuts across our work is the need to modernize how SSA does business, which SSA has acknowledged. While SSA has agreed with and taken action on many of our recommendations, many also remain un implemented including some we have suggested are a high priority for top leadership attention.

The challenges I will discuss today fall into three areas. First, managing disability workloads and program integrity. Second, modernizing physical infrastructure and service delivery. And third, modernizing information technology.

With regard to managing disability workloads and program integrity, while SSA significantly reduced the number of pending ini-

tial claims over the past 7 years, pending appealed claims rose from 770,000 to 1.1 million over the same period. And these claims now take an average of 605 days to process.

Although SSA has a plan and initiatives underway to reduce its appeals backlog, we reported that some of SSA's appeals initiatives are either contingent on additional funding, such as hiring, or have met with limited success when tried in the past. Our work has also shown that SSA faces challenges ensuring the integrity of its disability programs. For example, one case of fraud reported by the SSA's inspector general involved 70 individuals and 14 million in fraudulent benefits.

In 2017, SSA established an office responsible for coordinating antifraud programs across the agency and gathered information on some fraud risks. However, we found that SSA had not fully assessed its fraud risks, had not developed an overall antifraud strategy, and did not have a complete set of metrics to determine whether its antifraud efforts have been effective. SSA has agreed to our recommendations and begun to take action on some of them.

Turning to modernizing service delivery and infrastructure, advances in technology have the potential to greatly improve SSA's service delivery while reducing its reliance on costly office space. For example, individuals can now apply for some disability benefits online rather than in person. However, we found that SSA did not have readily available data on problems customers had with online applications or why. In addition, the agency had not established performance goals to determine whether these new service delivery options, such as off-site kiosks, are succeeding. We also found that SSA has not developed a long-term plan for right-sizing its office space to reflect these types of changes in service delivery. We recommended that SSA improve its building space plans and do more to monitor and assess online and remote service delivery. And SSA agreed to take action.

Finally, regarding the modernization of SSA's information technology, SSA's legacy information technology systems are increasingly difficult and expensive to maintain. We identified SSA's spending on the operations and maintenance of its IT infrastructure as among the 10 largest IT expenditures of Federal agencies in fiscal year 2015. We recommended that the agency identify and plan to modernize or replace legacy systems in accordance with OMB guidance. SSA agreed and reported that it is finalizing an information technology modernization plan.

In summary, the actions SSA's executive leadership will need to take to modernize the management of its disability programs, its physical infrastructure, its online service delivery and information technology assets will require vision and sustained long-term attention.

This concludes my prepared statement, and I am happy to answer the committee's questions.

[The prepared statement of Elizabeth Curda follows:]

United States Government Accountability Office

Testimony
Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. ET
Wednesday, March 7, 2018

SOCIAL SECURITY ADMINISTRATION

Continuing Leadership Focus Needed to Modernize How SSA Does Business

Statement of Elizabeth Curda, Director
Education, Workforce, and Income Security

GAO-18-432T

GAO Highlights

Highlights of GAO-18-432T, a testimony before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

March 7, 2018

SOCIAL SECURITY ADMINISTRATION

Continuing Leadership Focus Needed to Modernize How SSA Does Business

Why GAO Did This Study

SSA provides vital benefits and services that affect the lives of many Americans. In fiscal year 2017, it paid out nearly $1 trillion in retirement and disability benefits to 67 million beneficiaries, and an average of 420,000 people call or visit one of its 1,200 field offices each day.

However, SSA has struggled to manage its disability workloads, maintain program integrity, and modernize its service delivery and information technology systems. GAO has issued a number of reports on these challenges, and placed SSA's disability programs on GAO's High Risk List, in part due to challenges with workloads and claims processing.

GAO was asked to testify on challenges facing SSA. This statement summarizes ongoing SSA challenges described in SSA's strategic plan and past GAO work in three areas: 1) managing disability workloads and ensuring program integrity; 2) modernizing physical infrastructure and service delivery methods; and 3) modernizing information technology.

Although GAO is not making recommendations in this statement, our prior work included recommendations to help SSA address these challenges, many of which SSA has agreed with and initiated actions on. SSA provided technical comments on a draft of this statement, which we incorporated, as appropriate.

View GAO-18-432T. For more information, contact Elizabeth Curda at (202) 512-7215 or curdae@gao.gov.

What GAO Found

GAO's prior work and Social Security Administration's (SSA) strategic plan for fiscal years 2018-2022 highlight significant demographic and technological challenges facing the agency. For example, SSA's workloads are increasing due to 80 million baby boomers entering their disability-prone and retirement years, and institutional knowledge and leadership at SSA will be depleted due to an expected 21,000 employees retiring by the end of fiscal year 2022. GAO's prior work has identified related management challenges and opportunities for SSA to further modernize and improve its disability programs, service delivery, and information technology (IT) systems.

- **Managing disability workloads and program integrity.** SSA has long struggled to process disability claims and, more recently, appeals of denied claims, in a timely manner. Consistent with our 2013 recommendation, SSA produced a broad vision for improving service delivery, including ensuring prompt and accurate disability decisions. However, SSA is still developing concrete plans to implement its vision. Although SSA has initiatives underway to improve appeals backlogs, GAO reported that some of SSA's appeals initiatives are either contingent on additional funding or have met with limited success when tried in the past. GAO's prior work also identified other challenges related to SSA's disability programs, and actions SSA could take, for example, to modernize disability criteria, prevent and recover overpayments, and manage fraud risks.
- **Modernizing physical infrastructure and service delivery.** Advances in technology have the potential to change how and where SSA delivers its services. For example, individuals can now apply for some disability benefits online rather than in person. However, GAO found that SSA did not have readily available data on problems customers had with online applications or why staff support was needed. Additionally, the agency had not established performance goals to determine whether new service delivery options, such as off-site kiosks, are succeeding. In addition, we found that SSA has not developed a long-term plan for its building space that, among other things, includes a strategy for downsizing offices to better reflect changes in service delivery. We recommended SSA improve building plans and do more to assess and monitor service delivery, with which SSA agreed.
- **Modernizing information technology.** SSA's legacy IT systems are increasingly difficult and expensive to maintain and GAO identified SSA's needed investment in infrastructure operations and maintenance as among the 10 largest expenditures at federal agencies in fiscal year 2015. GAO recommended SSA identify and plan to modernize or replace legacy systems, in accordance with forthcoming Office of Management and Budget guidance. SSA agreed, and reported that it is finalizing its Information Technology Modernization Plan.

Continuing focus by SSA leadership is critical to addressing these broad and long-term challenges and effectively delivering benefits and services to the many Americans who depend on SSA programs.

Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee:

I am pleased to be here to discuss the significant management challenges and structural issues currently facing the executive leadership of the Social Security Administration (SSA).

SSA is a vast enterprise responsible for providing benefits and services that affect nearly every American at some point in their lives. In fiscal year 2017, SSA paid out nearly $1 trillion in Social Security retirement, disability, and Supplemental Security Income benefits to 67 million beneficiaries. While the services it provides are vitally important, SSA faces significant demographic and technological challenges. For example, as SSA noted in its 2018-2022 strategic plan and as we have previously reported, SSA is experiencing increasing workloads due to 80 million members of the baby boom generation entering their most disability-prone and retirement years.[1,2] At the same time, SSA projects 21,000 of its employees will retire by the end of fiscal year 2022, resulting in a loss of institutional knowledge and impediments to succession management and knowledge transfer. In addition, SSA noted that Americans are increasingly relying on technology to access services while information technology (IT) advances create opportunities for SSA to use substantially different tools and approaches than it has in the past.

We have issued a number of reports with recommendations addressing shortcomings in how SSA has addressed these challenges. While SSA has agreed with and taken action on many of our recommendations, many others remain open, some of which we have suggested to SSA should be given high priority.[3] In addition, Social Security disability programs are on our High Risk List due to persistent workload and other challenges with processing disability claims.[4] A common theme that cuts across these issues is the need to modernize how SSA does business. SSA has acknowledged the importance of modernization in its new

[1] See Social Security Administration, Fiscal Years 2018 – 2022, Agency Strategic Plan.

[2] GAO, *Social Security Administration: Long-Term Strategy Needed to Address Key Management Challenges*, GAO-13-459 (Washington, D.C.: May 29, 2013).

[3] See appendix I for our February 2018 letter to SSA's Commissioner, in which we call attention to open recommendations that should be given high priority.

[4] GAO, *High Risk Series: Progress on Many High-Risk Ares, While Substantial Efforts Needed on Others*, GAO-17-317 (Washington, D.C.: February 15, 2017)

strategic plan. The actions SSA leadership will need to take to modernize the management of disability programs, facility planning and service delivery, and information technology will require vision and sustained, long-term attention.

My testimony today summarizes the results from a number of our past reports on SSA's operations and will focus on management challenges and structural issues facing SSA in three key areas: 1) managing its disability workloads and ensuring program integrity; 2) modernizing its physical infrastructure and service delivery methods; and 3) modernizing its information technology.

In developing this testimony, we relied on reports that we have previously issued. These reports, cited throughout this statement, include detailed information on the scope and methodology for our reviews.[5] The work on which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform audits to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

Background

SSA Programs and Functions

The scope of SSA's operations and responsibilities is vast. One of SSA's key responsibilities is to provide financial benefits to eligible individuals through three benefit programs:

- Old-Age and Survivors Insurance (OASI)—provides retirement benefits to older individuals and their families and to survivors of deceased workers.
- Disability Insurance (DI)—provides benefits to eligible individuals who have qualifying disabilities, and their eligible family members.
- Supplemental Security Income (SSI)—provides income for aged, blind, or disabled individuals with limited income and resources.

[5] We asked SSA to review and provide technical comments on a draft copy of our statement, and incorporated SSA's comments where appropriate.

In support of its mission, SSA maintains workers' earnings information and in fiscal year 2017 posted over 279 million earnings items to workers' records. SSA also determines if claimants are eligible for benefits, completing 10 million claims and more than 680,000 hearings decisions in fiscal year 2017. SSA also maintains birth and death records and issues Social Security Numbers. In fiscal year 2017, SSA issued almost 17 million new and replacement Social Security cards.

Beyond administering its programs and core missions, SSA provides key administrative support to the Medicare program, partners with the Department of Homeland Security in verifying employment eligibility for new hires, and assists with the administration of other programs, such as the Supplemental Nutrition Assistance Program and programs administered by the Railroad Retirement Board.

SSA's workforce is large, as is its physical footprint. About 62,000 federal employees and 15,000 state employees administer SSA programs in about 1,500 facilities nationwide. These facilities include regional offices, more than 1,200 field offices, teleservice centers, processing centers, hearings offices, the Appeals Council offices, and SSA's headquarters in Baltimore, Maryland.

Customers can access SSA services in-person at an SSA field office; by phone with field office staff or through a National 800 number; or online.[6] In 2018, SSA reported that, each day, about 170,000 people visit and 250,000 call one of its field offices for various reasons, such as to file claims, ask questions, or update their information. SSA also reported that its national 800 number handles over 30 million calls each year.

[6] SSA also receives communications from and sends communications to customers by mail. For example, in fiscal year 2017, SSA mailed nearly 250 million notices.

Challenges to Managing SSA's Disability Workloads and Ensuring Program Integrity

Complex eligibility rules and multiple handoffs and potential layers of review make SSA's disability programs complicated and costly to administer.[7] Program complexity arguably has made it challenging for SSA to make significant advances in efficiently managing high disability workloads, ensuring timely and consistent disability decisions, preventing benefit overpayments, and mitigating fraud risks.

Our recent work highlighted some of the challenges SSA faces in making disability decisions that are timely, consistent and based on current concepts of disability, while also preventing and deterring fraud and ensuring that only beneficiaries who are entitled to benefits receive them. These findings underscore the need for SSA leadership to approach these challenges strategically and follow through with rigorous plans in order to achieve significant improvements in its disability programs.

Making Timely Disability Decisions

In recent years, SSA made noteworthy strides in reducing its backlog of initial disability claims, but delays in deciding disability appeals continue to worsen. SSA has reduced the number of pending claims each fiscal year since 2010—from about 842,000 in fiscal year 2010 to about 523,000 in fiscal year 2017. However, the number of appealed claims pending at the end of 2017 was approximately 1.1 million compared to about 700,000 in fiscal year 2010, and the average time needed to complete appeals increased from 426 days to 605 days during that same time.

In our 2017 High Risk Update, we reported that SSA had taken some steps to address its growing appeals backlog, such as hiring additional administrative law judges (ALJ).[8] SSA also published a plan in 2016 to improve appeals timeliness that called for further hiring, improving business processes, sharing workloads across offices, and making better use of IT resources, such as increasing the number of video hearings. However, SSA's Office of Inspector General (OIG) found that many of the initiatives in SSA's plan duplicated past efforts that had met with limited

[7] SSA field offices and state Disability Determination Services both play a role in initially determining eligibility for disability benefits. Claimants who are dissatisfied with their initial determination have multiple levels of appeal available to them. We reported in 2013 that, although SSA's disability programs account for only about 23 percent of its total benefit outlays for its three benefit programs, they represent 66 percent of the administrative expenses.

[8] GAO-17-317.

success. SSA also noted that some efforts, such as additional hiring, will depend on resource availability. We also reported that SSA is still developing plans to implement its broad vision for service delivery, *Vision 2025*, which addresses SSA's capacity to provide timely initial claims and appeals decisions.[9] To address its appeals backlog and position itself to effectively provide timely disability decisions at all levels, SSA leadership will need to continue to operationalize *Vision 2025*, plan and implement systems support for initial claims, and implement and monitor the success of its appeals initiatives.

Modernizing Disability Criteria

While SSA has made significant progress in updating the outdated occupational and medical criteria it uses to make disability eligibility decisions, some of these efforts are multi-year and will require the continued focus of top leadership. Most significantly, SSA has made strides updating a decades old Dictionary of Occupational Titles with a new Occupational Information System (OIS), which contains occupational data to make disability determinations.[10] SSA expects to have OIS in place by 2020, and currently plans to update OIS information every 5 years thereafter. Regarding the medical criteria used to make disability decisions, we reported in our 2017 high risk update that SSA had published final rules for nearly all of the 14 body systems for adults and was on track to update criteria for all body systems every 3 to 5 years.[11] While SSA has addressed all our recommendations in this area, other opportunities exist for updating aspects of SSA's disability decision process. For example, SSA officials have acknowledged that the vocational rules it uses to determine eligibility may no longer accurately reflect the nature and scope of work available in the national economy and stated that the agency is conducting a review to determine if changes to vocational factors are necessary. Agency leadership will play a key role in ensuring SSA pursues these opportunities to further modernize its

[9] SSA issued its *Vision 2025* in response to our 2013 recommendation that SSA should prepare for wide-ranging management challenges by developing a long-term strategy for service delivery. See GAO-13-459.

[10] As part of its disability determination process, SSA may determine whether the individual is able to perform past relevant work or any work that exists in the national economy. To inform these determinations, SSA uses a Department of Labor database—known as the Dictionary of Occupational Titles—which is an inventory of occupations performed in the national economy.

[11] GAO-17-317

criteria and devotes appropriate resources to continuously updating its occupational and medical criteria on a timely basis.

Enhancing the Accuracy and Consistency of Disability Decisions

Our recent work analyzed variation in the rate that different ALJs grant disability benefits when claimants appeal an earlier denial, and found that SSA's efforts to monitor the consistency of appeal hearing decisions are incomplete. In 2017 after analyzing data on hearings decisions, we estimated that the allowance (approval) rate could vary by as much as 46 percentage points between different judges with respect to a typical claim.[12] SSA conducts various reviews to monitor the accuracy and consistency of ALJ decisions, but SSA has not systematically evaluated whether its reviews are effective. SSA has also struggled to sustain all of its quality review efforts, in part, because SSA reassigned staff to help expedite claims decisions.[13] We also reported on shortcomings in SSA's Compassionate Allowance initiative (CAL)—which fast tracks disability claims for severe medical conditions that are most likely to be approved—that could prevent claims from being consistently and accurately identified for expedited processing.[14] These shortcomings include lacking a systematic approach and clear criteria for designating medical conditions for inclusion in CAL.

With about one in three beneficiaries being granted benefits at SSA's appeals hearing level, it remains crucial that SSA leadership commit to ensuring appeal applications receive fair and consistent treatment,

[12] A typical claim had average values on all other factors we analyzed (related to the claimant, judge, other participants in the process, hearing office, and economic characteristics). Our analysis was purely statistical in that we did not conduct the legal analysis needed to reach conclusions about what legal factors might have affected a judge's decision or whether the decision that was reached in any particular case was correct. Similarly, we were not making any predictions about the correct outcome of future individual decisions. Each case is unique in both its facts and circumstances and must be examined on its own merits. GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearing Decisions*, GAO-18-37 (Washington, D.C.: December 7, 2017).

[13] In its technical comments on our draft statement, SSA stated that, effective October 1, 2017, the Acting Commissioner moved offices with responsibilities for oversight of disability decisions into the agency's Office of Analytics, Review, and Oversight, in order to use data collected from quality reviews at all levels of adjudication to improve policy compliance of disability decisions.

[14] GAO, *SSA's Compassionate Allowance Initiative: Improvements Needed to Make Expedited Processing of Disability Claims More Consistent and Accurate*, GAO-17-625 (Washington, D.C.: August 11, 2017).

including assessing persistent and unexplained variations in ALJ allowance rates. Ensuring oversight and scrutiny of SSA's CAL initiative is also essential to avoid potential equity issues with regards to SSA's most vulnerable claimants.

Preventing and Collecting Overpayments

Benefit overpayments represent avoidable losses to the DI trust fund and, for the individual who may have incurred an overpayment despite conscientiously reporting wages, a financial hardship when required to repay and a disincentive to pursue work. In fiscal year 2015, the most recent year for which we have data, SSA identified $1.2 billion in new overpayments in its DI program, and had $6.3 billion in total overpayment debt outstanding. In 2015, we reported that the SSA process for beneficiaries to report earnings (and consequently inform whether they remain eligible for DI benefits) had a number of weaknesses, including staff not following established procedures, limited oversight, and a lack of automated reporting options for beneficiaries, such as an automated telephone system or smart phone app.[15] SSA has made progress expanding electronic work reporting, but these efforts will not eliminate vulnerabilities caused by SSA's multi-faceted processes for receiving and handling work reports, and will require additional management focus to shore up internal controls and avoid unnecessary overpayments.

Once overpayments do occur, SSA will endeavor to recover those overpayments. However, we recently found that the collection of overpayment debts warrants more attention than SSA has demonstrated to date. In 2016, we reported that SSA's largest source of debt recovery is withholding a portion of beneficiaries' monthly benefits payments.[16] However, we found that amounts withheld may not consistently reflect individuals' ability to pay, and that many repayment plans could take decades to complete. We recommended SSA improve oversight and pursue additional debt recovery options—recommendations that SSA has yet to implement. Absent clear policies and oversight procedures for establishing and reviewing withholding plans—SSA's main tool for recovering overpayments—SSA cannot be sure that beneficiaries are repaying debts in appropriate amounts within appropriate time frames.

[15] GAO, *Disability Insurance: SSA Could Do More to Prevent Overpayments or Incorrect Waivers*, GAO-16-34 (Washington, D.C.: October 29, 2015).

[16] GAO, *Disability Insurance: SSA Needs to Better Track Efforts and Evaluate Options to Recover Debt and Deter Potential Fraud*, GAO-16-331 (Washington, D.C.: April 13, 2016).

Further, by not implementing additional debt collection tools that would speed up repayment, which can extend past the beneficiaries' lifetimes and is diminished in value by inflation, SSA is missing opportunities to restore debts owed to the DI trust fund.

Strategic Approach to Managing Fraud Risks

Although the extent of fraud in SSA's benefit programs is unknown, high-profile cases—such as one case reported by SSA's OIG involving 70 individuals and $14 million in fraudulent benefits—underscore the importance of continued vigilance on the part of SSA leadership in managing fraud risks to prevent fraud. We reported in 2017 that SSA established a new office responsible for coordinating antifraud programs across the agency, and had taken steps to gather information on some fraud risks.[17] However, we also found that SSA had not fully assessed its fraud risks, had not developed an overall antifraud strategy to align its efforts with those risks, and did not have a complete set of metrics to determine whether its antifraud efforts are effective. SSA has already taken action on one of our recommendations by producing a fraud risk assessment, which we will evaluate, and has stated its intent to take action on our other recommendations. Nevertheless, leadership will be essential for developing and implementing an antifraud strategy aligned with the risk assessment and ensuring that SSA's efforts to prevent and detect fraud are effective, thereby helping to safeguard the integrity of its programs and its delivery of benefits to only eligible individuals.

Challenges to Modernizing SSA's Physical Footprint and Service Delivery

With one of the largest physical footprints of any federal agency, and in light of rising facility costs, SSA may be able to achieve efficiencies by reducing the size of its footprint and pursuing additional, cost effective service delivery options. However, as we reported in 2013, rightsizing SSA's physical infrastructure can be complex, politically charged, and costly; expanding service delivery options is also challenging due to the complexity of SSA's disability programs and the varying needs of SSA's customers.[18] Our recent review of SSA's plans to reconfigure its physical footprint and expand how it delivers services confirmed a number of

[17] GAO, *SSA Disability Benefits: Comprehensive Strategic Approach Needed to Enhance Antifraud Activities*, GAO-17-228 (Washington, D.C.: April 17, 2017).

[18] GAO-13-459.

challenges SSA must navigate.[19] It also highlighted the importance of approaching these challenges strategically and systematically, through strong leadership that guides robust planning, data collection, and assessment efforts.

Reconfiguring SSA's Physical Footprint

In our 2017 work, we identified several challenges that could hinder SSA's ability to readily reconfigure its footprint, align it with evolving needs and potentially achieve desirable cost savings.[20] For example, we found that despite progress reducing its square footage and the number of occupied buildings, SSA's inflation-adjusted rental costs have remained steady. SSA's ability to further reduce or enlarge its physical space is constrained by rental markets, and by union and community concerns. According to SSA officials, high rents, limited building stock and complicated federal leasing processes present difficulties and community needs and union concerns may further complicate relocating offices. We also found that, even though SSA is expanding its remote delivery of services—online and through new technologies—overall demand for field office services has not decreased, although demand varied greatly across SSA's offices.

Expansion of online service—such as the SSI application, which became available online in 2017—present opportunities for SSA to further reduce or reconfigure its physical footprint. However SSA may miss those opportunities because we found that SSA had not fully integrated its strategic planning and facility planning, despite leading practices that indicate facility plans should align with an agency's strategic goals and objectives.[21] We recommended that SSA develop a long-term facility plan that explicitly links to its strategic goals for service delivery, and includes a strategy for consolidating or downsizing field offices in light of increasing use of and geographic variation in remote service delivery.

[19] GAO, *Social Security Administration: Improvements Needed in Facilities Planning and Service Delivery Evaluation*, GAO-17-597 (Washington, D.C.: July 25, 2017).

[20] GAO, *Social Security Administration: Improvements Needed in Facilities Planning and Service Delivery Evaluation*, GAO-17-597(Washington, D.C.: July 25, 2017).

[21] We recommended in 2013 that SSA determine if realigning its facilities structure, including field offices, could yield increases in the agency's effectiveness and efficiency by assessing the utility and feasibility of such a realignment or consolidation. At the time, SSA officials said they would begin exploring their office structure to find ways to increase efficiency and effectiveness; however, as of May 2017, this recommendation remains unimplemented. See GAO-13-459.

SSA agreed with our recommendation, and has since formed a Space Acquisition Review Board to consider space reductions in light of operational changes. SSA executive leadership will remain an important factor in ensuring a concerted effort to align the agency's physical footprint with its vision for future service delivery.

Expanding Remote Service Delivery

Our recent work also found that while the complexity of SSA's programs can make it challenging for customers to use online services, the agency lacked data to identify and address challenges with online applications. The online disability applications in particular can be confusing and challenging for customers to complete, according to many SSA managers and staff we interviewed.[22] Applications that are submitted online often require follow-up contacts with applicants to obtain missing information, according to SSA front-line staff. However, while SSA has taken steps to make its online services more user-friendly, such as adding a click-to-chat function for customers who run into problems, the agency does not routinely collect data on the reasons for staff follow-ups with online applicants. Such data are critical to SSA's efforts to further improve its online applications and ultimately allow SSA to shift more of its business online and further reconfigure its physical footprint.

SSA would also benefit from establishing performance goals to help it determine whether new service delivery options are succeeding. To help address access challenges such as limited broadband internet in some rural areas, SSA has rolled out self-service personal computers in field offices, icons to link to SSA services on computers in public libraries and video services accessed from senior centers. SSA also recently completed a trial of customer service kiosks in seven SSA offices and third-party locations. SSA staff in field offices reported some positive impacts from these initiatives in terms of extending remote access to certain populations, but also cited challenges, such as with customers' varying ability to use self-service computers. While SSA collects some data on usage, it has not developed performance targets or goals that could help it assess these initiatives' success or identify problems.

We recommended that SSA develop a cost-effective approach to identifying the most common issues with online benefit claims, and

[22] According to a survey conducted by SSA, the most common reason that applicants started but failed to complete a disability application online was that they did not understand what the questions meant. See GAO-17-597.

develop performance goals and collect performance data for alternate service delivery approaches. SSA agreed with our recommendations, and has since reported taking steps to implement them. As SSA continues to expand its service delivery options, the agency's leadership will need to encourage data driven approaches to ensure high quality and effective alternative service delivery.

Challenges to Modernizing Information Technology

In 2016, we reported that SSA faces challenges with IT planning and management, based on over a decade of prior work that identified weaknesses in system development practices, IT governance, requirements management, strategic planning, and other aspects of IT.[23] For example, in 2012, a GAO review reported that SSA did not have an updated IT strategic plan to guide its efforts and its enterprise architecture lacked important content that would have allowed the agency to more effectively plan its IT investments.[24] In addition, SSA and others have reported substantial difficulty in the agency's ability to implement its Disability Case Processing System—intended to replace 54 disparate systems used by state Disability Determination Services—citing software quality and poor system performance as issues. Consequently, in June 2016, the initiative was placed on the Office of Management and Budget's (OMB) government-wide list of 10 high-priority programs requiring attention. In February 2018, the SSA OIG completed an assessment of an independent contractor's analysis of options for the system. The SSA OIG concluded that several factors that limited the analysis supporting the contractor's recommendation for SSA to continue investing in a new, custom-build version of the Disability Case Processing System.[25]

Because OMB is no longer identifying high-priority programs, in November 2017, we recommended OMB resume identifying these programs.[26] We also recommended OMB ensure that the Federal Chief

[23] GAO, *Social Security Administration: Effective Planning and Management Practices Are Key to Overcoming IT Modernization Challenges*, GAO-16-815T (Washington, D.C.: July 14, 2016).

[24] GAO, *Social Security Administration: Improved Planning and Performance Measures Are Needed to Help Ensure Successful Technology Modernization*, GAO-12-495 (Washington, D.C.: April 26, 2012).

[25] SSA OIG, *Contractor's Market Research and Analysis for the Disability Case Processing System*, A-14-18-50506 (February 5, 2018).

[26] GAO, *Information Technology: OMB Needs to Report On and Improve Its Oversight of the Highest Priority Programs*, GAO-18-51 (Washington, D.C.: November 21, 2017).

Information Officer is directly involved in overseeing these high-priority programs as past experience has shown that this oversight could improve accountability and achieve positive results. OMB neither agreed nor disagreed with our recommendations, and has not indicated whether it will take action on these recommendations.

Beyond the challenges identified in these previous reports, GAO's May 2016 report on federal agencies' IT legacy systems highlighted the increasing costs that agencies, including SSA, may face as they continue to operate and maintain at-risk legacy systems.[27] We identified SSA's investment in IT infrastructure operations and maintenance as being among the 10 largest expenditures of federal agencies in fiscal year 2015. Further, we pointed out that legacy systems may become increasingly expensive as agencies have to deal with issues such as obsolete parts and unsupported hardware and software, and potentially have to pay a premium to hire staff or engage contractors with the knowledge to maintain outdated systems. For example, SSA reported re-hiring retired employees to maintain its systems that include many programs written in Common Business Oriented Language (COBOL).[28] We highlighted a group of systems for determining retirement benefits eligibility and amounts which were over 30 years old, with some written in COBOL. We also noted that the agency had ongoing efforts to modernize the systems but was experiencing cost and schedule challenges due to the complexity of the legacy systems. We recommended that the agency identify and plan to modernize or replace legacy systems, in accordance with forthcoming OMB guidance.[29] SSA agreed, and reported that it is finalizing its Information Technology Modernization Plan.

To its credit, SSA has made progress in consolidating and optimizing its data centers. Specifically, in August 2017, we reported that, as of February 2017, SSA was one of only two agencies that had met three of

[27] GAO, *Information Technology: Federal Agencies Need to Address Aging Legacy Systems*, GAO-16-468 (Washington, D.C.: May 25, 2016).

[28] COBOL is a programming language developed in the late 1950s and early 1960s. The Gartner Group, a leading IT research and advisory company, has reported that organizations using COBOL should consider replacing the language, as procurement and operating costs will steadily rise, and because there is a decrease in people available with the proper skill sets.

[29] See GAO-16-468.

the five data optimization targets established by OMB[30] pursuant to provisions referred to as the Federal Information Technology Acquisition Reform Act.[31] Meeting these targets increases SSA's ability to improve its operational efficiency and achieve cost savings.

In conclusion, many of the challenges facing SSA today are neither new nor fleeting because they are inherent in the complexity and massive size of SSA's programs and the scope of broad demographic and societal changes over time. Our past work has pointed to the need for rigorous solutions to these complex problems, such as strategic planning, evaluation efforts, measuring for impact, and leveraging data—solutions that invariably require leadership attention and sustained focus.

Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you or other members of the Subcommittee may have.

GAO Contact and Acknowledgements

If you or your staff have any questions about this testimony, please contact Elizabeth Curda, Director, Education Workforce and Income Security Issues, at (202) 512-7215 or curdae@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony statement. GAO staff who made key contributions to this statement are Michele Grgich (Assistant Director), Daniel Concepcion (Analyst-in-Charge), Susan Aschoff, Alex Galuten, Jean McSween, Sheila McCoy, Lorin Obler, Sabine Paul, Almeta Spencer, and Erin McLaughlin Villas.

[30] OMB, *Data Center Optimization Initiative (DCOI)*, Memorandum M-16-19 (Washington, D.C.: August 1, 2016).

[31] GAO, *Data Center Optimization: Agencies Need to Address Challenges and Improve Progress to Achieve Cost Savings Goals*, GAO-17-448 (Washington, D.C.: August 15, 2017). The five OMB optimization targets are 1) server utilization and automated monitoring, 2) energy metering, 3) power usage effectiveness, 4) facility utilization, and 5) virtualization.

Appendix I: GAO Letter to SSA on Priority Recommendations to Implement

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

February 26, 2018

Nancy A. Berryhill
Acting Commissioner
U.S. Social Security Administration
6401 Security Boulevard
Windsor Park Building
Baltimore, MD 21235

Dear Acting Commissioner Berryhill:

The purpose of this letter is to provide you with an update on the overall status of the Social Security Administration's (SSA) implementation of GAO's recommendations and to call your personal attention to areas where open recommendations should be given high priority. In November 2017, we reported that on a government-wide basis, 76 percent of our recommendations made 4 years ago were implemented.[1] SSA's recommendation implementation rate was 80 percent. As of January 16, 2018, SSA had 94 open recommendations. Fully implementing these open recommendations could significantly improve agency operations.

Since our June 2017 letter, SSA has implemented one priority recommendation related to modernizing disability programs. The agency has undertaken a study on advancements in assistive technology and work accommodations to inform its policy regarding disability determinations. Although the findings of the study did not support changes in SSA's decision making policy, SSA reported that it plans to capture information on accommodations offered by employers as part of its national data collection on job requirements, and would consider job requirements that include accommodations in making disability determinations. These steps will help SSA target its resources efficiently, ensure equitable disability decisions, and assist individuals with disabilities in re-engaging with the workforce.

We ask your continued attention on the remaining seven open priority recommendations identified in the 2017 letter. (See the enclosure for the list of these recommendations.) These priority recommendations fall into the two major areas listed below.

Realizing Cost Savings and Reducing Fraud, Waste, and Abuse

Six of the seven priority recommendations could result in cost savings and reduce fraud, waste and abuse. In August 2013, we recommended that SSA assess the costs and feasibility of establishing a mechanism to detect potentially disqualifying earnings during the waiting period for Disability Insurance (DI) cash benefit payments. As of January 2018, SSA had not conducted this assessment. We think this assessment could provide SSA with more comprehensive information with which to decide on potential revisions to its enforcement operation.

[1]GAO, *Performance and Accountability Report: Fiscal Year 2017*, GAO-18-2SP (Washington, D.C.: Nov.15, 2017).

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In November 2014, we recommended that SSA improve its efforts to detect and prevent physician-assisted fraud using data analytics by developing an implementation plan to identify short- and long-term actions. While SSA is taking steps to enhance its fraud detection and prevention efforts broadly—including developing a risk assessment of its disability program—it has yet to release an implementation plan that specifically addresses employing data analytics to detect potential fraud involving physicians. This plan should build on existing activities to coordinate anti-fraud efforts across the agency. Such detailed planning is critical to ensuring the agency can address this specific threat.

In July 2015, we made two recommendations that SSA (1) evaluate alternatives to the agency's current approach for reducing DI overpayments stemming from the concurrent receipt of federal workers' compensation payments and (2) strengthen its internal controls over these DI overpayments by implementing the alternative approach to self-reporting that yields the greatest net benefits. SSA agreed with both of these recommendations. As of January 2018, SSA had not fully implemented its plans to use Federal Employees' Compensation Act (FECA) data to reduce DI benefits in accordance with federal law or implement an alternative approach that provides greater net benefits.

In October 2015, we recommended that SSA develop a timetable for implementing updates to its Debt Management System to (a) align system controls with SSA policy, so that waivers over $1,000 cannot be administratively waived, and (b) ensure that evidence supporting waiver decisions is sufficiently maintained to allow for subsequent monitoring and oversight. Although SSA implemented the second part of the recommendation, continuing limitations in SSA's Debt Management System could allow staff to administratively approve waivers greater than $1,000 without review or detection by managers in violation of SSA policy. SSA should finalize changes to its Debt Management System to prevent administrative waivers over $1,000, in alignment with SSA policy.

In April 2016, we recommended SSA increase the minimum amount that it recoups from overpaid DI beneficiaries from $10 to 10 percent withholding from their monthly benefit amount. This change would increase scheduled collections and reduce the amount of time to fully recover overpayments, while minimizing the effect on beneficiaries receiving the lowest monthly benefits. It would also promote equity in how SSA deals with overpayments across its disability benefit programs. SSA agreed with this recommendation and has submitted legislative proposals in the President's fiscal year 2017 - 2019 budgets to establish a minimum withholding for overpayments of 10 percent of a beneficiary's monthly benefit.

Improving Financial Information for the Aging Population

This area involves the information SSA provides to clients on their estimated benefits to help improve financial information for the aging population.

Our September 2016 priority recommendation called for SSA claims specialists to consistently provide information to potential claimants for retirement benefits that delaying claiming will result in permanently higher monthly benefit amounts, in accordance with the SSA Program Operations Manual System. As of 2013, most older Americans relied on Social Security for the majority of their income and individuals who claim early risk losing tens of thousands of dollars in reduced benefits over their lifetime. Understanding this information is central to making informed decisions about when to claim Social Security benefits, ultimately affecting older Americans' lifetime benefit amounts and retirement security. To fully implement this recommendation, SSA should continue to take steps to ensure that claims specialists know to

provide this information, such as additional periodic reminders and possibly having field managers discuss best practices for providing this information to claimants.

In addition to these priority recommendations, since 1990, we have maintained a High Risk program to call attention to operations and programs that are high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement, or the need for transformation to address economy, efficiency, or effectiveness challenges.[2] Our High Risk program has served to identify and help resolve serious weaknesses in areas that involve substantial resources and provide critical service to the public. Progress on high risk issues has been possible through the concerted actions and efforts of Congress, OMB, and the leadership and staff in agencies, including within SSA.

Along with these high priority recommendations, we also wanted to call your attention to four government-wide high risk areas: Strategic Human Capital Management; Managing Federal Real Property; Ensuring the Security of Federal Information Systems and Cyber Critical Infrastructure and Protecting the Privacy of Personally Identifiable Information; and Improving Management of Information Technology (IT) Acquisitions and Operations. Regarding IT Security, we especially encourage you to give attention to any recommendations that your Inspector General may have related to implementing a comprehensive information security program. To assist agencies in their efforts, we have issued work on actions needed to improve cybersecurity and agency information security programs.[3] Regarding IT acquisitions, we have identified the need for federal agencies to continue to expeditiously implement the requirements of December 2014 IT acquisition reform legislation, known as the Federal Information Technology Acquisition Reform Act (FITARA), and to report all data center consolidation cost savings to OMB and address weaknesses in their management of software licenses.[4]

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I appreciate SSA's continued commitment to these important issues. If you have any questions or would like to discuss any of the issues outlined in this letter, please do not hesitate to contact me or Barbara Bovbjerg, Managing Director, Education, Workforce, and Income Security at

[2]GAO, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (Washington, D.C.: Feb. 15, 2017).

[3]See, for example, GAO, *Federal Information Security: Weaknesses Continue to Indicate Need for Effective Implementation of Policies and Practices*, GAO-17-549 (Washington, D.C.: Sept. 28, 2017).

[4]FITARA was enacted into law as a part of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, div. A, title VIII, subtitle D, §§ 831-837, 128 Stat. 3292, 3438-3450 (2014). See, for example, GAO, *Data Center Optimization: Agencies Need to Complete Plans to Address Inconsistencies in Reported Savings*, GAO-17-388 (Washington, D.C.: May 18, 2017) and *Federal Software Licenses: Better Management Needed to Achieve Significant Savings Government-Wide*, GAO-14-413 (Washington, D.C.: May 22, 2014).

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bovbjergb@gao.gov or 202-512-7215. Our teams will continue to coordinate with your staff on all 94 open recommendations, as well as those additional recommendations in the high-risk areas for which SSA has a leading role.

Sincerely yours,

Gene L. Dodaro
Comptroller General
of the United States

Enclosure

cc: The Honorable Mick Mulvaney, Director, OMB

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Enclosure

Priority Open Recommendations to SSA

Realizing Cost Savings and Reducing Fraud, Waste, and Abuse

Disability Insurance: Work Activity Indicates Certain Social Security Disability Insurance Payments Were Potentially Improper, GAO-13-635 (Washington, DC: August 15, 2013).

Recommendation: To improve SSA's ability to detect and prevent potential Disability Insurance (DI) cash benefit overpayments due to work activity during the 5-month waiting period, the Commissioner of Social Security should assess the costs and feasibility of establishing a mechanism to detect potentially disqualifying earnings during all months of the waiting period, including those months of earnings that the agency's enforcement operation does not currently detect and implement this mechanism, to the extent that an analysis determines it is cost-effective and feasible.

Actions Needed: SSA agreed with this recommendation. However, as of January 2018, SSA has not fully assessed the costs and feasibility of establishing a mechanism to detect potentially disqualifying earnings during all months of the waiting period. Instead, SSA concluded that conducting a study at this time would yield unreliable information because the agency's ability to obtain and track earnings from alternative sources is changing due to several requirements of the Bipartisan Budget Act of 2016, which SSA believes will likely affect GAO's concerns.

GAO continues to believe that undertaking an analysis to assess costs and feasibility could provide SSA with more comprehensive information with which to decide on potential revisions to its enforcement operation. To fully implement this recommendation, SSA will need to assess the cost and feasibility of a mechanism to detect beneficiaries' work activity that is beyond program limits and suspend benefits appropriately.

Director: Seto Bagdoyan, Forensic Audits and Investigative Service
Contact information: BagdoyanS@gao.gov (202) 512-6722

SSA Disability Benefits: Enhanced Policies and Management Focus Needed to Address Potential Physician-Assisted Fraud, GAO-15-19 (Washington, DC: November 10, 2014).

Recommendation: To improve the ability of the agency to detect and prevent potential physician-assisted fraud, and to help ensure new initiatives that use analytics to identify potential fraud schemes are successful, SSA should develop an implementation plan that identifies both short- and long-term actions, including: (1) timeframes for implementation; (2) resources and staffing needs; (3) data requirements, e.g., the collection of unique medical provider information; (4) how technology improvement will be integrated into existing technology improvements such as the Disability Case Processing System and National Vendor File; and (5) how different initiatives will interact and support each other.

Actions Needed: SSA agreed with this recommendation. To fully implement this recommendation, SSA will need to develop an implementation plan for anti-fraud efforts that

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addresses how it will employ data analytics to detect potential fraud involving physicians. This plan should build on existing activities to coordinate anti-fraud efforts across the agency.

Director: Elizabeth Curda, Education, Workforce, and Income Security
Contact information: CurdaE@gao.gov (202) 512-4040

Disability Insurance: Actions Needed to Help Prevent Potential Overpayments to Individuals Receiving Concurrent Federal Workers' Compensation, GAO-15-531 (Washington, DC: July 8, 2015).

Recommendation: To improve SSA's ability to detect, prevent, and recover potential DI benefit overpayments due to the concurrent receipt of Federal Employees' Compensation Act (FECA) benefits, the Commissioner of Social Security should, in accordance with OMB guidance, compare the costs and benefits of alternatives to SSA's current approach for reducing the potential for overpayments that result from the concurrent receipt of FECA benefits, which relies on beneficiaries to self-report any FECA benefits they receive. These alternatives could include, among others, routinely matching Department of Labor's (DOL) FECA program data with DI program data to detect potential DI overpayments.

Recommendation: To improve SSA's ability to detect, prevent, and recover potential DI benefit overpayments due to the concurrent receipt of FECA benefits, the Commissioner of Social Security should strengthen internal controls designed to prevent DI overpayments due to the concurrent receipt of FECA benefits by implementing the alternative that provides the greatest net benefits.

Actions Needed: SSA agreed with these recommendations. To implement these recommendations, SSA needs to fully implement its plans to use FECA data to reduce DI benefits in accordance with federal law, or implement an alternative approach that provides greater net benefits.

Director: Seto Bagdoyan, Forensic Audits and Investigative Service
Contact information: BagdoyanS@gao.gov (202) 512-6722

Disability Insurance: SSA Could Do More to Prevent Overpayments or Incorrect Waivers to Beneficiaries, GAO-16-34 (Washington, DC: October 29, 2015).

Recommendation: To improve compliance with waiver policies, SSA should develop a timetable for implementing updates to its Debt Management System to: (a) align system controls with SSA policy, so that waivers over $1,000 cannot be administratively waived; and (b) ensure that evidence supporting waiver decisions is sufficiently maintained to allow for subsequent monitoring and oversight.

Actions Needed: SSA agreed with this recommendation. In January 2018, SSA reported that in August 2017, the agency's Investment Review Board approved the Overpayment Redesign Project. This multi-year project will include functionality to ensure technicians cannot administratively waive overpayments over $1,000. However, until SSA finalizes changes to its Debt Management System to align with policy, SSA lacks assurance that staff will appropriately process waivers greater than $1,000.

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Director: Elizabeth Curda, Education, Workforce, and Income Security
Contact information: CurdaE@gao.gov (202) 512-4040

Disability Insurance: SSA Needs to Better Track Efforts and Evaluate Options to Recover Debt and Deter Potential Fraud, GAO-16-331 (Washington, DC: April 13, 2016).

Recommendation: To ensure effective and appropriate recovery of DI overpayments and administration of penalties and sanctions, the Acting Commissioner of the Social Security Administration should adjust the minimum withholding rate to 10 percent of monthly DI benefits to allow quicker recovery of debt.

Actions Needed: SSA agreed with this recommendation. SSA needs to increase the amount of DI overpayments it recovers by adjusting its minimum benefit withholding rate from $10 per month to 10 percent of monthly benefits. We reported that this change would result in an additional $276 million in overpayment debt recovered over a 5-year period.

Director: Elizabeth Curda, Education, Workforce, and Income Security
Contact information: CurdaE@gao.gov (202) 512-4040

Improving Financial Information for the Aging Population

Social Security: Improvements to Claims Process Could Help People Make Better Informed Decisions about Retirement Benefits, GAO-16-786 (Washington, DC: September 14, 2016).

Recommendation: To ensure that key information provided by claims specialists to potential claimants of Social Security retirement benefits is clear and consistent with SSA's Program Operations Manual System (POMS), the Commissioner of the SSA should take steps to ensure, when applicable, claims specialists inform claimants that delaying claiming will result in permanently higher monthly benefit amounts, and at least offer to provide claimants their estimated benefits at their current age, at full retirement age (FRA) (unless the claimant is already older than FRA), and age 70.

Actions Needed: SSA agreed with this recommendation. On October 19, 2016, SSA issued an administrative message reminding technicians (including claims specialists who discuss claiming with potential claimants) to (1) inform claimants filing for retirement insurance benefits that delaying results in permanently higher benefit amounts; and (2) provide claimants with estimated benefits at different claiming ages. To fully implement this recommendation, SSA will need to take additional periodic actions to ensure that claims specialists inform potential claimants, when applicable, that delaying claiming will result in permanently higher retirement benefits.

Director: Charles Jeszeck, Education, Workforce, and Income Security
Contact information: Jeszeckc@gao.gov (202) 512-7215

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Chairman JOHNSON. Thank you. I appreciate your testimony. Ms. Brannon, welcome. Thanks for being here. Please proceed.

STATEMENT OF VALERIE C. BRANNON, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Ms. BRANNON. Chairman Johnson, Ranking Member Larson, and members of the subcommittee. My name is Valerie Brannon. I am a legislative attorney in the American Law Division of the Congressional Research Service. Thank you for inviting me to testify today on behalf of CRS.

I will be addressing the statutes that may authorize someone to serve as acting commissioner of Social Security in the event of a vacancy in the office. There are two statutes that may authorize a governmental official to serve as acting commissioner. The first is the Federal Vacancies Reform Act of 1998, or the Vacancies Act, which generally governs acting officers serving in vacant advice and consent positions in the executive branch. The second statute is Section 702 of the Social Security Act which contains a provision pertaining specifically to a vacancy in the office of the commissioner.

The first statute, the Vacancies Act, generally governs vacancies in executive branch positions that require appointment through the advice and consent of the Senate. It usually provides the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any such position. The Vacancies Act places two kinds of limitations on acting service. First, the statute only allows certain classes of employees to perform the duties of a vacant position. And, second, it specifies that such employees may perform these duties for only a limited period of time.

The Vacancies Act allows three classes of officials to serve as acting officers. First, as a default rule, once the office becomes vacant, the first assistant to that office automatically becomes the acting officer. Alternatively, the President may direct two other classes to serve as an acting officer instead of that first assistant. Either a person who is currently serving in a different advice and consent position or certain senior employees working in the same agency.

The Vacancies Act also limits the amount of time that a vacant advice and consent position may be filled by an acting officer. There are two independent time limits. The first is a fixed term of days that runs from the date that the vacancy arose, and the second allows an acting officer to serve while a nomination to the position is pending in the Senate.

The second statute that may govern a vacancy in the commissioner's office is Section 702 of the Social Security Act which creates the positions of the commissioner and the deputy commissioner. Section 702 states that in the event of a vacancy in the office of the commissioner, the deputy commissioner shall be acting commissioner unless the President designates another officer of the government as acting commissioner. Section 702 does not explain who these other officers that may be directed by the President are, and it also doesn't contain any expressed time limitations on acting service.

As mentioned, the Vacancies Act usually provides the only way for an employee to temporarily perform the functions and duties of a vacant office. However, on its own terms, it is only exclusive unless another statute expressly designates someone to serve as an acting officer. Section 702 does designate another government official, the deputy commissioner, to temporarily perform the commissioner's duties as acting commissioner.

But just because the Vacancies Act does not apply exclusively to the position of the commissioner, that does not necessarily mean that it does not apply at all. It is possible that both the Vacancies Act and Section 702 could apply to a vacancy in the commissioner's office. If the two statutes are consistent, then this doesn't present any problems. But if there are inconsistencies between those two statutes, this could lead to challenges to an acting officer's authority. Imagine that one statute authorizes acting service but the other prohibits it. An acting commissioner might take an action under the more permissive statute, but someone could argue that the limitations of the other statute prohibited that action. If such an action was challenged in court, the judge would have to figure out not only whether this first possibly more permissive statute actually did permit the action, but also it would have to figure out which of the two conflicting statutes should prevail.

With respect to the commissioner's office, such a conflict is possible. The Vacancies Act creates a detailed scheme setting out who may serve and how long they may serve. On the other hand, Section 702 is silent on a few issues and could possibly be read as more permissive. However, it is also possible to read these two statutes as consistent.

There is very little case law interpreting these two statutes, so ultimately it is hard to reach any definite conclusions on this issue.

Thank you very much, and I will be happy to answer any questions you may have.

[The prepared statement of Valerie Brannon follows:]

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TESTIMONY

Statement of

Valerie C. Brannon
Legislative Attorney

Before

Committee on Ways and Means
Subcommittee on Social Security
U.S. House of Representatives

Hearing on

"Lacking a Leader: Challenges Facing the SSA After Over 5 Years of Acting Commissioners"

March 7, 2018

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Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee:

My name is Valerie Brannon. I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS regarding the vacancy in the office of the Commissioner of Social Security (Commissioner). My testimony will broadly address the statutory authority for other governmental officials to temporarily perform the duties of that office in an acting capacity.[1]

As discussed in more detail below, there are two statutes that could govern the ability of a government employee to serve as the Acting Commissioner. The first is the Federal Vacancies Reform Act of 1998 (Vacancies Act), the statute that generally governs the ability of government employees to perform the functions and duties of vacant advice and consent positions in the executive branch.[2] The second is Section 702 of the Social Security Act (Section 702), which creates the position of the Commissioner, along with a number of other high-level offices in the Social Security Administration (SSA).[3] Notably, Section 702 also contains a provision pertaining to a vacancy in the office of the Commissioner.[4]

Vacancies Act

The Vacancies Act generally provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate."[5] The law is triggered if an officer serving in an advice and consent position in the executive branch "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[6] With very few exceptions, the statute applies to most vacant advice and consent positions in the executive branch.[7] Importantly, the Vacancies Act places two kinds of limitations on acting service. First, the statute allows only certain

[1] This testimony is centrally concerned with the authority Congress has provided to allow an acting officer to temporarily exercise an office's powers. There may be other legal issues raised by an acting officer serving as the Commissioner of Social Security, such as the ability of the Commissioner to delegate duties to other officials to perform in their own capacities. *See* 42 U.S.C. § 902(a)(7) (authorizing Commissioner to assign duties and delegate authority). There may also be constitutional limitations on the ability of other officials to perform the duties of the Commissioner. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause of the U.S. Constitution]." (quoting U.S. CONST. art. II, § 2, cl. 2)). I am happy to explore any of these additional legal questions at the request of the Subcommittee.

[2] 5 U.S.C. §§ 3345-3349c. For a more thorough discussion of the Vacancies Act, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

[3] 42 U.S.C. § 902; Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994). Specifically, Section 702 also creates the offices of the Deputy Commissioner of Social Security, the Chief Actuary, the Chief Financial Officer, and the Inspector General. *Id.*

[4] 42 U.S.C. § 902(b)(4).

[5] 5 U.S.C. § 3347(a). The Vacancies Act only applies to functions or duties that are (1) established either by statute or regulation and (2) "required" by that statute or regulation "to be performed by the applicable officer (and only that officer)." *Id.* § 3348(a)(2). Accordingly, the Vacancies Act apparently restricts the exercise of nondelegable duties by other government officials. *See id.*; *see also* Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008).

[6] 5 U.S.C. §§ 3345, 3348.

[7] *See id.* §§ 3345(a), 3347(a), 3348(b), 3349(a) (excluding the Government Accountability Office); *id.* § 3349c (excluding members of certain boards and commissions, along with federal judges); *id.* § 3348(e) (excluding statutorily specified offices from the provision of the Vacancies Act that renders noncompliant actions void). *Cf. id.* § 3349b (providing that the Vacancies Act "shall not . . . affect" holdover statutes).

classes of employees to perform the duties of a vacant advice and consent position.[8] Second, the Vacancies Act specifies that such employees may perform these duties for only a limited period of time.[9]

Who Can Serve as an Acting Officer Under the Vacancies Act?

There are only three classes of government officials or employees who may temporarily perform the functions and duties of a vacant advice and consent office under the Vacancies Act.[10] First, as a default and automatic rule, once an office becomes vacant, "the first assistant to the office" becomes the acting officer.[11] Alternatively, under the Vacancies Act, the President "may direct" two other classes of people to serve as an acting officer instead of the "first assistant."[12] First, the President may direct a person currently serving in a different advice and consent position to serve as acting officer.[13] Second, the President can select a senior "officer or employee" of the same executive agency, if that employee served in that agency for at least 90 days during the year preceding the vacancy and if the rate of pay for that employee is at least GS-15 on the federal pay scale.[14]

How Long Can an Acting Officer Serve Under the Vacancies Act?

The Vacancies Act also limits the amount of time that a vacant advice and consent position may be filled by an acting officer. An acting officer may serve either (1) during a fixed 210-day period beginning on the date that the vacancy occurred, or (2) during the period while a "first or second nomination for the office" is pending in the Senate.[15] These two time periods run independently and concurrently.[16] Consequently, the submission and pendency of a nomination allows an acting officer to serve beyond the initial 210-day period.[17] The legislative history of the Vacancies Act suggests that an acting officer may serve during the pendency of a nomination even if that nomination is submitted after the initial 210-day period has expired.[18]

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[8] *Id.* § 3345.

[9] *Id.* §§ 3346, 3349a.

[10] *Id.* § 3345. Further, even individuals otherwise falling within one of these three classes might be prohibited from serving as an acting officer if they are themselves nominated by the President to serve permanently in that position. *See id.* § 3345(b). *See also* SW Gen., Inc. v. NLRB, 137 S. Ct. 929, 938 (2017) (holding 5 U.S.C. § 3345(b)(1) applies to all three classes of persons who might serve as acting officers under the Vacancies Act, rather than only to first assistants serving under 5 U.S.C. § 3345(a)(1)).

Individuals in one additional class may serve as an acting officer. Specifically, the Vacancies Act provides that if an officer serves a fixed term rather than serving at the pleasure of the President, and the President has nominated that officer "for reappointment for an additional term to the same office in an Executive department without a break in service," then the President may direct that officer to serve, subject to the same time limitations imposed by the Vacancies Act on any other acting officer. *Id.* § 3345(c)(1). Because the Commissioner serves a fixed six-year term, it is possible that this provision could allow a Commissioner who is re-nominated to the position to continue service. *See* 42 U.S.C. § 902(a)(3).

[11] 5 U.S.C. § 3345(a)(1).

[12] *Id.* § 3345(a). This directive *only* may come from the President. *Id.*

[13] *Id.* § 3345(a)(2).

[14] *Id.* § 3345(a)(3).

[15] *Id.* § 3346(a). If the first or second nomination to the office is "rejected by the Senate, withdrawn, or returned to the President by the Senate," the acting officer may continue to serve for a 210-day period beginning on the date of that rejection, withdrawal, or return. *Id.* § 3346(a).

[16] *See id.* § 3346(b).

[17] *See id.* § 3346.

[18] 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson). *Accord* Guidance on Application of Fed'l Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 68 (1999).

However, if the vacancy exists during the 60-day period beginning on the day a new President takes office, then the 210-day period begins the later of either 90 days after inauguration or 90 days after the date that the vacancy occurred.[19] Therefore, with respect to vacancies that existed on January 20, 2017, the Vacancies Act appears to have authorized certain government officials to serve in an acting capacity for a 300-day period beginning on January 20, 2017, and likely authorizes certain qualified officials to continue to serve upon the submission of a nominee.[20]

How is the Vacancies Act Enforced?

The heads of executive agencies are required to report any vacancies, along with information about acting officers and nominations, "to the Comptroller General of the United States and to each House of Congress."[21] Furthermore, if an individual is not serving in compliance with the Vacancies Act and attempts to perform "any function or duty of a vacant office," the Vacancies Act provides that such an action "shall have no force or effect."[22] Therefore, if an acting officer is not one of the three classes of government officials authorized to serve under the Vacancies Act or if an acting officer is serving after the relevant time periods have run, any attempt by that officer to perform a function or duty of an advice and consent office will have "no force or effect."[23] This provision might be enforced in courts if, for example, a private suit challenging the authority of a person to act seeks to nullify any noncompliant agency actions.[24] Additionally, if the Comptroller General determines that an officer has served "longer than the 210-day period," the Comptroller General must report this finding to the appropriate congressional committees, the President, and the Office of Personnel Management.[25]

Section 702 of the Social Security Act

Section 702 creates the positions of Commissioner and Deputy Commissioner of Social Security (Deputy Commissioner), along with a few other high-level positions, defining their duties and terms of service.[26] This provision was added to the Social Security Act as part of the 1994 reorganization that established the SSA as an independent agency.[27] Both the Commissioner and Deputy Commissioner positions require appointment through the advice and consent process.[28] Section 702 provides in relevant part that:

> The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of

[19] 5 U.S.C. § 3349a(b). This provision refers to the "transitional inauguration day," defined as "the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office." *Id.* § 3349a(a).

[20] *See id.* §§ 3346; 3349a.

[21] *Id.* § 3349(a).

[22] *Id.* § 3348(d)(1).

[23] *Id.*

[24] *See* S. REP. NO. 105-250, at 19-20 (1998) ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action."). *See, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 944 (2017) (holding government official violated Vacancies Act and affirming decision below that found an act taken by the official was invalid).

[25] 5 U.S.C. § 3349(b).

[26] 42 U.S.C. § 902.

[27] Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994).

[28] 42 U.S.C. §§ 902(a)(1), (b)(1).

> the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.[29]

Therefore, pursuant to Section 702, as a general matter, the Deputy Commissioner "shall be Acting Commissioner" in three situations: (1) the absence of the Commissioner; (2) the disability of the Commissioner; or (3) a vacancy in the office of the Commissioner.[30] In the case of a *vacancy* in the office, however, the Deputy Commissioner serves as Acting Commissioner "unless the President designates another officer of the Government as Acting Commissioner,"[31] Accordingly, in this third situation, if the President designates "another officer of the Government" as Acting Commissioner, the other "officer" will serve in that role instead of the Deputy Commissioner.[32]

Section 702 is silent on two critical issues. First, Section 702 does not define who is an "officer of the Government" that could be designated to serve as the Acting Commissioner in lieu of the Deputy Commissioner.[33] Second, Section 702 does not expressly limit the duration of an Acting Commissioner's service.[34]

Interaction between the Vacancies Act and Section 702

At first glance, both the Vacancies Act and Section 702 could potentially be viewed to govern a vacancy in the Commissioner's office. Section 702 expressly provides that in the event of a vacancy, the Deputy Commissioner shall serve as Acting Commissioner.[35] In turn, the Vacancies Act generally governs acting service for most executive branch offices,[36] and none of its limited exceptions seem to exempt the position of the Commissioner.[37] Any inconsistences between these two statutes may prompt challenges to the authority of an Acting Commissioner, if that official is not complying with one of the two statutes.[38]

Where two statutes encompass the same conduct, courts will, if possible, "read the statutes to give effect to each."[39] Courts are generally reluctant to conclude that statutes conflict and will usually assume that two laws "are capable of co-existence, . . . absent a clearly expressed congressional intention to the

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[29] *Id.* § 902(b)(4).

[30] *Id.* The President and the SSA have provided a further order of succession in the event that the offices of both the Commissioner and the Deputy Commissioner are vacant. *See SSA Organizational Manual, Chapter S: Social Security Administration*, SOC. SEC. ADMIN., https://www.ssa.gov/org/orgOC.htm (last visited Mar. 2, 2018) (referencing Presidential Memorandum on Providing an Order of Succession Within the Social Security Administration, 79 Fed. Reg. 63805 (Oct. 24, 2014)). *See also* Presidential Memorandum on Providing an Order of Succession Within the Social Security Administration, 81 Fed. Reg. 96337 (Dec. 30, 2016).

[31] *See* 42 U.S.C. § 902(b)(4).

[32] *See id.*; *cf.* United States v. Morrow, 266 U.S. 531, 534 (1925) ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation.").

[33] *See* 42 U.S.C. § 902(b)(4).

[34] *See id.*

[35] *See id.*

[36] 5 U.S.C. § 3347.

[37] *See supra* note 7. However, the Vacancies Act does provide that it will *not* be *exclusive* if another "statutory provision expressly" authorizes "an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1). Whether 42 U.S.C. § 902 renders the Vacancies Act *nonexclusive* as applied to this position will be discussed in greater detail below.

[38] *See, e.g.*, Lower E. Side People's Fed. Credit Union v. Trump, No. 1:17-cv-9536, 2018 U.S. Dist. LEXIS 17587, at *3-4 (S.D.N.Y. Feb. 1, 2018) (dismissing on standing grounds a suit challenging the authority of an acting officer designated under the Vacancies Act that argued that an agency-specific statute provided the sole authority for someone to serve as acting director of the agency).

[39] Watt v. Alaska, 451 U.S. 259, 267 (1981).

contrary."[40] With respect to the two statutes at issue here, as is discussed in more detail below, Congress provided some clues about how the Vacancies Act should interact with agency-specific statutes through the statute's exclusivity provision.[41]

Exclusivity of the Vacancies Act

As noted above, the Vacancies Act generally provides "the exclusive means" for authorizing acting service.[42] However, the statute is only exclusive "unless" another statutory provision "expressly . . . authorizes an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity."[43] Section 702 does authorize or designate another government official—the Deputy Commissioner—to temporarily perform the Commissioner's duties as "Acting Commissioner."[44] Accordingly, it is likely that on its own terms, the Vacancies Act is not the exclusive means to authorize an Acting Commissioner.[45] Put another way, the Vacancies Act allows for the operation of Section 702.

Open Questions Raised by Section 702

If Section 702 governs a vacancy in the Commissioner's office, there may be some open questions regarding the scope of the authority that the provision grants to acting officers. First, it is unclear *who* Section 702 authorizes to serve as the Acting Commissioner beyond the Deputy Commissioner. Section 702 appears to provide that the Deputy Commissioner will automatically succeed the Commissioner in an acting capacity in the case of a vacancy in the Commissioner's office.[46] However, Section 702 places a condition on this automatic succession by providing that the Deputy Commissioner is Acting Commissioner "unless the President designates another officer of the Government as Acting Commissioner."[47]

It is not entirely clear whether this language merely recognizes that other provisions of law might grant the President the authority to designate another acting officer or whether Section 702 itself grants the President that authority.[48] One plausible reading is that this clause refers to the designation of other

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[40] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[41] 5 U.S.C. § 3347.

[42] *Id.* § 3347(a).

[43] *Id.*

[44] *See* 42 U.S.C. § 902(b)(4).

[45] *See* 5 U.S.C. § 3347(a); 42 U.S.C. § 902(b)(4). This understanding of the statutory text finds support in the Vacancies Act's legislative history. *See* S. REP. NO. 105-250, at 15-16 (1998) (describing 42 U.S.C. § 902(b)(4) as one of the "existing statutes" governing acting service that "would be retained by" the Vacancies Act); 144 CONG. REC. S6414 (daily ed. June 16, 1998) (statement of Sen. Thompson) (stating that the bill "preserves those specific statutes" that already "provide a process by which persons can serve as acting officers when particular offices are vacant"). The relevant text of the proposed bill at the time of these statements was substantially similar to the text Congress ultimately enacted. *Compare* S. REP. NO. 105-250, at 26 (1998), *and* 144 CONG. REC. S6415 (daily ed. June 16, 1998), *with* 5 U.S.C. § 3347.

[46] *See* 42 U.S.C. § 902(b)(4) ("The Deputy Commissioner *shall* be Acting Commissioner . . . .") (emphasis added); *see, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 651 (2003) (noting "shall" is mandatory, not discretionary).

[47] *See* 42 U.S.C. § 902(b)(4).

[48] *Cf.* Alaska Bulk Carriers, Inc. v. Kreps, 595 F.2d 814, 835, 835 & n.108 (D.C. Cir. 1979), *rev'd*, Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) (discussing "housekeeping statutes" that "detail[] the means and methods of implementation of specific powers which are granted elsewhere in the statute" but do not constitute "an independent grant of power"); Colo. Gen. Assembly v. Lamm, 700 P.2d 508, 518-19 (Colo. 1985) (holding state statute "referring to transfers authorized by law . . . refers only to transfers which are authorized by some other provision of law").

officers *under the Vacancies Act*.[49] This reading may be persuasive because in 1994, at the time the current version of Section 702 was enacted,[50] the Vacancies Act's provisions allowing the President to direct someone other than a first assistant to serve as an acting officer also referred to "officers."[51] Specifically, the prior version of the Vacancies Act allowed the President to designate only heads of departments or Senate-confirmed officers to serve as an acting officer instead of a first assistant.[52] A 1979 Department of Justice opinion recognized "the close relationship" between the language of the Vacancies Act and a distinct statutory provision that, similar to Section 702, provided for a deputy to fill a vacancy in an acting capacity "unless the President shall designate 'another officer of the Government.'"[53] That opinion concluded that the agency-specific statute's proviso should be given the same meaning as the Vacancies Act.[54]

On the other hand, an argument can be made that the plain language of the proviso in Section 702 independently allows the President to designate another "officer of the Government" to serve as the Acting Commissioner "in the event of a vacancy in the office of the Commissioner."[55] Courts do sometimes interpret provisos to have independent effect.[56] For example, in one case, the U.S. Court of Appeals for the Ninth Circuit examined a bankruptcy statute concerning the legal effect that would result from dismissing a case, which provided in relevant part that the statutory outcome would occur "unless" a court "order[ed] otherwise."[57] The court concluded that this "unless" clause itself authorized a court to dismiss a case with prejudice, so as to avoid the legal consequences that would have otherwise resulted under the statute.[58]

If Section 702 is interpreted to affirmatively authorize the President to designate "another officer of the Government as Acting Commissioner," this interpretation raises another issue: the meaning of the phrase "officer of the Government."[59] In the context of executive branch employees, an "officer" often refers to a

[49] *See* 42 U.S.C. § 902(b)(4); 5 U.S.C. §§ 3345(a)(2)-(3).

[50] Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994).

[51] *See* S. REP. NO. 105-250, at 26 (1998).

[52] *See id.*

[53] Memorandum for the General Counsel, General Services Administration, 3 Op. O.L.C. 148, 149 (1979) (quoting 40 U.S.C. § 751(c), a provision that is now codified at 40 U.S.C. § 302(b)).

[54] *Id.* at 150. Another argument in favor of reading Section 702's proviso more narrowly is that in the context of executive agencies, courts are generally reluctant to construe ambiguous provisions to create new authority. *See* Gonzales v. Oregon, 546 U.S. 243, 262-63 (2006). *Cf., e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 309-10 (1979) (reading "housekeeping statute" to grant heads of agencies authority only to regulate internal affairs, rather than creating substantive regulatory powers).

[55] *See* 42 U.S.C. § 902(b)(4). We could find no case law interpreting the express proviso in Section 702. Moreover, courts have not interpreted statutes with similar language. *See* 38 U.S.C. § 304 ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary."); 40 U.S.C. § 302 ("The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant."); *cf.* 44 U.S.C. § 304 ("In case of the death, resignation, absence, or sickness of the Director of the Government Publishing Office, the Deputy Director of the Government Publishing Office shall perform the duties of the Director of the Government Publishing Office until a successor is appointed . . . ; but the President may direct any other officer of the Government, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed . . . .").

[56] *See* Republic of Iraq v. Beaty, 556 U.S. 848, 858 (2009) ("The principal clause granted the President a power; the second proviso purported to grant him an *additional* power. It was not, on any fair reading, an exception to, qualification of, or restraint on the principal power.") (emphasis in original). The proviso at issue in that case read, "The President may suspend the application of any provision of [a certain law]: . . . *Provided further*, That the President may make inapplicable . . . any other provision of law . . . ." *Id.* at 856 (quoting Pub. L. No. 108-11, § 1503, 117 Stat. 579 (2003)) (internal quotation marks omitted).

[57] Leavitt v. Soto (*In re* Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999) (quoting 11 U.S.C. § 349).

[58] *Id.*

[59] 42 U.S.C. § 902(b)(4).

special class of high-level officials who qualify as "officers of the United States" pursuant to the Appointments Clause of the U.S. Constitution.[60] However, this interpretation is not the only possible reading. Congress and the courts sometimes refer to lower-level government employees as officers,[61] even if those employees are not "officers" for the purposes of the Appointments Clause. Accordingly, if the exception contained in the vacancies clause of Section 702 has independent effect, it is unclear whether this provision would allow the President to designate only constitutional "officers of the United States"[62] to serve as the Acting Commissioner or whether the statute would also allow the President to select other governmental employees.

Further, Section 702 does not provide any limitations on the duration of acting service.[63] This silence could be interpreted to allow the Acting Commissioner to serve indefinitely.[64] However, even prior to the 1998 enactment of stricter and more broadly applicable time limitations in the Vacancies Act,[65] it was not necessarily the case that an acting officer could serve indefinitely.[66] The Department of Justice stated in at least one opinion that if a statute did require a position to be filled by advice and consent, it was "implicit" in such a statute that another official "may not properly serve indefinitely as Acting Director."[67] According to the Department of Justice, if there was no specific time limit provided in a statute allowing for acting service, the acting officer could serve for a "reasonable time."[68]

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[60] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause of the U.S. Constitution]." (quoting U.S. CONST. art. II, § 2, cl. 2)). *Cf.* Memorandum for the General Counsel, General Services Administration, 3 Op. O.L.C. 148, 149 (1979) ("We . . . conclude that a military officer who does not occupy a *statutory office* in a military department is not eligible for designation as Acting Administrator of General Services . . . .") (emphasis added).

[61] *See, e.g.*, United States v. Dubilier Condenser Corp., 289 U.S. 178, 199 (1933) (stating law that waived patent fees for "any *officer of the government*, except officers *and employees* of the Patent Office" was "evidently intended to encourage government *employees* to obtain patents" (emphasis added) (quoting Act of March 3, 1883, ch. 143, 22 Stat. 625.)).

[62] U.S. CONST. art. II, § 2, cl. 2. The term "Officers of the United States" includes both principal and inferior officers. *See* Edmond v. United States, 520 U.S. 651, 662-63 (1997) (discussing the distinction between principal and inferior officers).

[63] *See* 42 U.S.C. § 902(b)(4).

[64] *See, e.g.*, S. REP. NO. 105-250, at 3 (1998) (noting position of Department of Justice, prior to enactment of current version of Vacancies Act, that "where a department's organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Act's restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period").

[65] *See, e.g.*, S. REP. NO. 105-250, at 7 (1998) ("A limit must be placed on the President's time to act to fill a position. If the purpose of the Vacancies Act is to limit the President's power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides."); 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson) (discussing indefinite length of acting service as significant problem contrary to legislative intent); 144 CONG. REC. S11024 (daily ed. Sept. 28, 1998) (statement of Sen. Byrd) ("It is precisely that time restriction on the filling of these vacant positions that is, I believe, the linchpin of this issue.").

[66] *See, e.g.*, Dennis v. Luis, 741 F.2d 628, 634 (3d Cir. 1984) (holding there must be some limit on the time period an acting officer may serve because otherwise "there could be a complete nullification of the legislature's power of advice and consent," which would "obliterate the concept of separation-of-powers"). *Cf.* Williams v. Phillips, 482 F.2d 669, 671 (D.C. Cir. 1973) ("The Government concedes that the President cannot designate an acting officer indefinitely without any presentation to the Senate for confirmation. An indication of the reasonable time required by the President to select persons for nomination appears in the 30-day period provided in the Vacancies Act for temporary appointments of Executive Department officers pending nomination to the Senate . . . .").

[67] Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 289 (1977).

[68] *Id.* at 289-90. *Cf., e.g.*, Memorandum Opinion for the Deputy Counsel to the President, 6 Op. O.L.C. 119, 120 (1982) (noting disagreement with Comptroller General, who took "the position that the 30-day limitation of 5 U.S.C. § 3348 must be read into (continued...)

Possibility of the Vacancies Act Applying

Even if the Vacancies Act does not *exclusively* apply to the position of the Commissioner, that does not necessarily mean that it does not apply *at all*.[69] Section 702 does not itself expressly state that it is the exclusive means to temporarily fill a vacancy or state that the Vacancies Act is inapplicable.[70] Indeed, as discussed above, the "unless" clause in Section 702 at the very least contemplates that the President can designate "officers of the Government" under the authority of another statute.[71] It is possible, therefore, that both statutes might be available to temporarily fill the vacancy.[72] If both statutes apply, any inconsistencies would continue to present the question of which statute governs in the case of an unavoidable conflict. If an Acting Commissioner is authorized to serve under one statute but not by the other, this raises the possibility that her actions were unauthorized and subject to legal challenge, if the more restrictive statute governed her service. While the two statutes are generally consistent with each other, there are two possible areas of conflict between the Vacancies Act and Section 702.

Turning first to the question of *who* may serve as Acting Commissioner, both statutes are consistent in the sense that they both appear to contemplate the Deputy Commissioner automatically becoming Acting Commissioner in the event of a vacancy. Section 702 expressly provides for this,[73] and it is likely that the Deputy Commissioner would be the "first assistant" who automatically steps into the role under the Vacancies Act.[74] Although the term "first assistant" is not expressly defined in the Vacancies Act, and there is no statute or regulation that expressly defines any given official as the Commissioner's "first assistant,"[75] it seems likely that the Deputy Commissioner, as the second in command in the SSA,[76] should be considered the Commissioner's first assistant.[77]

(...continued)

all statutes authorizing the temporary filling of vacancies, because otherwise the President could circumvent the power of the Senate to advise and consent to appointments").

[69] Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C. ___, slip op. at 5 (Nov. 25, 2017). *See also* Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 556 (9th Cir. 2016) ("[The Vacancies Act] form[s] the exclusive means for filling a vacancy in an Executive agency office unless another statute expressly provides a means for filling such a vacancy. Because [29 U.S.C. § 153(d)] does so, neither the [Vacancies Act] nor [29 U.S.C. § 153(d)] is the *exclusive* means of appointing an Acting General Counsel of the [National Labor Relations Board].") (emphasis in original).

[70] *See* 42 U.S.C. § 902(b)(4).

[71] *Id.*

[72] *See* English v. Trump, No. 17-cv-2534, 2018 U.S. Dist. LEXIS 4571, at *24 (D.D.C. Jan. 10, 2018), *appeal filed*, No. 18-5007 (D.C. Cir. Jan. 12, 2018) (holding that statute providing that Deputy Director "shall . . . serve as acting Director" of the Consumer Financial Protection Bureau in case of the Director's "absence or unavailability" did not displace the Vacancies Act (quoting 12 U.S.C. § 5491(b)(5)) (internal quotation mark omitted)); S. REP. No. 105-250, at 17 (1998) ("[E]ven with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office."); Temporary Filling of Vacancies in the Office of U.S. Attorney, 27 Op. O.L.C. 149, 149 (2003) (concluding that the Vacancies Act and a separate statute, 28 U.S.C. § 546(a), were both "available" to temporarily fill the position).

[73] 42 U.S.C. § 902(b)(4) ("The Deputy Commissioner shall be Acting Commissioner . . . in the event of a vacancy in the office of the Commissioner.").

[74] *See* 5 U.S.C. §§ 3345(a)(1) ("[T]he first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . .").

[75] *See* 42 U.S.C. § 902; 28 C.F.R. § 422.1; *SSA Organizational Manual, Chapter S: Social Security Administration*, SOC. SEC. ADMIN., https://www.ssa.gov/org/orgOC.htm (last visited Mar. 2, 2018). *See generally* Guidance on Application of Fed'l Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63 (1999) ("At a minimum, a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of the Vacancies Reform Act."). *Cf., e.g.*, 28 U.S.C. § 508 ("[F]or the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."); 28 C.F.R. § 0.137(b) (2017) ("Every office within the Department [of Justice] to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998. Where there is a position of Principal Deputy to the . . . office, (continued...)

However, both statutes also provide for the possibility that the President might designate someone other than the Deputy Commissioner to serve as Acting Commissioner.[78] The Vacancies Act would allow the President to select either a person currently serving in any other advice and consent position or certain senior employees from the SSA.[79] As discussed, it is unclear whether Section 702 merely recognizes that other provisions of law—like the Vacancies Act—might allow the President to designate others as Acting Commissioner, or whether it instead independently grants the President the authority to select "another officer of the Government," whatever that phrase might mean.[80] The statutes may conflict if Section 702 and the Vacancies Act are interpreted to allow the President to direct different classes of individuals to serve as Acting Commissioner.

The statutes might also conflict with respect to *how long* a person may serve as Acting Commissioner. The Vacancies Act would only allow an Acting Commissioner to serve for either a limited, precisely set period of time starting on the date of the vacancy or while a nomination to the position is pending in the Senate.[81] Section 702 does not provide any express limitations on the duration of acting service, and on its own terms, might allow an Acting Commissioner to serve for a "reasonable" period of time, which could conceivably last longer than the period outlined in the Vacancies Act.[82]

Conclusion

The Vacancies Act sets out a detailed scheme delineating which governmental officials the President may direct to serve as acting officers[83] and expressly limits the duration of an acting officer's service.[84] Section 702 is largely silent on these issues and could possibly be read as more permissive than the Vacancies Act.[85] Accordingly, if, for example, an Acting Commissioner is not one of the classes of people authorized to serve under the Vacancies Act or is serving beyond the time limitations outlined in that law, but may otherwise be complying with Section 702, a potential conflict may exist between the two laws.[86] In such a situation, if the actions of the Acting Commissioner were challenged in a court as violating the Vacancies Act, the court would likely interpret the two statutes so that they are in harmony with each other.[87] One way to do this would be to read Section 702 narrowly, so that the limitations in the Vacancies

(...continued)

the Principal Deputy shall be the First Assistant.").

[76] *See Organizational Chart*, SOC. SEC. ADMIN., https://www.ssa.gov/org/ssachart.pdf (last visited Mar. 2, 2018).

[77] *See* 144 CONG. REC. S11037 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman) (describing "first assistant" as "a term of art that generally refers to the top deputy"); 42 U.S.C. § 902(b) (creating position of Deputy Commissioner and providing that Deputy Commissioner will serve as Acting Commissioner during the Commissioner's absence or disability or in the event of a vacancy in the office).

[78] *See* 42 U.S.C. § 902(b)(4); 5 U.S.C. §§ 3345(a)(2)-(3).

[79] *See* 5 U.S.C. §§ 3345(a)(2)-(3).

[80] *See* 42 U.S.C. § 902(b)(4).

[81] *See* 5 U.S.C. § 3346.

[82] *See* 42 U.S.C. § 902(b)(4); Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977) (outlining factors that determine what period is reasonable under the circumstances).

[83] *See* 5 U.S.C. § 3345.

[84] *Id.* § 3346.

[85] *See* 42 U.S.C. § 902(b)(4).

[86] *Cf.* CRS Legal Sidebar LSB10036, *UPDATE: Who's the Boss at the CFPB?*, by Valerie C. Brannon and Jared P. Cole (describing conflict over vacancy in the position of the Director of the Consumer Financial Protection Bureau in which the outgoing Director invoked an agency-specific statute to name an Acting Director, and the President subsequently invoked the Vacancies Act to name a different person as Acting Director).

[87] *See, e.g.*, Watt v. Alaska, 451 U.S. 259, 267 (1981).

Act govern. An alternative way to reconcile the two statutes would be to conclude because both statutes confer discretion on the President, whichever the President invokes should control.[88] If a court determined that the statutes instead irreconcilably conflict, it might turn to traditional principles of statutory interpretation, such as the rule of favoring the more specific statute over the more general law.[89] Ultimately, however, because of the dearth of case law interpreting either statute, it is difficult to draw any definite conclusions as to how a reviewing court might resolve a legal challenge over the actions of the Acting Commissioner.

[88] *See* Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 556 (9th Cir. 2016); English v. Trump, No. 17-cv-2534, 2018 U.S. Dist. LEXIS 4571, at *24 (D.D.C. Jan. 10, 2018), *appeal filed*, No. 18-5007 (D.C. Cir. Jan. 12, 2018). It could be argued, however, that this reading of the statute renders the express limitations of the Vacancies Act superfluous, suggesting that such an interpretation might not properly give effect to both statutes. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (noting that courts should give effect to two statutes if that "would not render one or the other wholly superfluous"). *See also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("The courts are not at liberty to pick and choose among congressional enactments."); *but see Hooks,* 816 F.3d at 556 (concluding that Congress intended the Vacancies Act to provide an alternative process for temporarily occupying the office) (citing S. REP. NO. 105-250, at 17 (1998)).

[89] *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (noting "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (noting that in "conflict[s] between laws of equivalent dignity," "the specific governs the general"). In such a situation, a court might conclude that Section 702 should control because it is the more specific statute: Section 702 applies solely to the Commissioner, while the Vacancies Act generally applies to the entire executive branch. *Compare* 42 U.S.C. § 902(b)(4), *with* 5 U.S.C. § 3347.

Chairman JOHNSON. Thank you.

What is the one thing you want us to get out of that comment?

Ms. BRANNON. There are some complicated statutes that govern this vacancy.

Chairman JOHNSON. And you follow the statutes?

Ms. BRANNON. I do.

Chairman JOHNSON. Thank you very much.

Mr. Richtman, welcome. Thanks for being here. Please proceed.

STATEMENT OF MAX RICHTMAN, PRESIDENT AND CEO, NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE

Mr. RICHTMAN. Thank you, Mr. Chairman, Ranking Member Larson, and members of the subcommittee. On behalf of the National Committee to Preserve Social Security and Medicare, I want to thank you for inviting me to testify at this morning's hearing regarding the challenges faced by Social Security after being led for 5 years—over 5 years by a series of acting commissioners.

Before I present my statement, I just want to say on behalf of the millions of members and supporters of the national committee, I would like to express my thanks to you, Chairman Johnson, for your many years of leadership on matters involving Social Security and, of course, for your distinguished service to our country for many years prior to that.

Turning to the subject of today's hearing, I believe that extended periods without a confirmed commissioner is obviously not desirable. When Congress decided to make the Social Security Administration an independent agency back in 1994, one of the goals of the legislation was to provide the agency with continuity of leadership. In fact, I am told the Senate-passed version of the bill required the President to nominate a new commissioner within 60 days of enactment.

While desirable, we do not believe that the problems confronting Social Security can be fixed simply by nominating and confirming a new commissioner. Congress must also provide the new commissioner with the resources he or she will need to do the job, and that means adequate funding for this important agency. Unfortunately, what we have seen in recent years is a steady decline in funding for the agency at exactly the same time the workload has soared.

Mr. Larson mentioned 10,000 people being added to the roles every day. It is about a million additional people added every year for the last few years. This is not a time to be reducing funding. In fact, the Social Security Administration's budget has been cut by a total of about 11 percent adjusted for inflation. These cuts have forced the closing of field offices, shortening of office hours, reductions in overtime, shrinking of staff. And automation has helped some but not enough to prevent the deterioration in levels of service.

So it is not surprising that the quality and timeliness of the service has declined. Getting an appointment to file a claim can take weeks, and some offices—and those who visit an office without an appointment have to wait hours in many cases. Service on the 800 number line has declined as well. Currently it takes about 20 minutes to reach a service representative. In 2010 it took about 3 min-

utes. Many seniors simply hang up—give up and hang up. In fact, we called the 800 number when you gaveled the hearing to order. We are still on hold. We are told it will be about an hour.

So I wanted to also make a comment about how disturbing it is when you look at the disability hearing situation. Over the past few years, a historically high backlog has grown. There are over a million cases waiting to be heard. Right now it takes about 600 days on average for a decision to be made. The human hardship caused by these delays is enormous. People are losing their homes, delaying healthcare declaring bankruptcy. And they are dying. About 10,000 people die each year while waiting for a decision.

If this hearing goes for about 2 hours, two people will die during the course of the hearing waiting for an appeals decision. Social Security's administrative funding has been neglected for far too long. I believe it is time for Members of Congress to adequately fund Social Security so it can provide the vital services that American seniors expect and deserve.

During the debate on the 2018 omnibus appropriations, the national committee urges members to provide the agency with 560 million additional dollars over this year's appropriated level of $12.4 million. This will increase and help restore some of the cuts that were made since 2010, and cover—or begin to cover inflation. We believe similar increases should be in the 2019 appropriations bill.

To conclude, Mr. Chairman, we agree completely that having a confirmed commissioner is important, but it is also important that the agency has adequate funding. These two must be united if the special—if the Social Security Administration is able to meet its obligations to the American people.

Thank you very much.

[The prepared statement of Max Richtman follows:]

Statement of
Max Richtman, President and CEO
National Committee to Preserve Social Security and Medicare
Before the Committee on Ways and Means
Subcommittee on Social Security
House of Representatives
Hearing on
"Lacking a Leader: Challenges Facing the SSA
After Over 5 years of Acting Commissioners"
March 7, 2018

Chairman Johnson and Ranking Member Larson:

On behalf of the millions of members and supporters of the National Committee to Preserve Social Security and Medicare, I want to thank you for holding this hearing focused on the challenges facing the Social Security Administration (SSA) after over five years of acting commissioners, highlighting the need for stable leadership for SSA. I am honored to testify before the Subcommittee today.

First a few words about our organization. National Committee members come from all walks of life and every political persuasion. What unites them is their passion for protecting and strengthening Social Security and Medicare, not just for themselves, but for their children and grandchildren as well. Our members see Social Security as an inter-generational compact that protects all members of the family. To them, it is a single integrated system of benefits that provides protection from birth to death. It is a system where all of its parts are equally important.

Through the services it provides, the SSA touches the lives of virtually all Americans, including the 67 million individuals who receive Social Security and Supplemental Security Income (SSI) benefits and the over 173 million workers who are contributing to Social Security today. One out of every five Americans receives monthly cash benefits from Social Security or SSI, the major programs that SSA administers. This fact alone highlights the critical role customer service plays in the functioning of this agency as it provides services to millions of Americans.

Importance of Today's Hearing

The National Committee agrees with you, Mr. Chairman, that the Social Security Administration needs strong leadership. We also believe that the problems confronting SSA cannot be remedied simply by nominating and confirming a new Commissioner. We urge Congress to also provide the tools needed by a new Commissioner to deal with the agency's challenges, and that means adequate

funding for this critically important agency. Unfortunately, what we have seen in recent years is a steady decline in funding for the agency at exactly the same time that its workload has soared.

Magnitude of SSA's Responsibilities

Social Security is an essential economic lifeline for millions of America's most vulnerable people, including aged individuals and persons with disabilities, as well as their spouses, dependents and survivors. At the end of 2017, 45.5 million people were receiving retirement and survivor benefits and another 10.4 million disabled workers and their family members were receiving disability benefits. In fiscal year 2017, SSA:

- Paid approximately $990 billion in benefits to over 69 million Social Security and SSI beneficiaries;
- Served about 42 million visitors to its network of 1,200 field offices nationwide;
- Completed over 5.6 million new applications for Social Security retirement, survivors and Medicare benefits; almost 2.5 million applications for initial disability claims and almost 187,000 SSI aged claims;
- Handled over 36 million calls on the agency's toll-free telephone service;
- Completed nearly 3.5 million program integrity reviews; and
- Posted over 279 million earnings reports to workers' records.

While there is no denying the extraordinary magnitude of these achievements, recent reductions in the agency's administrative budgets have taken their toll on the quality and timeliness of the services the agency provides.

Effect of Budget Cuts

Budget cuts since 2010, estimated to equal 11 percent (after adjusting for inflation), have led to long waits on the phone and in field offices for taxpayers and beneficiaries, as well as record-high disability backlogs. While SSA's appropriation for FY 2018 is still a work in progress, both the Administration and House appear intent on basically flat-lining the agency's appropriation relative to FY 2017. Unfortunately, the Senate Labor-HHS Appropriations Subcommittee has proposed to reduce the House's proposed funding level for the agency by $493 million. We strongly urge that funds made available in the recently-enacted budget agreement provide SSA with at least an additional $560 million over the FY 2017 SSA appropriated level of $12.482 billion. This increase will help to restore the cuts made since 2010 and cover inflationary increases in operating costs. We also believe a similar increase should be included in the FY 2019 appropriations bill which would strengthen the ability of a new Commissioner to address issues currently plaguing SSA.

SSA has already made cuts in customer service to stay within the confines of these extremely tight budgets, forcing it to close field offices, shorten office hours and shrink its staff. While SSA has increased automation and reduced the number of Social Security statements that it provides, these

efficiencies cannot compensate for the fact that SSA serves an additional one million beneficiaries each year.

As workloads and costs grow and budgets shrink, SSA's service has worsened by nearly every metric. Further cuts—and make no mistake, static funding is a $350 million cut—would force the agency to freeze hiring, furlough employees, shutter more field offices, or further restrict field office hours leading to longer wait times for the vulnerable seniors for whom SSA's services are an essential lifeline.

Additional reductions in SSA's funding will only lead to further reductions in service. The agency has already cut service significantly. Rather than compelling agency officials to cut even more deeply into the sinew and bone of the agency, we call on the Congress to provide SSA with the resources it needs to do its job as it should be done, with accessible, timely, and accurate service to all who need it.

Take a Number and Wait…

The American people can conduct business at SSA field offices in almost every community in the country. Last year, 42 million people visited field offices to apply for benefits, replace lost Social Security cards, and to report changes that might affect their future eligibility for benefits.

Since the end of FY 2016, SSA lost over 1,000 field office staff, bringing the loss since 2010 to 3,500. Under the funding level for FY 2019 proposed by the Trump Administration, those losses would increase by another 1,000 staff. These reductions have taken a toll on customer service. Field offices must serve nearly the same number of visitors with far fewer staff available for doing so. The result has been increases in the length of time visitors must wait for an appointment. In some offices, seniors are required to wait weeks for an appointment to file a claim while those who come to an office without having an appointment may wait for hours to speak with an agent. America's seniors deserve better than this.

SSA's Toll-Free Telephone Service Also Faces Problems

SSA's national toll-free telephone number is the gateway to the agency's services. Thirty-six million individuals used SSA's toll-free service in FY 2017. Agents take claims for benefits, schedule appointments and answer questions about SSA's programs. Automated services are also available 24 hours a day, seven days a week.

Unfortunately, budget cuts have degraded the level of service provided by the teleservice centers as well. Recent performance data indicate that most Americans who call the toll-free service experience difficulties using it to resolve questions. The majority of callers give up without even getting through. They either get a busy signal or hang up after lengthy waits. Wait times have worsened. In 2010 each caller waited about 3 minutes to speak to an agent. Currently callers wait for an agent, on average, about 20 minutes. This is unacceptable.

Most Workers No Longer Receive Social Security Statements

The President's FY 2019 budget proposes to mail only 15 million Social Security Statements, mostly to individuals who are 60 or older and who have not yet filed for Social Security benefits. This is down from over 150 million statements being produced as recently as 2010. These reductions, driven by budget cuts, have occurred, even though section 1143 of the Social Security Act unambiguously requires SSA to provide statements annually to most workers 25 and older.

This is yet another example of the harmful effects of budget cuts at SSA and illustrates how they have sapped the ability of the agency to fulfill its obligations under the law. Congress should restore funding for Social Security statements so that all Americans are informed annually of their rights and benefits under the Social Security program.

Disability Appeals Backlogs are at Historic Highs

SSA administers the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs. Under these two programs, SSA pays benefits to workers with impairments that are so severe that they cannot support themselves and their families. The average processing time for initial claims has held fairly steady at about 3 to 4 months.

Unfortunately, the same cannot be said for those individuals who appeal when their initial application for benefits is denied. In that situation, the next step in the appeals process is to appear before an administrative law judge, who decides the case. Over the past few years a historically high backlog of hearing cases has developed. Currently, over one million individuals are caught in this backlog, and each will wait over 600 days, on average, for a decision.

The hearing backlog has an enormous human cost associated with it. Waiting nearly two years for a final decision, as a typical appellant does, causes financial and medical hardship. Some applicants will lose their homes or have to declare bankruptcy while waiting for a decision on their appeal. Many will experience a decline in health, and unfortunately, some will die. An estimated 10,000 individuals died in FY 2017 while waiting for a decision. To set this in context, during the course of this hearing, more than two individuals will have died while waiting for a decision on their disability claim. This should not be an acceptable outcome.

The Path Forward

To summarize, the Social Security Administration faces enormous challenges in the years to come. The largest age cohorts of the baby boom generation are only now reaching retirement age and their need for services can be met only if the agency is enabled to meet these challenges with both strong leadership in the form of a confirmed Commissioner and with adequate funding from Congress. These two considerations must be united in tandem if SSA is to provide a level of service the American people expect and deserve.

Committee on Ways and Means
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: MAX RICHTMAN		
1. Are you testifying on behalf of a Federal, State, or Local Government entity? a. Name of entity(ies). b. Briefly describe the capacity in which you represent this entity.	Yes ☐	No ☒
2. Are you testifying on behalf of any non-governmental entity(ies)? a. Name of entity(ies). NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE b. Briefly describe the capacity in which you represent this entity. PRESIDENT & CEO	Yes ☒	No ☐
3. Please list any Federal grants or contracts (including subgrants or subcontracts) which you have received during the current fiscal year or either of the two previous fiscal years that are related to the subject matter of the hearing: NONE		
4. Please list any grants, contracts, or payments originating from foreign governments which you have received during the current calendar year or either of the two previous calendar years that are related to the subject matter of the hearing: NONE		
5. Please list any offices or elected positions you hold.		
6. Does the entity(ies) you represent, other than yourself, have parent organizations, subsidiaries, or partnerships you are not representing?	Yes ☐	No ☒
7. Please list any Federal grants or contracts (including subgrants or subcontracts) which were received by the entity(ies) you represent during the current fiscal year or either of the two previous fiscal years, which exceed 10 percent of entity(ies) revenues in the year received. Include the source and amount of each grant or contract. Attach a second page if necessary. NONE		
8. Please list any grants, contracts, or payments originating from foreign governments which were received by the entity(ies) you represent during the current fiscal year or either of the two previous fiscal years related to the subject matter of the hearing. Include the source and amount of each grant or contract. Attach a second page if necessary. NONE		

Chairman JOHNSON. Thank you, sir.

Mr. Stier, welcome, and thanks for being here. Please proceed.

STATEMENT OF MAX STIER, PRESIDENT AND CEO, PARTNERSHIP FOR PUBLIC SERVICE

Mr. STIER. Yeah. Thank you very much, Mr. Chairman, ranking Member Larson, members of the committee. My name is Max Stier. I am the president and CEO of the Partnership for Public Service. We are a nonpartisan, nonprofit organization working to make the Federal Government more effective.

This hearing is a terrific hearing to focus on a critical issue. We have a broken system. No other democracy on this planet has a new administration walking in with the requirement of putting in 4,000 political appointees, 1,200 of them requiring Senate confirmation. So this is an issue that actually extends beyond Social Security but clearly is a big issue here as well. And your hearing is critical to make sure that the spotlight is placed on it.

The problem is a big one. No administration has staffed quickly. This administration is well behind prior administrations. We tracked the top 630-some-odd appointments of those 1,200 that require Senate confirmation. Of those, only 274 are actually filled. And you are looking at 218 where there is no nominee. That is a big problem. There are big chunks of government where a critical leader is simply not in place.

Mr. Chairman, you made a great point in your opening comments. It matters. To have a temporary or an acting individual, in my terms, it is the equivalent of a substitute teacher. They may be a wonderful educator, but they get no respect. Everyone knows they are not there for the long-term. People understand that they are not going to take on the tough issues or think about long-term solutions. And their decisions aren't going to be viewed as final. It is a real problem. Great people may be operating in those positions, but they are operating with two hands tied behind their back. That is no way to do things.

At SSA, it is not just the commissioner. You are talking about three Senate-confirmed positions, and all three don't have a permanent person in place. You only have one nominee for the IG. That is a big problem. And then it cascades through the rest of the organization where you have acting individuals in critical spots. So you have an acting deputy commissioner for operations, an acting deputy CIO, acting chief information security officer. And three of the ten regional commissioners are also acting.

Having acting leadership at the top has consequences throughout the organization. Hard to recruit people, hard to make decisions for full-time folk if you don't know who the real boss is going to be. That is a big problem. These positions are critical to all kinds of issues that are fundamental to the operations of SSA. And we need to make sure we get folks in there.

A couple of facts about SSA that are worth focusing on for a second. Note: Only about 4.3 percent of the SSA population workforce itself is under the age of 30. There are six times as many people in the IT workforce over the age of 60 than under the age of 30. You are not going to get done the critical work you need to do without the right workforce, and you don't have it there right now.

So, one—so what can you do about it? This committee hearing is fundamental. So kudos to you for doing it. Five ideas for you. I am going to run through them fast.

Number one. It is not just getting someone in place. That is fundamental. But you need to find the qualities and competencies needed for these roles that are open. It is not good enough just to have someone in the seat. You need to make sure you have got someone who has got large management capabilities, can deal with the IT transformation that needs to take place. So identify those capabilities.

Number two, you need a job—that is a job description. Number two, you need a performance plan. You need to make sure that they are actually being held accountable for specific things that need to be changed, and that needs to be transparent in real-time so you understand whether they are doing the job and it is being done well.

Number three, use the data that you already have. The Federal employee viewpoint survey is a powerful tool to tell you what is going on in these agencies. Not a good story at SSA. In 2012, it was number six in our best places to work rankings. Today it is number 12 out of 18. That is a big drop. And if you look at the numbers themselves, there are some big issues. So on the question, for example, employees are encouraged to find better ways of doing things, at SSA, that is only 55 percent of the employees would say yes. That number is 18 points lower than our private sector benchmark. On the questions about are my talents being used while in the workplace at SSA? Again, that is 54 percent. That is 23 percent below a private sector benchmark.

Fundamentally, though, you have an incredibly mission-driven workforce. So one area where their numbers are better than the private sector to the question, I am willing to put in the extra effort to get my job done. You have got 95.6 percent of the employees that are saying that. They care about what they are doing.

So now number four recommendation, consider tying the 6-year term to confirmation. The chairman noted that you are 5 years into a term. You do need a long tenure if you are going to get real work done and to do real transformation. You know, average tenure of an ordinary public political appointee is 18 months to 2 years. That is one of the big problems for government. You have got short-term leaders not aligned to the long-term needs of the organizations they run. A 6-year term makes sense, but only—it makes sense only if it is real, if the person walking in has that full tenure. That is not what you have right now.

And then you all have responsibility for more than the Social Security Administration. Please do this for the other agencies you are looking out for as well, because these same issues play out across the board.

Thank you very much.

[The prepared statement of Max Stier follows:]

Statement of Max Stier
President and CEO
Partnership for Public Service

Written statement prepared for

The House Committee on Ways and Means Subcommittee on Social Security

Hearing entitled,

"Lacking a Leader: Challenges Facing the SSA after over 5 Years of Acting Commissioners"

March 7, 2018

Chairman Johnson, Ranking Member Larson and members of the subcommittee, thank you for the opportunity to appear before you today. I am Max Stier, President and CEO of the Partnership for Public Service, a nonpartisan, nonprofit organization that works to revitalize our federal government by inspiring a new generation to serve and by transforming the way government works.

The Partnership works to inspire and educate mission-critical talent on the importance and rewards of public service. We also work with government leaders to prepare them to build strong teams, drive innovation, and work across organizational boundaries to deliver results for America. Our work includes all aspects of how the federal government manages people – attracting them to government, leading and engaging them, supporting their development, managing performance – all the essential ingredients for creating, developing and maintaining a world-class workforce. We also honor the important contributions that federal employees make every day to help strengthen and protect our country through our annual recognition of excellence in the civil service with the *Samuel J. Heyman Service to America Medals* program.

The Partnership's programs and activities largely center around the need for strong, capable leaders in the federal government, in both career and political leadership positions. The reason for that is simple and straightforward – leadership is intrinsically tied to the ability of any organization to be successful. I hope that my testimony today will provide insight into the effects that leadership vacancies have on agencies, the crucial need for early and ongoing planning by both presidents-elect and presidents on how to fill those vacancies, ways that the administration and Congress can each work to reduce vacancies in leadership positions, and ways to increase transparency into which important federal positions are vacant.

Impact of Vacancies on Agency Operations

The Subcommittee on Social Security is right to focus on leadership positions left vacant within the Social Security Administration (SSA). SSA is not a cabinet level agency but is more familiar to most Americans than other federal agencies. Americans expect the agency to provide financial security to us in the later years in life and ensure needed support for those who qualify for disability payments.

SSA employs a workforce of more than 60,000 full-time equivalent employees through a network of 1,200 field offices across the country and the world. SSA benefits will reach approximately 71 million individuals this year. Through administration of the Old-Age Survivors Insurance, Disability Insurance and Supplemental Security Income programs, SSA distributed approximately $985 billion in payments in fiscal year 2017. SSA also in fiscal year 2017 completed 5.6 million survivor claims, 2.4 initial disability claims, over 595,000 disability reconsiderations, and handled over 36 million phone calls through its national 800 number.[1]

SSA serves every American at some point in their lives, and its mission requires sustained attention and consistent leadership. Each year, the SSA Office of Inspector General (itself under acting leadership since May of 2016) identifies the top management and performance challenges facing the agency. The list includes:

- improving customer service;
- modernizing information technology infrastructure;
- securing information systems and protecting sensitive data;
- reducing improper payments and increasing overpayment recoveries;
- improving administration of the disability programs;
- strengthening planning, transparency, and accountability; and

[1] "Annual Performance Report FY 2017 – FY 2019." *Social Security Administration*, February 2018, pp. 3-4, 32-34, 37, https://www.ssa.gov/budget/FY19Files/2019APR.pdf.

- strengthening the integrity and protection of the social security number.[2]

These are daunting challenges, and addressing them successfully starts with a vision and a strategy set by a dedicated team of both political and career leaders.

There are three full-time Senate-confirmed positions within SSA, both the commissioner and deputy commissioner as well as the inspector general.[3] Of these positions, there are no nominees for commissioner or deputy commissioner, and the nominee for inspector general has been pending in the Senate since October 2017. The last Senate-confirmed commissioner of SSA left the agency in 2013 and the position has been filled by acting officials over the last five years.

Vacancies in presidentially-appointed Senate-confirmed (PAS) positions across the government are expected, given the short-term nature of political positions. Even so, the number of vacancies and their duration can be diminished through advance planning and effective actions by an administration and the Senate.

Career civil servants are often designated to serve temporarily in vacant Senate-confirmed positions in an acting capacity because they are senior and highly-regarded leaders in their agencies – as is the case of SSA's current acting commissioner. In other cases acting officials are political appointees who have had distinguished careers and have earned the confidence and trust of the president – as was the case of the previous acting commissioner.

The reality is, though, that acting officials often are not able to operate with the full perceived authority that flows from Senate confirmation. Some acting officials do not feel like it is their place to make long-term policy, operational, or management decisions that will bind their successors. I often make an analogy to substitute teachers here – they are skilled professionals who have much to offer their students, but they are not perceived by those around them as having the full authority of the teacher, and they do not view themselves as having the right to make decisions with long-term impact. Saying "I am acting" is simply not as powerful as saying "I was nominated by the President and confirmed by the U.S. Senate."

Vacancies in top leadership positions may cause harm to an organization's ability to carry out its mission. The Partnership has found that high-level vacancies in particular can have the effect of slowing decision-making, ultimately diluting agencies' ability to best serve the public interest. For example, the Partnership believes that over the years, frequent and often lengthy vacancies at the Department of Homeland Security have been a key driver of the agency's performance and morale challenges.[4] Thad Allen, the former commandant of the Coast Guard, has said that when there is a vacancy, "people who are in an acting capacity feel they do not have the power to make long-term changes and do what they need to do." Another senior official who held positions at the departments of State and Defense under Presidents George W. Bush and Barack Obama characterized agencies as being thrown into neutral gear when there are acting officials. He said that those serving in an acting capacity usually "take the path of least resistance."[5]

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[2] "Fiscal Year 2017 Inspector General's Statement on the Social Security Administration's Major Management and Performance Challenges." *Office of the Inspector General, Social Security Administration*, November 2017.

[3] Three of the seven members of the agency's part-time advisory board are also Senate-confirmed positions.

[4] Written testimony of Max Stier, prepared for the House Committee on Homeland Security hearing entitled, "Help Wanted at DHS: Implications of Leadership Vacancies on the Mission and Morale." *Partnership for Public Service,* December 12, 2013.

[5] "Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch." *Partnership for Public Service*, September 2016, p. 29, https://ourpublicservice.org/publications/viewcontentdetails.php?id=589

Another impact of long-term vacancies at the top of an agency is that decisions about filling other senior leadership positions are sometimes put on hold. An agency's ability to recruit the best candidates for these jobs is diminished without permanent leadership. A big factor for anyone considering a job is who the boss will be. Uncertainty created by temporary leadership exacerbates what is already a tough recruiting environment.

The vacancy at the top is likely contributing to the existence of vacancies in other political or career leadership positions within SSA. The position of deputy commissioner for operations is vacant, having previously been held by the individual now serving as the acting commissioner. As of January 2018, the position of acting associate commissioner for international programs is vacant, and acting officials are serving as the deputy chief information officer and associate commissioner for information security/chief information security officer – two key positions responsible for taking on the agency's enormous challenges with information technology modernization and ensuring the agency's cybersecurity. Other positions filled by acting officials include three of the agency's ten regional commissioners, the deputy commissioner for communications, and the deputy commissioner for legislative and congressional affairs.[6]

And finally, vacancies also create ripple effects that can cause stress on the agency. When leadership positions are vacant, employees may feel uncertainty about the future direction of their agency. Also, each level of leader must move up a notch in a temporary capacity when there is a vacancy. This disrupts agency operations and in reality puts many leaders in the position of being "dual-hatted" – they assume duties of the position one notch above but are expected to ensure the execution of their regular jobs. In particular, oversight of an agency's management can suffer when the deputy – who is supposed to be the chief operating officer of the agency – must serve as the acting head of the agency.

Importance of Transition Planning

While presidents should be prepared to fill vacancies at any point in an administration, the need for attention to vacancies obviously becomes more acute during presidential transitions. The task of a U.S. presidential transition is one the greatest organizational challenges in the world. There are about 1,200 Senate-confirmed positions and about 4,000 politically appointed positions overall.

The Partnership and *Washington Post* have been tracking the status of nominations and confirmations for 638 key positions requiring Senate confirmation.[7] For these positions as of March 4, 2018, 273 nominees have been confirmed, 139 have been nominated but not yet confirmed, and eight have been announced but not formally nominated. There are no announced nominees for the other 218 positions.

Vacant positions with significant responsibilities related to security and the economy include the ambassador to the Republic of South Korea, the assistant secretary for nuclear energy at the Department of Energy, director of the National Counterterrorism Center and, of particular note to this committee, numerous top positions at the Treasury Department, including deputy secretary, chief financial officer, undersecretary for domestic finance, and several assistant secretary positions. Other important vacant positions include the commissioner of the Internal Revenue Service, which is undertaking the enormous task of implementing the new tax law, and the director of the U.S. Census Bureau, which is in an intense period of planning for the 2020 decennial census. In total, these widespread vacancies have negative implications on the administration's ability to govern effectively and implement management reforms.

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[6] "Social Security Administration Organization Chart." *Social Security Administration*, January 5, 2018, https://www.ssa.gov/org/ssachart.pdf

[7] https://www.washingtonpost.com/graphics/politics/trump-administration-appointeetracker/database/?utm_term=.98bffd147095

The number of key nominations put forward by President Trump at this point in the presidency is lower than that of his three most recent predecessors. But it is also important to remember that the average time that it has taken the Senate to confirm President Trump's nominations, 79 days, is also considerably longer than the average time for his predecessors at this point in their terms (60 days for President Obama, 42 for President George W. Bush, 47 for President Clinton, and 51 for President George H.W. Bush). Many non-controversial nominees experience unnecessary delays – delays which have the negative impacts discussed above but also discourage qualified people from wanting to serve in Senate-confirmed positions and place nominees in limbo while awaiting Senate action, often for months at a time.

The nomination and confirmation process is a shared responsibility of the President and the Senate, and the data make clear that there is room for improvement on both ends. Given that the process requires a series of complicated sequential steps—like financial disclosure, a background investigation, and Senate confirmation—it is critical that transition teams begin identifying and vetting potential nominees for these major positions as early as possible during the election and transition period. This reduces the amount of time that these critical positions experience leadership gaps that are dangerous for our country's security and well-being. The Senate also should consider process reforms that would preserve its role of diligent vetting yet ensure that non-controversial nominees are not delayed in the confirmation process.

Importance of Leadership on Agency Morale

The Partnership releases the annual *Best Places to Work in the Federal Government®* rankings of federal agencies based largely on the results from the Federal Employee Viewpoint Survey (FEVS) administered by the Office of Personnel Management. We rank agencies by size and function, and we also analyze the key drivers of employee engagement – in other words, the factors that have the biggest impact on how employees view the agencies in which they work.

Employee engagement and commitment are two necessary ingredients in developing high-performing organizations and attracting top talent. The rankings are also an important tool for congressional oversight and for ensuring that employee engagement is a top priority for government managers and leaders. They provide a mechanism for holding agency leaders accountable for the health of their organizations, serve as an early warning sign for agencies in trouble, offer a roadmap for improvement and give job seekers insight into how federal employees view their agencies.

Since the rankings began in 2003, one thing has been clear – leadership is the number one driver of engagement. Employees who hold their leaders in high regard are more likely to be motivated, and that drives better performance.

In the 2017 *Best Places* rankings, SSA ranks 12 out of the 18 large agencies in overall employee engagement, with a score of 63, which is the same score that the agency had in 2013 but is down from a score of 66 two years ago. In the years that we have been tracking *Best Places* scores, SSA's highest score was in 2010, with a score of 71.6. From 2007 to 2016, SSA's engagement score exceeded the median score of large agencies, but dipped slightly below the median in 2016.

The *Best Places* report tracks results of questions related to senior leaders, who are defined in the FEVS survey as the heads of departments and agencies and their immediate leadership team who are responsible for directing the policies and priorities of the department or agency. This "Effective Leadership: Senior Leaders" category measures the employees views on: respect for the organization's senior leaders; how well senior leaders generate high levels of motivation and commitment in the workforce; whether senior

leaders maintain high standards of honesty and integrity; and how well management communicates information to employees.

In this "Senior Leaders" category, SSA ranks 13 out of the 18 large agencies, with a score of 46.5. This marks the second year of a decline in score in this category, from 49.4 in 2015. The highest score in this category over the last decade was 57.4 in 2011. While the score has fluctuated in recent years, the long-term trend shows that SSA was in the upper quartile of large agencies from 2007 to 2012, dropped but was still above the median from 2013 to 2015, and then slipped below the median in 2016. On one of the key FEVS questions about senior leadership in the latest survey, only 37.8 percent of employees agreed that the senior leadership generates high levels of motivation and commitment to the workforce.

A strategy to improve these scores begins with filling key vacancies, starting with the commissioner and the senior leadership team. Permanent leadership would also enable SSA to better address other areas where the *Best Places* scores show need for improvement. For example, SSA ranks 16 out of 18 of the large agencies in the "Empowerment" category, which measures employee satisfaction with their involvement in decisions affecting their work. Improving employee empowerment is particularly important given that the agency has shed nearly 6,000 employees since 2010 while serving an aging population that increases its workload.

Senior leadership performance plans should ensure that the senior leaders are held accountable for improving employee engagement. These efforts should include reducing communications barriers, building employee trust and confidence through open communications, holding employee listening sessions, and taking concrete actions to respond to employee concerns, ideas, and feedback. Broader efforts should include making leadership development a priority and investing in cultivating the next generation of career leaders within the agency. In all these efforts, solicitation of employee feedback and fostering effective working relationships with unions and employee representative organizations can help agency leaders better identify, understand, and respond to employee perspectives. SSA should monitor and measure the results of its employment engagement efforts, including through "pulse" surveys to track progress on key metrics.

Recommendations to Reduce Vacancies and Increase Transparency of Vacancies

Through its Center for Presidential Transition, the Partnership serves as a repository of institutional knowledge from previous presidential transitions and provides hands-on assistance to both outgoing and incoming administrations on the execution of transitions. Filling critical Senate-confirmed positions as quickly as possible with the right people should be a priority of any presidential transition. Through our work with past transition teams of both parties, the Partnership has identified a number of ways to reduce the number of vacancies in Senate-confirmed positions, improve oversight of the transition process and provide transparency into appointments.

1. Congressional committees should perform rigorous oversight.

Congressional committees and subcommittees should do exactly what this subcommittee is doing today – conduct oversight of the operations of their agencies. Committees can help draw attention to the importance of filling key vacancies – as Chairman Johnson and Ranking Member Larson did in their letter of February 2017 to the president urging prompt nomination of a commissioner for SSA, and as the subcommittee is doing today. Congress also should signal to agency leaders, whether acting or confirmed, that they hold them responsible for forward-looking stewardship of the agencies. One of the best ways that members of this subcommittee and staff could do this is to visit SSA field offices and processing centers to meet and see firsthand the work of employees on the front lines, who through their unfiltered views can offer valuable insights that can help guide oversight.

2. *Congress should reexamine the Vacancies Act to ensure clarity in the law and create a central location for reporting vacancies in real time as they occur.*

The Federal Vacancies Reform Act addresses the issues of who can serve in an acting position and how long an individual can serve in an acting capacity. The Act has generated some confusion over where and how its limits are applied. Moreover, agency reporting on vacancies typically is not timely, and therefore no reliable public source for capturing government-wide data on federal vacancies exists. Congress should conduct oversight of the Vacancies Act, ensure that lines of succession are understood, and require real-time reporting into a public database for positions subject to Senate confirmation.

3. *The administration must identify, vet and submit nominees for top Senate-confirmed positions at a quicker pace.*

The president needs to ensure that his White House has a robust system for developing a pipeline of qualified candidates, vetting those candidates, and submitting nominees to the Senate at a much quicker pace to fill existing vacancies.

4. *The Senate should streamline the process for non-controversial nominees.*

Building on an expedited process established in 2011 for certain nominees, the Senate should improve rules that enable prompt confirmation of non-controversial nominees.

5. *Nominee paperwork must be streamlined.*

The amount and complicated nature of the paperwork that a nominee is required to complete is daunting, often duplicative and discourages qualified people from serving in these positions. The paperwork required for both pre-nomination and Senate vetting must be reexamined and streamlined in order to move nominees through the process more quickly and remove some of the overly burdensome disincentives for serving in these positions.

6. *Reduce the number of nominations that require Senate confirmation.*

Currently, the Senate must advise and consent on about 1,200 PAS positions.[8] Congress should work to reduce this number where possible – either by eliminating the Senate confirmation requirement or converting them to career positions – to enable the White House and the Senate to concentrate vetting on the highest-level positions. For example, the Senate provides advice and consent on a number of positions that are primarily managerial, such as chief financial officers. These types of positions that are less partisan by nature could be converted to career positions, thus reducing the burden on both the White House and the Senate. Congress should also consider whether there are other Senate-confirmed positions that should have fixed terms such as the six-year term that the SSA commissioner has, in order to provide stable, long-term leadership.

7. *The Office of Presidential Personnel and agencies should maintain detailed position descriptions for all priority Senate-confirmed positions, and political appointees should have clear performance plans.*

Transition personnel teams spend much of the initial transition period in trying to understand exactly what each political position does and what qualifications a nominee should possess to succeed in a given

[8] In addition, more than 900 judicial nominations require advice and consent.

position. The Partnership found in 2016 that the transition teams did not have this information in any comprehensive or consistent way, and so we created over 400 position descriptions for the transition teams with the input of experts and former office holders. Having a comprehensive and up-to-date position description for each of these jobs would allow the transition teams to focus immediately on recruiting and vetting high quality nominees, thus reducing the amount of time needed to identify quality candidates. Also, unlike senior career leaders, who are required to have performance plans, political appointees often lack performance plans, which help hold officials accountable for management responsibilities and employee engagement. Congressional oversight can help ensure that these position descriptions and performance plans are in place.

8. There should be greater transparency into non-Senate confirmed political appointments.

Political appointments that do not require Senate confirmation often are not publicly announced. Yet these non-PAS appointees are often very senior officials within agencies, and sometimes can serve as acting officials for unfilled Senate-confirmed positions. The public should have visibility into who the non-PAS appointees are and what positions they hold.

Conclusion

Chairman Johnson, Ranking Member Larson and members of the subcommittee, thank you again for the opportunity to share the Partnership's views on the impacts of vacancies and our recommendations on the way forward to help SSA and the federal government as a whole operate effectively with a core team of leaders in place. We look forward to being of assistance to you as you consider these issues.

Committee on Ways and Means
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: Max Stier		
1. Are you testifying on behalf of a Federal, State, or Local Government entity? a. Name of entity(ies). b. Briefly describe the capacity in which you represent this entity.	Yes ☐	No ☒
2. Are you testifying on behalf of any non-governmental entity(ies)? a. Name of entity(ies). Partnership for Public Service b. Briefly describe the capacity in which you represent this entity. CEO.	Yes ☒	No ☐
3. Please list any Federal grants or contracts (including subgrants or subcontracts) which you have received during the current fiscal year or either of the two previous fiscal years that are related to the subject matter of the hearing:		
4. Please list any grants, contracts, or payments originating from foreign governments which you have received during the current calendar year or either of the two previous calendar years that are related to the subject matter of the hearing:		
5. Please list any offices or elected positions you hold.		
6. Does the entity(ies) you represent, other than yourself, have parent organizations, subsidiaries, or partnerships you are not representing?	Yes ☐	No ☒
7. Please list any Federal grants or contracts (including subgrants or subcontracts) which were received by the entity(ies) you represent during the current fiscal year or either of the two previous fiscal years, which exceed 10 percent of entity(ies) revenues in the year received. Include the source and amount of each grant or contract. Attach a second page if necessary.		
8. Please list any grants, contracts, or payments originating from foreign governments which were received by the entity(ies) you represent during the current fiscal year or either of the two previous fiscal years related to the subject matter of the hearing. Include the source and amount of each grant or contract. Attach a second page if necessary.		

Chairman JOHNSON. Thank you, sir, for your testimony.

We will now turn to questions.

As is customary for each round of questions, I will limit my time to 5 minutes and will ask my colleagues to also limit their time to 5 minutes.

Ms. Curda, yesterday GAO confirmed what we all know—Social Security has been led by an Acting Commissioner for too long.

What does it mean for an agency to be in violation of the Vacancies Reform Act?

Ms. CURDA. Chairman Johnson, after the expiration of an official's allowed period of acting duty, the position is to remain vacant. And the nondelegable functions and duties of that position can only be performed by the head of the agency. To determine any impact, the agency would need to determine if any actions that were taken by the acting commissioner after November 17 were nondelegable. In other words, they could only be performed by the commissioner and nobody else. Any such action taken in violation of the act would have no force or effect and may not be ratified. Where violations have occurred in the Vacancies Act, it is the agency's responsibility to determine if any actions that were taken were nondelegable.

Chairman JOHNSON. Thank you.

Ms. Brannon, right now we are more than 5 years into the current 6 year Commissioner's term. Knowing how long the Senate can take sometimes, if the President wanted to, could he nominate someone for the next term right now? And if not, why not?

Ms. BRANNON. The President could probably nominate someone for the next term. I think the Social Security Act, however, would prohibit—while there is still a vacancy in the office, I don't think someone could be appointed to that next term because the statute says that if a commissioner is appointed to the term of office after the commencement of that term, they may only serve for the remainder of that term. So so long as there is a vacancy in the office, anyone who is appointed in the middle of a term can only serve for the remainder of a term.

Chairman JOHNSON. So do we need to change that rule?

Ms. BRANNON. You could.

Chairman JOHNSON. Thank you very much.

Mr. Larson, I recognize you.

Mr. LARSON. Well, thank you, Mr. Chairman. I want to thank the witnesses as well.

I am struck by a number of things, and I will start with what Mr. Richtman had to say, and that is that by putting somebody in place is not going to solve, at least listening to all your testimonies, the problems that Social Security faces long and short-term. And, Mr. Stier, I especially liked the example where you say we put somebody in for a short-term period to solve what are long-term problems for the country.

Ms. Curda, you elaborated a lot on the technology aspects of this and said while, on one hand, that Social Security was addressing some of these issues, that they failed to follow through. That failure, is that based as Mr. Richtman said, on lack of resources, or is it technical ability? Is it because of what Mr. Stier said? Because

the age of people is different and people with different capabilities aren't in those positions?

Could you elaborate more on what GAO's findings were?

Ms. CURDA. Certainly.

I think the main issue with SSA's information technology is the size of the legacy IT operations that they have. They have systems that are running on software that uses a programming language that was most prevalent in the 1950s and the 1960s called——

Mr. LARSON. Wonderful.

Ms. CURDA [continuing]. COBOL.

Mr. LARSON. Is it radioactive?

Ms. CURDA. I don't think they even teach it anymore. And so they are dependent on people——

Mr. LARSON. So we are operating in the—and Social Security takes great pride in saying that its loss ratio is like 99 percent, which makes it one of the most—and the envy of the private sector insurance world would love to have that kind of loss ratio, and yet we see these glaring failures. You know, wait times, 600 days, as the chairman was saying, to me, that is totally unacceptable, 4-hour waits. Are they still on hold waiting for your call, Max?

Mr. RICHTMAN. Yes, sir.

Mr. LARSON. This is just—we cannot, as an institution, as government, you know, sworn to serve our constituents, to allow this to go forward.

What improvements could be made and does it need the funding of these resources to overhaul a system that has been in place since the 1950s?

Ms. CURDA. We would recommend that they—we have recommended that they modernize their legacy systems.

Mr. LARSON. Well, when you recommend that, what does that mean? Do you suggest a specific remedy? Do you—specific technology?

Ms. CURDA. Well, let me just break it down for you.

They spend currently $1.8 billion on information technology, and that is split into two major categories. 1.1 billion is spent on operations and maintenance of those legacy systems.

Mr. LARSON. Oh, wow.

Ms. CURDA. And only 0.7 billion is spent on development, which is essentially where you get to create new and better systems.

So a focus on shifting more resources into the development side is needed. They have 66 total systems, of which six are major systems.

Mr. LARSON. So let's take it as a given based on what you are saying, and we can gather this from the written information as well, that we are woefully negligent on the technology side. But as Mr. Richtman pointed out, still for that human contact, and as Mr. Stier pointed out with the age of the agency people there, what will we have to do there as well?

Mr. Richtman, you know, it seems to me like we have a——

Mr. RICHTMAN. I think the resources are inadequate across the board. I don't have a specific number. I did point out that we have written to the appropriators asking for an addition of about $460 million for fiscal 2018 and about that much for fiscal 2019.

You know, I mentioned to Mr. Larson when—before the hearing started that I was in Florida for a townhall meeting with one of your colleagues last Friday night. And a woman asked a question. She started by saying she waited for 4 hours to talk to somebody in a Social Security office. And then she said, "Don't you people in Washington understand what it means to have to wait 4 hours or to wait 600, 700 days to get a hearing?" And she included me in "those people in Washington" when she said that.

And she did want to understand why Members of Congress don't appreciate all of that, and I didn't really have a good answer for her.

Mr. LARSON. Well, I know my time is up, Mr. Chairman, but I would like, in a second round, to come back to Mr. Stier.

Thank you for your five recommendations, because I would like to explore those further. And, Ms. Brannon, we both commented when you were speaking that, wow, did Congress really write that? Based on how you were explaining it, we could barely follow it.

But one thing we would like to see is what your recommendation would be to improve it. This happens frequently at hearings. I don't know if my other colleagues feel the same way. But oftentimes we get people who tell us very specifically what they think is wrong but then don't offer a suggestion as to how we should improve it or how we could make it better. So in the next round.

Thank you Mr. Chairman.

[Member Submission for the Record follows:]

Reuters: Banks scramble to fix old systems as IT 'cowboys' ride into sunset

By Anna Irrera, April 10, 2017

NEW YORK (Reuters) - Bill Hinshaw is not a typical 75-year-old. He divides his time between his family – he has 32 grandchildren and great-grandchildren – and helping U.S. companies avert crippling computer meltdowns.

A worker guides the first shipment of an IBM System Z mainframe computer in Poughkeepsie, New York, U.S. March 6, 2015. Picture taken March 6, 2015. Jon Simon/IBM/Handout via REUTERS

Hinshaw, who got into programming in the 1960s when computers took up entire rooms and programmers used punch cards, is a member of a dwindling community of IT veterans who specialize in a vintage programming language called COBOL.

The Common Business-Oriented Language was developed nearly 60 years ago and has been gradually replaced by newer, more versatile languages such as Java, C and Python. Although few universities still offer COBOL courses, the language remains crucial to businesses and institutions around the world.

In the United States, the financial sector, major corporations and parts of the federal government still largely rely on it because it underpins powerful systems that were built in the 70s or 80s and never fully replaced. (GRAPHIC: tmsnrt.rs/2nMf18G)

And here lies the problem: if something goes wrong, few people know how to fix it.

The stakes are especially high for the financial industry, where an estimated $3 trillion in daily commerce flows through COBOL systems. The language underpins deposit accounts, check-clearing services, card networks, ATMs, mortgage servicing, loan ledgers and other services.

The industry's aggressive push into digital banking makes it even more important to solve the COBOL dilemma. Mobile apps and other new tools are written in modern languages that need to work seamlessly with old underlying systems.

That is where Hinshaw and fellow COBOL specialists come in. A few years ago, the north Texas resident planned to shutter his IT firm and retire after decades of working with financial and public institutions, but calls from former clients just kept coming.

In 2013, Hinshaw launched a new company COBOL Cowboys, which connects companies to programmers like himself. His wife Eileen came up with the name in a reference to "Space Cowboys," a 2000 movie about a group of retired Air Force pilots called in for a trouble-shooting mission in space. The company's slogan? "Not our first rodeo."

Of the 20 "Cowboys" that work as part-time consultants many have reached retirement age, though there are some "youngsters," Hinshaw said.

"Well, I call them youngsters, but they're in their 40s, early 50s."

Experienced COBOL programmers can earn more than $100 an hour when they get called in to patch up glitches, rewrite coding manuals or make new systems work with old.

For their customers such expenses pale in comparison with what it would cost to replace the old systems altogether, not to mention the risks involved.

Antony Jenkins, the former chief executive of Barclays PLC, said for big financial institutions – many of them created through multiple mergers over decades – the problems banks face when looking to replace their old technology goes beyond a shrinking pool of experts.

"It is immensely complex," said Jenkins, who now heads startup 10x Future Technologies, which sells new IT infrastructure to banks. "Legacy systems from different generations are layered and often heavily intertwined."

IBM engineers work with a System 360 mainframe computer using business programs written in an early version of the COBOL language in this undated handout photo obtained by Reuters March 31, 2017. IBM/Handout via REUTERS

Some bank executives describe a nightmare scenario in which a switch-over fails and account data for millions of customers vanishes.

The industry is aware, however, that it cannot keep relying on a generation of specialists who inevitably will be gone.

The risk is "not so much that an individual may have retired," Andrew Starrs, group technology officer at consulting firm Accenture PLC, said. "He may have expired, so there is no option to get him or her to come back."

International Business Machines Corp, which sells the mainframe computers that run on COBOL, argues the future is not so bleak. It has launched fellowships and training programs in the old code for young IT specialists, and says it has trained more than 180,000 developers in 12 years.

"Just because a language is 50 years old, doesn't mean that it isn't good," said Donna Dillenberger, an IBM Fellow.

But COBOL veterans say it takes more than just knowing the language itself. COBOL-based systems vary widely and original programmers rarely wrote handbooks, making trouble-shooting difficult for others.

"Some of the software I wrote for banks in the 1970s is still being used," said Hinshaw.

That is why calls from stressed executives keep coming.

"You better believe they are nice since they have a problem only you can fix," he said. Hinshaw said the callers seem willing to pay almost any price and some even offer full-time jobs.

Oliver Bussmann, former chief information officer of UBS AG, said banks usually tap into their networks of former employees to find COBOL experts. Accenture's Starrs said they go through a "black book" of programmer contacts, especially those laid off during or after the 2008 financial crisis.

The industry appears to be reaching an inflection point, though. In the United States, banks are slowly shifting toward newer languages taking cue from overseas rivals who have already made the switch-over.

Commonwealth Bank of Australia, for instance, replaced its core banking platform in 2012 with the help of Accenture and software company SAP SE. The job ultimately took five years and cost more than 1 billion Australian dollars ($749.9 million).

Accenture is also working with software vendor Temenos Group AG to help Swedish bank Nordea make a similar transition by 2020. IBM is also setting itself up to profit from the changes, despite its defense of COBOL's relevance. It recently acquired EzSource, a company that helps programmers figure out how old COBOL programs work.

In the meantime, banks' scramble has revived careers of those who retired or were let go, and whose expertise, until recently, was considered obsolete.

One COBOL programmer, now in his 60s, said his bank laid him off in mid-2012 as it turned to younger, less expensive employees trained in new languages.

In 2014, the programmer, who declined to be named to avoid jeopardizing current professional relationships, was brought in as a contractor to the same bank to fix issues management had not anticipated.

"The call back to the bank was something of a personal vindication for me," he said.

Wall Street Journal: Cobol Is Dead. Long Live Cobol!

By Gary Beach, October 2, 2014

Want in on an amazing fact?

Eighty percent of the world's daily business transactions rely on a 59-year-old programming language called Cobol, short for "Common Business Oriented Language." Global commerce depends so much on Cobol that if its' 220 billion lines of installed code were mysteriously erased business would be catapulted back to the "B-Commerce" era.

As in "barter."

While the pivotal importance of Cobol is clear, its' image among CIOs is a murky mash-up between Rodney Dangerfield and Mark Twain: it earns little respect as a strategic asset, even among ardent supporters; and reports of its impending death are exaggerated, with even staunch critics claiming Cobol could be operational deep into the 2030 decade.

What accounts for the longevity of Cobol?

As Scott Colvey, a writer for The Guardian wrote in 2009, "Cobol is to business what the combustion engine is to motoring: it has been around so long, and installed in so many places, that doing something different would be impossibly costly."

If you run hardware long enough, it breaks. If you run software long enough, it works. Cobol works. As the CIO of a Fortune 350 firm who requested anonymity because he didn't want to be associated with a story about Cobol, told me, "Cobol is the most extraordinarily efficient programming language ever written."

"Cobol is alive and well," says Steven A. Mills, IBM senior vice president and group executive, Systems and Software. He should know. Decades after journalist Stewart Alsop predicted the last mainframe would be unplugged, over 20,000 mainframe computers, 49% of them from IBM, remain tethered to their power sources. Most running Cobol.

But the technological health of Cobol is not its' biggest future challenge. As hundreds of thousands of Baby Boomer tech workers with Cobol experience retire, and younger workers prefer to code in Java and C#, the future of Cobol is very human.

Cobol needs more mechanics.

One of Cobol's most senior mechanics is Edmund Lalli, a 73-year old senior systems programmer with AriFleet. Mr.Lalli, who wrote his first line of Cobol in 1964, says "it is understandable that younger people are attracted to the newer languages, but they should also learn Cobol. I worry about a tipping point in five years where the number of Cobol programmers drops precipitously."

That tipping point doesn't worry David Dischiave, associate professor and director of Global Enterprise Technology, Syracuse University, who says, "I don't buy into the idea that there is a shortage of Cobol programmers. If there is a shortage, why aren't employers responding to my calls to get jobs for majors with Cobol experience? What employers do, rather than what they say, matters most."

According to Dr.Leon Kappelman, professor of Information Technology at the University of North Texas, Dallas employers are doing a lot of "doing". "Four years ago," he says, "local Fortune 500 employers encouraged the university to offer Cobol courses. Now, graduates who take Cobol electives earn starting salaries of $75,000 compared to starting salaries of $62,500 for those who did not."

A review of the major job posting sites underscores Professor Dischiave's claim: while it is easy to find thousand of Java job postings, it is hard to find more than 300 Cobol jobs on any site.

That makes sense to Rick Mears, Senior Vice President/CIO at Owens Minor who says, "am I ever going to post a job to hire a dedicated Cobol programmer? Probably not. But we are always looking for candidates with Cobol skills. My team's job is to grow the business. If that requires a Cobol rewrite, we all jump in and wash the windows."

Steven Haindl, senior vice president and CIO for Arifleet, agrees. "It is important our staff be proficient in multiple programming languages, including Cobol, in order to have a deeper understanding of the business as it exists today, and more important, what it might look like tomorrow."

Supporting multiple languages worries Syracuse's Mr. Dischiave. "Mixing the natural business language of Cobol with newer languages is a nightmare waiting to happen. Why? Because the programming difficulty of the newer languages can lead to sloppy coding." Edmund Lalli agrees, claiming, "programs like C#, with its reliance on complex symbols, are harder to understand."

Is a pending Cobol skills gap fact or fiction?

David Eddy, an industry analyst, says "the approaching Baby Boomer Cobol retirement brain drain is going to make Y2K look simple." But Don Resnik, program manager for IBM's Academic Initiative, disagrees. "Every 10 years a Cobol skills crisis arises. Most CIOs are resourceful enough to attract, train or source for needed Cobol expertise. The more important issue going forward is that Cobol continue to be an essential component of enterprise computing strategies."

Alberto Ruocco, vice president and CIO for American Electric Power, is in sync with Mr.Resnik's observation. The company is implementing a multi-faceted enterprise computing approach that supports the firm's Cobol code base. Mr.Ruocco says, "it is strategically important to extend the professional life of Cobol-trained staff with programs that accelerate Cobol knowledge transfer." Mr. Eddy is wary of most Cobol knowledge transfer programs, which he observes, "are usually four years into a two year project."

So what is the future of Cobol?

When asked, Mr.Ruocco framed it succinctly, "Cobol is dead. Long live Cobol."

Chairman JOHNSON. No. Thank you for the questions. And thank you for your responses.

Mr. Holding, you are recognized.

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. Stier, I am going to follow up a little bit on my friend Mr. Larson's line of questioning. This subcommittee has talked a lot about the critical need for SSA to update its seriously aging IT systems. What is it called? Thought it was Cobalt, COBOL from the 1950s? And even SSA has stated that their previous strategy of incremental modernization isn't going to get the job done, and there is a critical need to undertake a large multiyear approach to updating its aging IT. In 2016, GAO testified before this subcommittee about SSA's struggles, the strategic planning and long-term planning when it comes to IT.

So, Mr. Stier, maybe you could speak to the importance of having a confirmed commissioner in place to implement and execute a long-term multiyear task like IT modernization which seems to be a big issue not only for SSA but a lot of other government agencies as well.

Mr. STIER. Yeah. Absolutely. And I think you put your finger on something vital there.

It is across government. The Federal Government spends $80 to $90 billion in IT. The overall numbers are even worse across government than in SSA. It is about 70 percent in operations and maintenance. And the workforce challenges are also spread across government.

You do have to have long-term leadership to—not only to be able to see a project like that through but also to make the commitment to prioritize it, because it is so hard and so difficult. No one in their right mind is going to do it if they are going to be around just for the first year of paying and not see any benefit later on down the road. I would say that GAO is one of the best run organizations in government, not in—substantially because you got a 15-year term. And whether it is Dave Walker or Gene Dodaro, you know, they know that, when they make the investments in their people, their systems, whatever, they are going to see that pay off for themselves. So, again, you have a better alignment.

Here is what I think—what I would argue that you need to do in addition to the resource question here. One, it is not just the amount of money. It is actually having multiyear money and certainty. One of the big challenges, you know, you think about a business that you are running. You have capital budgets. You have the ability to actually think longer term about the kinds of investments that you are going to make. And agencies don't have that. When you talk about these IT system, large investments, very, very hard to actually see them through when you have very short-term money.

Number two, you need executives that actually understand technology. It is not just your IT workforce. You need executives themselves that understand how to drive these transformation projects. When the IRS had its major transformation the last go-around, for the first time in maybe ever, and certainly a long time, they didn't hire a tax expert. They hired a technology guy, Charles Rossotti. And he was able to change the IRS in a pretty dramatic way. Dif-

ferent model. You had someone who understood the large scale transformation that needed to take place the technology around the IRS. Problem being that once you do it, you know, 15, 20 years ago, it is not good enough.

One of the challenges for government is we are catching up to the past. And you see these big long projects that fundamentally aren't agile, that are not actually using the techniques that the best in class companies do, because they are thinking about a 10-year project, or whatever it might be, rather than the more iterative "We can make mistakes, but we are going to get better and better." And that kind of development is fundamental, especially as the shelf life of technology is getting shorter and shorter.

It is not good enough to build these long-term systems, expect them to live 30 or 40 years. They ain't going to do that. You have to look at more commercial, that is practice, off the shelf stuff. You need a very different level of technology. You need different kinds of people like what you will see in the United States digital service, which I think is a good resource.

But I think this is a great topic for you. You know, absolutely it begins with leaders. If you don't have leaders, none of this other stuff is going to matter. But it doesn't end with leaders. You need to have the technology transformation to change the capability of the organization.

Mr. HOLDING. Thank you, Mr. Stier.

Now, I want to switch gears really quickly to Ms. Bannon. And if this is beyond your brief, you can get back to me in writing.

I understand there is a lawsuit pending at the Supreme Court related to the appointment of a handful of SEC administrative law judges. And in response to the case, the SEC commissioners have recently ratified the appointment of all the ALJs to ensure their legitimacy. But the Supreme Court's ruling in the case could have a serious—could have serious consequences for all of SSA ALJs appointed by an acting commissioner.

If you are able, could you walk me through these possible legal ramifications?

Ms. BRANNON. So the concern in that case is that these ALJs are officers of the United States within the meaning of the appointment clause of the Constitution. If they are officers of the United States, then they have to be appointed in accordance with the constitutional procedures. The ratification was an attempt to appoint them in accordance with those procedures.

The situation I think is analogous to the ALJs in Social Security. There are possible differences. And I think that was recognized by the courts that are considering this issue.

I would be happy to—there are a lot of complex issues involved in this, so I would be happy to explore that more at a later date.

Mr. HOLDING. Right. Thank you very much.

Mr. Chairman, I yield back. Chairman JOHNSON. Thank you.

Mr. Pascrell, you are recognized.

Mr. PASCRELL. Thank you, Mr. Chairman.

Good morning. All of you are experts, really, in this area. You did a terrific job. I am very interested in your testimony, Mr. Stier, because I think it is really a pass for us. You are demanding more of us, and we should have oversight that fights. Right now it is

kind of vague, foggy. And that is how a lot of people like it. So thank you for holding this meeting, Mr. Chairman, ensuring we have leadership in this critical area of Social Security and the Social Security Administration.

There is no way an organization can effectively do its job without someone at the top planning for the long-term. We heard from Mr. Richtman the long-standing problems at the Administration, Social Security Administration. And that simply is not going to be remedied by appointing, confirming a new commissioner. We don't even have a nominee yet let alone a person to take the job. That is unacceptable. We need to provide the Social Security Administration with more resources to reduce wait times for paying benefits, approving benefit applications, and responding to inquiries from the public.

You can do go down many lists whether you are talking about transportation, educational technology, regardless of what you are talking about. Trade negotiations. We don't have people to do the job. We just don't. And you can't ignore that issue.

This is a pattern, a plague on both parties. No one is individually responsible. No party is individually responsible for this. We go along to get along here.

Across the country there have been a closure of 64 field offices. Disability hearings backlog with an average of 605 days. I am just thinking of all the folks that I have come to my office for help for this, 605 days.

In New Jersey, wait times in Newark average 668 days. That is almost 2 years. I mean, how long do we have to live? That is an interesting question. In Jersey City, 703 days. The South Jersey hearing office has one of the worst processing times in the Nation, 739 days. And we talk about our responsibility to our veterans. What about our responsibility to our seniors? They served the country. They gave it the best. They made it the greatest country in the world.

You know, this amounts to nearly 25,000 cases waiting to be heard. It sounds like the VA. These types of numbers are outrageous, and they are unacceptable, and we cannot argue them away. They didn't happen overnight. It is not a Republican problem. It is not a Democratic problem. It is our problem, lack of oversight. They happen when congressional Republicans choose many times to starve the agency. Fewer resources mean fewer staff and tools which means more people are left out in the cold waiting for help.

Adjusted for inflation, the Social Security Administration, the budget has declined 11 percent in the last 7 years. During this same period, the number of Americans receiving Social Security benefits has climbed by 15 percent, 8 million people. We are going backwards.

Mr. Richtman, let me ask you this question. Can you talk about the enormous service delivery challenges facing Social Security in future years as baby boomers reach retirement age? What impact is that going to have?

Mr. RICHTMAN. I think the problems that you have outlined will be aggravated. There will be more people brought into the system. If the trajectory of funding continues, there will be less money

to help more people. So I think it is pretty obvious, as you said, we are going the wrong direction.

Mr. PASCRELL. And what that does is increase the lack of credibility in government. And it seems to me that that may be an objective of some people who get elected to come to this House.

Just one more question, Mr. Chairman.

Will these service delivery challenges be helped or hurt if the Social Security agency receives the additional $560 million Ranking Member Neal and Larson and Davis have requested? Is that going to help it? Hurt it? What? What is it going to do?

Mr. RICHTMAN. Absolutely help it. We sent a letter to the House endorsing the legislation you just talked about. And we think it would make an enormous difference.

We are trying to catch up now, and that is what this additional funding would allow.

Mr. PASCRELL. I want to thank the honesty of all the panel members and thank the chairman again for bringing this subject to the American people.

Thank you.

Chairman JOHNSON. Thank you.

Mr. Schweikert, you are recognized.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

And forgive me if I take a slightly one-off. I absolutely agree with everything that has been said here about, you know, the time for revolution and technology, you know, the mechanisms, if it is—and I think the actual number is, what, 10,300 baby boomers functionally retiring a day now since 2008.

So if you—10,300 is 3.7 million a year. But my fear is—and some of this is going to be to you, Mr. Richtman. I actually think we are whistling also by the crisis. If I sit here and do math, Medicare Social Security will be adding 130 billion a year in additional entitlement spending. Okay. Think of that. Every 5 years that is the value of the entire Defense Department. So every 10 years, just the increased spending is two defense departments. Since 2008, Social Security Medicare account for 72 percent of all the inflation adjusted growth and spending here in government.

Today, someone retiring in Medicare, inflation adjusted dollars, like-for-like dollars, put in $140,000 and takes up $420,000. My little girl, when she is a teenager, there will be only two workers, so one couple supporting a single retiree. Yeah, we have problems in their IT system, problems in their budget, problems in the outreach and the quality of customer service. And we have a crisis that becomes one of the greatest systematic threats ever to this Nation, and it is not decades away. It is in a dozen years.

And so, Mr. Richtman, first, is there something wrong in anything I just said mathwise?

Mr. RICHTMAN. Well, you know——

Mr. SCHWEIKERT. Is there anything wrong I just said mathwise?

Mr. RICHTMAN. What is wrong with what you said is that these programs, Social Security, and a good part of Medicare is paid for by the payroll tax. And that is money that is dedicated to these programs.

Mr. SCHWEIKERT. Okay. And your point is?

Mr. RICHTMAN. My point is, you know, we are not a group that has our heads buried in the sand. We realize if nothing happens in 2034 there will not be enough money to pay every beneficiary every penny that they are supposed to be paid. We are not saying don't do anything, ignore the problem. First of all, it is not a crisis. The crisis was 1983 when we were looking at six months.

Mr. SCHWEIKERT. So the——

Mr. RICHTMAN. So my—if you can let me answer.

The answer is not to start talking about cutting benefits, cutting the COLA, raising the retirement age. The answer is looking at ways, reasonable ways, to bring more revenue into the program.

Mr. SCHWEIKERT. Okay. So your solution is the additional tax revenues.

Mr. RICHTMAN. My answer is to make—the payroll tax——

Mr. SCHWEIKERT. Let me finish. Let me finish.

Over the next 30 years—and, now, this is not inflation adjusted dollars, just Medicare adds $40 trillion in debt. Just Social Security adds 19 trillion. I think the greatest systematic threat to seniors is almost what you just said, the unwillingness to actually either get leadership at this agency, leadership from all of us, leadership from the advocacy groups to actually do math, because, Mr. Chairman, math always wins.

Chairman JOHNSON. Thank you.

Mr. Kelly, you are recognized.

Mr. KELLY. Thank you, Chairman. And thank you all for being here.

Ms. Bannon, you had talked about the SSA being in violation of the Vacancies Act. If the President were to nominate a commissioner, would the SSA still continue to be in violation?

Ms. BRANNON. So the Vacancies Act says that someone can serve either for a 300 term of—term of days starting from the vacancy. That is gone. Or can serve during the pendency of a nomination. So Ms. Berryhill would likely be serving in compliance with the Vacancies Act if she meets the criteria for a senior official who is permissively directed by the President to serve and if a nomination other than her is submitted to——

Mr. KELLY. Okay. I want to make sure we are doing that.

Now, the other thing—question I want to ask, because I think we are all on the same topic and the same concern, and that is the viability of what it is that we put out for folks and the fact that it is funded by people in the workforce, because it is that—the wage taxes that fund us.

I want to ask you something, because sometimes it comes down to how do we spend the dollars we get in. In 2008, the previous administration decided to develop an in-house software program to replace the commercial off-the-shelf disability determination system. The goal was to save money, right, and improve efficiency. However, to date, we spent hundreds of millions of dollars, missed all the deadlines, and don't still have the project complete. SSA has spent well over $420 million on this project even though a commercial off-the-shelf program has existed for decades at a cheaper cost. And, unfortunately, under an interim director, this effort for an in-house program has continued.

Are any of the witnesses familiar with the issue? And do you think not having a confirmed SSA commissioner has been part of the problem?

Mr. Stier, I think you are spot on with this. So if we had somebody there—and I think the thing that we lack, and I think we all talk about this, Social Security can continue on this type of a program because it is not in the private sector. And what I am wondering about is, is it the process that is the problem?

Mr. STIER. So I think that, unfortunately, there is a—and I am answering the question——

Mr. KELLY. No. It is okay. Because you are all—we are all concerned about the same thing.

Mr. STIER. I mean, I think the—there are multiple contributors to the challenge here and——

Mr. KELLY. But my question, if you are in the private sector and you have a problem that you have to solve; and the reason you have to solve it, because if you don't solve it, it means you go out of business. Unfortunately, there is no deadlines for any of this. There is no possibility this ever going away. And we keep saying what we have to do is find more revenue somewhere.

And so I look at this, and we say we sent $420 million on a project even though there was an off-the—there was already a commercial off-the-shelf piece available. But we decided not to do that. And you could only do that if it is not your own money. But if it is your money and you have to stay open, you do what is in the best interest of the people you serve and the money that you have to work with. So I have always wondered is it a lack of money or is the fact that we don't spend money the right way?

Mr. STIER. So my view is you are going to have, again, a combination of multiple things here. It actually is more complicated. So sometimes the model for folks in thinking about how you run a government agency is just run it like a business. The answer is you cannot run the government like a business. You——

Mr. KELLY. I understand that. We are $20 trillion in the red.

Mr. STIER. There you go. Correct. But you can apply business principles. It is not sufficient simply to look at——

Mr. KELLY. Okay. Can I ask you? Because you just said we could apply business principles.

Mr. STIER. Yes.

Mr. KELLY. There is no CEO serving on any private entity right now that would be looking at this and say "I still deserve to be in charge."

My concern is, as we go through this—we have been waiting 5 years, right, for a commissioner? So it just didn't start now. But this process of getting through—and I have got to tell you, if somebody from the private sector who is looking to come on and somehow help his country or her country by serving in government and then looking at the process they have to go through and be on the sidelines waiting to be approved, you would have to be a damn fool to sit there waiting for that to happen. I just think we lose so much enthusiasm, so much passion. The fact that we leave people sit on the sideline and say, "Some day you will get a chance to get on the field, but not yet."

Mr. STIER. Yes. And your proposition is absolutely correct for the political appointees. It is also true for the career folks as well. So you have a lot of great talent that actually would like to serve their country. The process of hiring is overly complex. It is too long.

Mr. KELLY. That is my point.

Mr. STIER. You are entirely right. There is opportunity to bring great talent in. And the process itself is dissuading really good people from pursuing those options. And that is something that ought to be changed, and it is something that, you know, frankly, again, that you have some opportunity to change.

So when you would think about the rules that govern the way our government operates were largely created in a different era. You have a legacy government that hasn't kept up with the world——

Mr. KELLY. One of the things I have noticed since I have been here is, you know, when you ask somebody, So why do we do it this way? They say, well, that is the way we have always done it. And I said, well, that that is not a good process going forward.

I find your testimony really good. And I just—and I know. There are so many really patriotic people that serve in the government. It has got to be very frustrating to be watching this and say "I know it could be better if we could just get this process changed and make it more—make it something that makes sense.

So I appreciate you being here. Mr. Chairman, thanks for having this. I think we all want the same thing for all our people because we know who funds it. It is the people who are working and the people who pay them to work.

Mr. STIER. Yep.

Mr. KELLY. That is at a wage tax.

So thanks for being here. Thanks, to all. I really appreciate everything you all are doing.

Chairman JOHNSON. Mr. Rice, you are recognized.

Mr. RICE. Thank you, Mr. Chairman. I am struck by the continued testimony we hear about various government agencies and their inability to modernize their IT. And I think that, you know, certainly it is not going to solve all the problems but it is going to go a long way toward solving a lot of these problems. I think it would definitely affect the 600A wait time. I think it would probably cut down on the need for some of the employees and probably cut down on some of the needs for funding.

So Mr. Stier, I want to ask you. This, today, is about Social Security and—I guess, Ms. Curda. You said they have how many systems running on legacy programs?

Ms. CURDA. They have a total of 66 systems.

Mr. RICE. Sixty-six systems.

Ms. CURDA. Yes.

Mr. RICE. That seems like an awful lot. Do they really need 66 systems?

Ms. CURDA. That, I don't know. But someone had referred to the modernization of their disability case processing system, and that is a case of where you have got 54 disparate systems operating across the States that are used to process the disability claims. And the point of the modernization is to bring all those together.

Mr. RICE. So right now there are 54 different systems across 50 States?

Ms. CURDA. Yes.

Mr. RICE. So some States have more than one system, and they can't necessarily talk to each other?

Ms. CURDA. Probably not.

Mr. RICE. Do you know how many of those are these legacy programs that have been around for 50 years?

Ms. CURDA. I am sorry. Could you repeat that?

Mr. RICE. Do you know how many of those are these legacy programs that have been around for 50 years?

Ms. CURDA. No, not specifically.

Mr. RICE. Okay. You know, we met with the IRS a month ago, and they said that they had 300 points of failure, which means that—over 300. It was like 320. Which means that they have programs that they are running, 300 different systems, where they have just one guy who knows how to program it because it is so old. And if he dies or he retires, they are in trouble.

Ms. CURDA. Yes, there is the same problem at the Social Security Administration. They have had to rehire people who have retired who have the knowledge to do the programming of the COBOL systems.

Mr. RICE. You know, Mr. Larson likes to say that Social Security is a really good insurance policy. It is the most effective insurance policy you can buy. So just think of an insurance company, say MetLife or Aetna. Do you think they are all running these legacies programs, any of them?

Ms. CURDA. Probably not.

Mr. RICE. Probably not.

Mr. Stier, why is it that, you know, it is not just Social Security, it is not just the IRS. CMS, they testified in front of us last week about the opioid crisis. And I asked them, can they track the prescriptions? You know, we are paying for it. I mean, the Federal Government is the biggest drug dealer in the world. I mean, we are the source of the money that buys these opium prescriptions.

Medicare and Medicaid. And I asked them if they could track those prescriptions and tell how many pills people are buying. She said, We could in 40 States. Well, we have 50 States.

Air traffic control, we are working on a system that is developed just after World War II. They are handing slips of paper back and forth. Why is this a systemic problem in government. Why is it that, you know, you look at every private agency, and they have all long, they don't even know how to spell COBOL. That is long forgotten. Why is this a systemic problem in government?

Mr. STIER. Three answers: Number one, when you look at the top of the House, the leadership, you have got the short-term leaders that are not aligned to the long-term needs of the organizations they run. That is the fundamental here. Very hard to get, you know, you get the exception. You will get someone who comes in, who is willing to make all the hard calls, take all the lumps, even knowing that they are not going to get any of the benefit on their watch. But that is number one.

Number two, is you have real challenge around realtime performance information in government. In a private sector organization,

you have clarity of outcome because you have a financial metric you are trying to achieve. Government is trying to seek public goods——

Mr. RICE. In other words, it is not their money.

Mr. STIER. I am sorry?

Mr. RICE. It is not their money.

Mr. STIER. No, it is not——

Mr. RICE. The people who are running it——

Mr. STIER. It is a different point. It is not that it is not their money, it is that their performance goals are not about money. Their performance goals are about a public good. So if you are working at the State Department, it is about national security.

The measurement in government in the public sector is harder. So I am trying to give you what I think are the root causes. And the third one is—I am going to say this and I am hoping that it will be taken in—is you. And it is Congress. And the reality is Congress has a fiduciary——

Mr. RICE. Amen.

Mr. STIER [continuing]. Responsibility for the executive branch in four different ways. Number one, is the budget. You are not giving budgets—you talk to me about any private sector executive out there, they could not run their organization. They had everything else that they needed with the kind of runway you give them. And it is not the amount of money, it is the fact that they don't have a budget. You have 21 CRs, or rather 21—yeah, it has been like 21 CRs in the last, whatever, how many, years. It is nuts. Can't be.

Number two, and this is on the Senate, is they have a role, to play obviously, in the confirmation process. Number three, it is your oversight. This is a rare kind of hearing that you have here. You need more of them. You need to be holding the leadership and the executive branch accountable.

And number 4, you need to look at the underlying authorization laws. Because, again, you have legacy organizations. You have legacy understanding of what the mission and goals are, and that work hasn't been done by this body. So with all due respect, those are my three reasons.

Mr. RICE. I am glad you said that. I am making it my goal in the immediate future to try to drag some of these agencies into the 21st century.

Mr. STIER. I would love to be of any assistance that I can possibly be on that goal.

Mr. RICE. Thank you, sir.

Chairman JOHNSON. Mr. Crowley, you are recognized.

Mr. CROWLEY. Thank you, Chairman Johnson. Let me yield a minute to my colleague from Connecticut.

Mr. LARSON. You know, I just wanted to followup on what Mr. Stier had to say. And I think the line of questioning here is great. I think there is some great common ground here that we can find. But I want to go back to another point. And I do believe that this is an insurance issue, and this is an actuary issue.

Mr. Stier, have any of your insurance premiums gone up since 1983?

Mr. STIER. This sounds like it is going to be an ugly line of questioning. That sounds like a rhetorical question to me.

Mr. LARSON. It is——

Mr. STIER. Yeah.

Mr. LARSON [continuing]. A rhetorical question, because they have.

Mr. STIER. Yeah.

Mr. LARSON. But to your three points, one, and I think you also mentioned lack of a capital budget, but with this kind of oversight and with some of the people that we have here on this committee and some of their knowledge, I think with a capital budget, getting those kind of improvements that CEOs of a private sector company would do would come automatically. But when Mr. Richtman was asked before, I mean every, you know, everyone in America understands, whether it is your homeowners, your automobile, your health, whatever, it has risen actuarially. That hasn't happened since 1983, so it is no wonder without any kind of investment on our part that, you know, we find ourselves in this situation. And yet, what is Social Security but the full faith and credit of the United States Government.

I make this point because I think this is easily addressed. But if we just address, and this is a point my colleague was making, if you just address the spending side but we don't address the technology and capital improvement side, and do that in terms of the revenue, then, you know, I think that we have a balancing out in a way that we could phase this in and work through this in a way where all Americans would benefit.

And we could take Social Security off the list of concerns that we have here and let Americans all take a deep breath, including millennials and Gen-X's know that——

Mr. CROWLEY. One minute.

Mr. LARSON [continuing]. We have solved the future. I am sorry, Joe. Go ahead.

Mr. CROWLEY. That is a long minute. Thank you. Thank you.

Mr. LARSON. I was a former chairman. You know how that is, Joe.

Mr. CROWLEY. You are killing me here.

Let me thank you for this hearing today.

And Social Security is what keeps millions of Americans from abject poverty. It ensures that if you are injured on the job and you can't return to work, you have the affordability of disability insurance. And it really affects the neediest, the most vulnerable amongst us.

It is something that they have earned. It comes out of their paycheck each and every month. And that is why, this is what makes what has been done to the administrative part of the program so unconscionable, in my opinion.

I agree with the chairman that we need a Social Security commissioner who is permanent. I appreciate the bipartisan work on this. And I really don't understand why the President hasn't even nominated one to be the Social Security commissioner, but the main problem is that the administrative funding for SSA has been seriously hurt since my Republican colleagues have taken office. As a result, we now have a wait time in Queens and the Bronx of over

700 days. That is 700 days wait time. That is nearly 2 years. And Americans are quite literally dying while they were waiting for their benefits to be approved. Thousand of Americans.

And, again, we are talking about benefits that they have earned. I have a Daily News article that I would like to enter into the record, Mr. Chairman, that talks about the ridiculous wait times, including for a man who has spinal cord injuries. And he waits for his disability. It shows why we need to make sure that people actually get the benefits that they have earned. But the article also shows how this is a manmade crisis.

[Member Submission follows:]

Daily News: Feds' bureaucratic hellscape gnaws at New Yorkers' health, hope

By Glenn Blain, December 25, 2017

ALBANY — Thousands of injured or sick workers in the New York City area are spending the holiday season in bureaucratic limbo as they wait to see if they qualify for federal disability payments.

They are among more than a million injured or sick workers nationwide whose initial claims for Social Security disability benefits were denied and are now stuck in a monstrous backlog of cases waiting for an administrative law judge to decide their appeal.

"It is just awful," said Elsie Nelson, 59, a former school bus attendant from Brooklyn who suffers from rheumatoid arthritis and has been waiting for a hearing on her appeal since March 2016.

"I am on the verge of bankruptcy," Nelson said, adding that she's been informed by federal officials that her appeal could take an additional nine months to be resolved.

Five years ago, most cases were decided within a year, but the average processing time is now nearly double that — about 606 days.

In the New York City area, however, waits are much longer, often stretching well beyond 700 days, according to data from the Social Security Administration.

The administration estimates that over the past two years, more than 18,000 people across the country have died while waiting for their appeals to be heard.

"It is a really long haul where the odds are against you from the minute you come in the door," said Mary Dale Walters, a senior vice president at Allsup LLC, a firm that represents applicants. She noted that only about 33% of people have their initial disability requests approved.

Walters and other advocates blame several factors for the backlog, including a lack of judges and support staff to decide cases and not enough funding from Congress.

"Instead of making common-sense investments, Republicans have cut Social Security's budget," said Rep. Joseph Crowley, a Queens Democrat and member of the Ways and Means Committee. "Because of these cuts, there are not enough examiners and judges available to make decisions about benefit applications, resulting in this outrageous backlog. They are punishing people who are hurt through no fault of their own, and it has to stop."

Rep. Sam Johnson, a Texas Republican who is chairman of the Ways and Means Committee's subcommittee on Social Security, agreed the backlog was unacceptable but placed blame for the situation on the fact that the agency has not had a full-time commissioner since 2013.

"Without a commissioner, Social Security is just spinning its wheels," Johnson said in a statement to the Daily News.

Darren Lutz, a spokesman for the Social Security Administration, said the agency is working to reduce the backlog but conceded "previous hiring freezes" had slowed its ability to hire new judges and staff.

"For several years in a row, the agency received a record number of hearing requests, due primarily to the aging of the baby boomers as they entered their disability-prone years," Lutz said.

"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."

Lutz insisted, however, that the agency is making progress in reducing the backlog and still plans to bring on hundreds of new judges.

"Reducing the wait times for a hearing decision is of utmost importance," Lutz said.

In the meantime, injured workers are left to wait.

"It's pretty damn frustrating when you have no money coming," said Michael Schwartz, 62, of Forest Hills, Queens, who says he can no longer work because of spinal cord injuries he suffered in a 2015 fall. "There is something wrong with the system here."

Mr. CROWLEY. There is a simple fix to the problem, which is to provide funds to help process benefits and adjudications. But the Congress has kept SSA administrative budget basically flat. And when you add in inflation, we are talking about massive cuts. Is it really too much to ask for proper funding so people can get through on the 1–800 number? Is it really too much to ask to hire more staff so people can get their benefits on time? It shouldn't be. So let's make it happen.

I know over 100 of my colleagues have joined myself and my good friend from Connecticut, Mr. Larson, in sending a letter to the administration urging a fix for this problem. And if this Congress can afford to cut trillions in taxes for the wealthiest, can't we also ensure that people get the Social Security benefits that they have earned and they deserve.

Mr. Richtman, I have just a quick question for you. Would additional funding allow Social Security to hire judges, attorneys, decision-writers and clerks needed to reduce the delays in disability appeals hearings? And would additional funds help Social Security decrease wait times in places like my district in Queens and the Bronx?

Mr. RICHTMAN. The answer is yes. Before you arrived at the hearing, I commented that the National Committee to Preserve Social Security and Medicare has endorsed increasing the funding by $465 million this year, and about the same next year.

It is not only the points that you raised, but there are people who actually develop and write the opinions. There aren't enough of them. That is part of the delay. And waiting 700 days is not unusual.

And, you know, I just wonder how many Members of Congress would be willing to wait 700 days to have a decision that important made, or to wait 4 hours to talk to someone in a Social Security office. Four hours, that is how long a lady that I met with in Florida last Friday had to wait. There is—and I may not make any friends, but there is a Social Security office in the building next door, and there are two people there that serve everybody. And anybody can use it, but hardly anybody knows about it. And you don't have to wait 4 hours to talk to someone. You can talk to someone immediately. I have been in that room. I worked for a Congressman here, I worked for Sid Yates years ago, and I know where that office is. You don't wait at all.

So I think it is important for Members of Congress to understand the reality of having to deal with these kinds of waits, or having to sell your home because you are waiting so long to get a benefit that you deserve. So the short answer was yes. The long answer I just gave you.

Mr. CROWLEY. Mr. Chairman, let me once again thank you for holding this hearing and in a bipartisan spirit as well. I think there are things we can do to reduce this wait time and to help our constituents. This is not a Republican or a Democratic cause. It just so happens you all are a majority now. The responsibility here is more incumbent upon you all, but we want to help. Democrats and Republicans want to work together on this issue to address the waiting period. It is just unconscionable, as I mentioned earlier.

So thank you, Mr. Chairman.

Chairman JOHNSON. You are welcome. You know, as we have heard today, Social Security has been without a Commissioner for 5 years. We have also heard that Social Security is facing critical challenges that aren't going to get any better without real leadership. Social Security is just too important to continue to leave on autopilot. And that is why today, I once again ask the President to please nominate a commissioner without delay.

Mr. President, we need a nominee, and we need one now. America deserves nothing less.

Thank you to our witnesses out there. We appreciate all of you. Thank you for your testimony. Thank you to our members for being here.

With that, the subcommittee stands adjourned.

[Whereupon, at 11:14 a.m., the subcommittee was adjourned.]

[Member Questions for the Record follows:]

COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

March 22, 2018

Valerie Brannon
Legislative Attorney
Congressional Research Service
Library of Congress
101 Independence Avenue SE
Washington, DC 20540

Dear Ms. Brannon,

Thank you for your testimony before the Committee on Ways and Means Subcommittee on Social Security at the March 7, 2018 hearing on "Lacking a Leader: Challenges Facing the SSA After Over 5 Years of Acting Commissioners." In order to complete our hearing record, we would appreciate your responses to the following questions:

1. A violation of the *Federal Vacancies Reform Act of 1998* prohibits the exercise of nondelegable functions and duties of an office. What is a nondelegable function or duty? How is a function or duty determined to be delegable or nondelegable?

2. What are the nondelegable functions or duties of the office of Commissioner of Social Security? Are there common nondelegable functions or duties exercised by other heads of federal departments and agencies that are considered delegable functions of the Commissioner?

We would appreciate your responses to these questions by April 5, 2018. Please send your response to the attention of Amy Shuart, Staff Director, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, 2018 Rayburn House Office Building, Washington, DC 20515. In addition to a hard copy, please submit an electronic copy of your response in Microsoft Word format to mm.russell@mail.house.gov.

Thank you for taking the time to answer these questions for the record. If you have any questions concerning this request, you may reach Amy at (202) 225-9263.

Sincerely,

Sam Johnson
Chairman
Subcommittee on Social Security

MEMORANDUM March 30, 2018

To: House Committee on Ways and Means, Subcommittee on Social Security
Attention: Amy Shuart, Staff Director

From: Valerie C. Brannon, Legislative Attorney, vbrannon@crs.loc.gov, 7-0405

Subject: **Responses to Questions for the Record**

This memorandum responds to Chairman Johnson's letter of March 22, 2018 requesting a response to questions for the record in connection with the March 7, 2018 hearing entitled "Lacking a Leader: Challenges Facing the SSA After Over 5 Years of Acting Commissioners" before the Committee on Ways and Means, Subcommittee on Social Security.

Question 1. A violation of the *Federal Vacancies Reform Act of 1998* prohibits the exercise of nondelegable functions and duties of an office. What is a nondelegable function or duty? How is a function or duty determined to be delegable or nondelegable?

Answer. The Federal Vacancies Reform Act of 1998 (Vacancies Act) generally provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate."[1] The Vacancies Act defines "function or duty" to include only functions or duties that are (1) established either by statute or regulation, and (2) "required" by that statute or regulation "to be performed by the applicable officer (and only that officer)."[2] Accordingly, the Vacancies Act appears to apply only when a government official performs a nondelegable duty of a vacant office, defined as a function or duty that is "required" to be performed by a particular officer. If a function or duty is not exclusively assigned to a particular officer, it is outside the purview of the Vacancies Act.

There is very little case law interpreting what types of duties are nondelegable for purposes of the Vacancies Act.[3] Nonetheless, some laws might obviously signal through their text that certain duties are nondelegable. For example, a statute or regulation that expressly prohibits delegation of a duty likely renders that duty nondelegable for the purposes of the Vacancies Act.[4] Alternatively, a statute or

[1] 5 U.S.C. § 3347(a).

[2] *Id.* § 3348(a)(2).

[3] *See* Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009).

[4] *See* S. REP. NO. 105-250, at 18 (1998) ("The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer . . . ."); *see, e.g.*, 22 U.S.C. § 4865(a)(2)(B)(ii)(I) ("The Secretary [of State] *may not delegate* the waiver authority under clause (i) with respect to a chancery or consulate building." (emphasis added)).

(continued...)

regulation that expressly provides that "only" a certain officer may perform a certain duty would also likely make that duty nondelegable.[5]

Outside the context of the Vacancies Act, the Supreme Court has recognized that if a statute specifically vests authority in certain named officers, the statute may prohibit any delegation of that authority to officials other than those specifically named in the statute.[6] Absent such an express limitation, however, courts have not yet weighed in on what language suffices to make any particular duty nondelegable for purposes of the Vacancies Act. The Government Accountability Office (GAO) suggested in one opinion that it might not be enough for a statute or regulation to "assign" a function to a particular office.[7] In that opinion, the GAO concluded that the Vacancies Act "requires language that clearly signals duties or functions that cannot be delegated, such as providing final approval or final decisionmaking authority in a particular position."[8] This opinion indicates that whether a job responsibility is nondelegable may turn on whether that duty represents an exercise of "final" authority.[9] Ultimately, the GAO decided that the duty disputed in that case—the general responsibility of the Assistant Attorney General for the Office of Legal Counsel to supervise the department—was delegable because the regulations "contain[ed] no language indicating that this responsibility (or any of the other enumerated responsibilities) may not be delegated."[10]

Question 2. What are the nondelegable functions or duties of the office of Commissioner of Social Security? Are there common nondelegable functions or duties exercised by other heads of federal departments and agencies that are considered delegable functions of the Commissioner?

Answer. The inquiry into whether a function or duty is nondelegable is highly fact-specific and depends on the nature of the particular duty being performed. Accordingly, it is difficult to compare the functions or duties of the Commissioner to those of other federal agency heads.

As a general matter, the Social Security Act broadly provides that the Commissioner "may assign duties, and delegate, or authorize successive redelegations of, authority to act and to render decisions, to such officers and employees of the [Social Security] Administration as the Commissioner may find necessary."[11] Additionally, the section of the Social Security Act that outlines the procedures to determine individuals' eligibility for benefits specifically authorizes the Commissioner "to delegate to any member, officer, or employee of the Social Security Administration designated by the Commissioner any of the powers conferred upon the Commissioner by" that statutory section.[12] These provisions suggest that the Commissioner may generally delegate authority to Social Security Administration officials.

There are three more provisions in the Social Security Act that expressly address—and implicitly *limit*—the Commissioner's ability to delegate certain authority. The first provision allows the Commissioner to

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[5] *See* 5 U.S.C. § 3348(a)(2) (defining "function or duty" as any function or duty "required" by a statute or regulation "to be performed by the applicable officer (and *only* that officer)" (emphasis added)).

[6] *See* United States v. Giordano, 416 U.S. 505, 507-08 (1974) (holding that where 18 U.S.C. § 2516 vested certain authority in the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General," "Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him").

[7] Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *11 (Comp. Gen. June 13, 2008).

[8] *Id.* at *12.

[9] *Id.*

[10] *Id.* Further, the GAO believed that "the Department's practice of delegating various duties assigned to the [vacant office] . . . indicates that the Department's interpretation of this regulatory provision has permitted such delegation in the regular course." *Id.*

[11] 42 U.S.C. § 902(a)(7).

[12] *Id.* § 405(l).

(continued...)

enter into agreements with state and local governments to extend services to those entities' employees.[13] This statute provides that the Commissioner "is authorized, pursuant to agreement with the head of any Federal agency, to delegate any of the Commissioner's functions under this section to any officer or employee of such agency."[14] Second, two separate statutes give the Commissioner the power to address fraud and provide that the Commissioner may delegate those powers "to the Inspector General."[15] By expressly naming the officers to whom the Commissioner may delegate these specific powers, these three provisions appear to implicitly prohibit the Commissioner from delegating those powers to any *other* officers.[16]

As discussed, absent such a clear limitation on delegability, it is difficult to determine whether any given duty of the Commissioner is nondelegable. The fact that a duty is expressly assigned to the Commissioner in a statute or regulation is likely a necessary condition for a duty to be considered nondelegable, but may not be sufficient to make it so.[17] The Social Security Act assigns a wide variety of responsibilities to the Commissioner, expressly identifying "the Commissioner" as the person to carry out these duties.[18] However, there appear to be no provisions within the Social Security Act that assign a duty "only," "solely," or "exclusively" to the Commissioner.[19]

Moreover, the delegability of a duty will likely turn on the nature of the task.[20] For example, there are three statutes that designate the Commissioner an *ex officio* member of the Board of Trustees of certain trust funds.[21] An *ex officio* member of a board serves "by virtue of holding an office."[22] Arguably, because the duty to sit on these boards is inherently tied to the office of the Commissioner itself,[23] any *ex officio* duties related to these boards would be nondelegable.

Ultimately, because there is so little case law defining what types of duties are nondelegable for the purposes of the Vacancies Act, it is difficult to come to any definitive conclusion regarding whether the Vacancies Act would govern the performance of most of the duties assigned to the Commissioner.

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[13] *See id.* § 418(a).

[14] *Id.* § 418(h).

[15] *Id.* §§ 1320a-8(i), 1320b-6(i).

[16] *See* United States v. Giordano, 416 U.S. 505, 507-08 (1974).

[17] *See, e.g.*, Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101 (Comp. Gen. June 13, 2008).

[18] *See, e.g.*, 42 U.S.C. § 405(a) ("The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions . . . .").

[19] No such statutes were returned after running the following search of the United States Code Service using Lexis Advance: unanno((commissioner /s (only OR exclusively OR solely)) /p "social security").

[20] *See* Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *11 (Comp. Gen. June 13, 2008).

[21] 42 U.S.C. § 401(c) (Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund); *id.* § 1395i(b) (Federal Supplementary Medical Insurance Trust Fund); *id.* § 1395t(b) (Federal Hospital Insurance Trust Fund).

[22] BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "member ex officio" as "[a] member who serves on a board or committee by virtue of holding an office, and whose membership will therefore pass with the office to his or her successor"). *See also id.* (defining "ex officio" as "[b]y virtue or because of an office; by virtue of the authority implied by office").

[23] *See id.*

[Public Submissions for the Record follows:]

March 12, 2018

House Ways and Means

Social Security Subcommittee

Chairman Sam Johnson

Dear Ladies and Gentlemen:

My name is Mary L. Jones, private citizen.

"Lacking a Leader: Challenges Facing the SSA After 5 Years of Acting Commissioners" is a subject that I feel I must address. The people dependent of Social Security involve my family members, born in the 1930's and 1940's, who worked harder than any other subsequent generation forging out a life for themselves and their families. Their benefits are miniscule for the hard physical labor that they put into their work. The people who are dependent on Social Security are disabled military personnel or disabled peopled by no fault of their own. These populations need – I dare say deserve the best this country has to offer.

Social Security even without a Commissioner has dedicated people who truly care about the public they serve and about the quality of work they provide. As we know the baby boomer population has reached retirement age. Many of them do not want to file online applications, they want face to face interviews so there is a personal touch to this life changing event. This service request, a face to face interview, is one that they deserve because they worked for retirement or are disabled.

SSA is lacking in staff to process these claims and thus are pushing the online services. Appointment calendars going out for two months are completely booked causing an undue hardship on the public as far as scheduling appointments. Offices near Washington, DC staff has been pushed so hard that they are like robots and not personable. Thus, there are fast growing numbers of people driving an hour or two to get to an office with people who are not robots. People are spreading the word, my concern is that these will be offices pushed into becoming robots by the level of work that needs to be completed by a less than adequate number of staff. If there is any doubt to the truth in these statements, anonymously visit offices near metropolitan Washington, then visit offices outside metropolitan Washington…sit in the lobbies; listen to what the public is saying. I can pretty much guarantee that you will see no employee standing around the water fountain talking about the weather.

SSA staff retirements, hiring freeze, and lack of an experienced job pool are creating unbearable conditions within the SSA. Current staff are being required to produce numbers and numbers of claims under astronomical pressure from the management team and the public. The stress is wearing on the staff, affecting morale, and the quality of work physically possible under such conditions. The Public deserves better, the hard working staff deserve better.

It would be my sincere hope, that having an actual Commissioner who has strength and integrity could turn the downhill slide of morale to an upward swing. A commissioner who could hold the management team accountable for the way the treat their staff, hold management accountable for their behavior or lack of management skill. A commissioner who would insist that first time managers have at the very least good interpersonal relationship skills, rather than no skills at all and expect them to learn on the job. . .a job where their stress is high, learning the processes difficult, and the most important quality from the start interpersonal relationship skills thrown aside. Some of the management personnel lack the integrity that the front line workers are charged with having. It is as if, their integrity flies out the window when they become managers. Not all managers but more than there should be. Some lie regarding personnel issues, some are sneaky trying to catch a staff member with something wrong when they fail to admit their own mistakes. Management is supposed to lead by example. I grow ever concerned with what is happening in the rank and file of SSA.

However, on a positive note, there has been no front-page scandals involving employees of the SSA as there has been with other federal agencies. SSA does a tremendous job with what little they have received as far as funding and staffing.

The management teams of SSA need a strong leader, one who will bring back integrity, one who will fight for the employees on the front line and attempt to relieve some of their stress by ensuring there are appropriate, well-trained people promoted to management. A leader who will ensure that management teams provide the type of leadership that will ensure the loyalty of the staff not create hostile work environments based on their unconscious bias. A leader who has the ability to say to the powers in Washington that SSA needs more staff to provide the quality of public service SSA has provided in the past.

Thank you for taking the time to read this message, submitted respectfully by: