

# TSCL Policy Paper

## THE SENIOR CITIZENS LEAGUE WHITE PAPER ON

### CURTAILING WASTE, FRAUD, AND ABUSE IN THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

January 20, 2017

It is widely understood that the “**Old Age Survivors and Disability Insurance**” Trust Funds (“OASDI”) is badly underfunded. In 2020, the fund will begin to expend more than its income, and all reserve funds will be exhausted in 2034. However, there are actually two trust funds: one for the “**Old Age Survivors**” (“OAS”) program and one for the “**Disability Insurance**” program (“DI”). And the Disability Insurance Trust fund has been under the greater pressure, being required to pay benefits far in excess of anything previously anticipated.

In August 2015, TSCL submitted to the Senate Finance Committee and the House Ways and Means Committee its [report](#) on “Top 10 Ways Seniors Would Fix the Social Security Disability Insurance Program.” However, in late 2015, rather than take steps to solve this problem, Congress again “kicked the can down the road” and directed that for a three-year period the ratio between the two payroll taxes fueling these funds would be adjusted so that more payroll taxes would be deposited into the DI Fund to hide, rather than fix, the serious problems existing in

that program. This money diverted to shore up the DI Program was taken from the Old Age Survivors Fund, thereby advancing the date on which this retirement fund will be depleted.

In this paper, fittingly issued on Inauguration Day 2017, we explore the history of the DI Fund, the function that it was intended to serve, how the program has been administered, and why payments from the fund have grown exponentially. We explain that federal politicians have a vested interest in having more unemployed persons classified as disabled, so they are no longer counted as unemployed. And, we explain that state politicians have the same vested interest because disabled persons receive federal benefits and are removed from state welfare rolls. We also review and evaluate numerous proposals to modify the operation of the DI Fund, and propose our own reforms. If threats to the Disability Insurance Trust Fund are not addressed promptly, it will threaten the government’s ability to fulfill its promise to pay retirement benefits to seniors.

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## THE SENIOR CITIZENS LEAGUE

Founded in 1995, the Senior Citizens League (“TSCL”) is one of the largest nonpartisan seniors groups in the United States, with over 1 million members and supporters. TSCL’s members consist of vocally active senior citizens concerned about the protection of their Social Security, Medicare, and veteran/military retiree benefits. TSCL’s mission is to promote and assist members and supporters, to educate and alert senior citizens about their rights and freedoms as United States citizens, and to protect and defend the benefits for which senior citizens have earned and paid.

The roots of the Senior Citizens League go back well before 1995, when it was operated as a project of Congressionally Chartered The Retired Enlisted Association. Now, as a separately incorporated nonprofit social welfare organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code, TSCL provides a number of services aimed at improving the quality of life of our nation’s senior citizens. Some of its primary activities include: distribution of public awareness and educational materials; dissemination of information concerning Congressional legislation; enlistment of senior citizens in grassroots lobbying campaigns on issues affecting retirees (civilian and military); providing testimony and statements to Congressional Committees, and ensuring that governmental bodies live up to commitments made to senior citizens.

TSCL has led the way on fighting threats to retirees, such as that posed by providing benefits to illegal aliens under the [proposed U.S.-Mexico Social Security Totalization Agreement](#). TSCL also has exposed the [manipulation of the Consumer Price Index](#) by the Bureau of Labor Statistics, which has the effect of reducing the Social Security COLA.

## EXECUTIVE SUMMARY

The Social Security Administration (“SSA”) administers not only the nation’s Social Security Old-Age Insurance Program (“OASI”) providing earned retirement benefits, but also the Disability Insurance (“DI”) program. DI began in 1956 as a small program, but has increased dramatically in size in recent years to where, in 2015, **its total annual cost was approximately \$140 billion**, and there were almost **11 million** persons receiving DI benefits. The average lifetime benefit for a DI recipient is approximately \$300,000.<sup>1</sup>

Of immediate concern now is that the program is not being well run, resulting in benefits being provided to many more persons than anticipated, and payment of much higher levels of benefits than planned. This threatens the financial integrity of not only the DI program, but also the Social Security retirement benefit program, which has been drained repeatedly by Congress to cover losses in the DI program. This White Paper is designed to address serious problems in the DI program, and to propose common-sense solutions.

Together known as the “**Old-Age Survivors and Disability Insurance Trust Fund**” (“OASDI Trust Fund”), the program is funded by a payroll tax of 6.2 percent each from employers and employees (for a total of 12.4 percent) on wages up to a **LIMIT** of \$118,500. Of the payroll funds received, prior to 2015:

- 81 percent are deposited into the OASI Trust Fund, and
- 19 percent are deposited into the DI Trust Fund.

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<sup>1</sup> See CBS News 60 Minutes, “Disability, USA,” <http://www.cbsnews.com/news/disability-usa/>.

On July 22, 2015, the next-to-last 2015 Annual Report of the Trust Funds

Trustees projected that:

- the OASI Trust Fund was estimated to be sufficient to cover program expenses until **2033**, but
- the DI Trust Fund was estimated to be depleted by **late 2016**.<sup>2</sup>

Rather than address problems in the DI program, in October 2015, Congress chose to do what it promised not to do — transfer income from the OASI Trust Fund to the DI Trust Fund and “kick the can down the road.” In its Bipartisan Budget Act of 2015 (“BBCA”), Pub. L. No. 114-74, **Congress increased the allocation to the DI Trust fund by an additional 0.57 percentage points** (from 1.8 percentage points to 2.37 percentage points of the total combined 12.4 percent payroll tax) in **2016, 2017, and 2018**.

Unfortunately, this money had to come from somewhere, and it came from a reduction in the OASI Trust Fund used to fund retirement programs. This increased allocation of the payroll tax to the DI Trust Fund is projected to extend the date of depletion of the DI Trust Fund reserves from the end of **2016 until the end of 2022**. However, it also has the secondary effect of hastening the date of depletion of the OASI Trust Fund.

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<sup>2</sup> If allowed to become depleted, under current law, benefits paid from the DI Trust Fund automatically would be reduced to correspond to the Fund’s current income levels. See <https://www.ssa.gov/oact/tr/2015/tr2015.pdf>.

There are two primary reasons that recipients of Social Security retirement benefits should be concerned about the enormous and largely uncontrolled growth of DI programs.

- Some DI benefits are funded **directly** from the OASI Trust Fund — leaving less money in the OASI Trust Fund available to pay retirement benefits to retirees.
- Even those DI programs supposedly funded exclusively from the DI Trust Funds actually are being funded **indirectly** from the OASI Trust Fund (as the DI Trust Fund is drained by Congressional transfers from the OASI Trust Fund).

There are many reasons to believe that the DI program is being poorly run, incurring significant waste, fraud, and abuse. The Social Security Administration has already admitted several flaws in testimony to Congress. For example, many DI applicants have been shown to have exaggerated the extent and length of their injuries to collect disability payments and, once receiving DI benefits, have no desire to return to work even if physically able to do so.

On March 22, 2013, National Public Radio broadcast and published a story entitled “Unfit for Work: The startling rise of disability in America.”<sup>3</sup> The report explains that the growth in the number of persons on disability has “skyrocketed ... even as medical advances have allowed many more people to remain on the job, and new laws have banned workplace discrimination against the disabled.” Just one of the interesting revelations in the report was that, in 1961, only 8.3 percent of newly

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<sup>3</sup> C. Jodffe-Walt, “Unfit for Work,” National Public Radio, All Things Considered and This American Life, <http://apps.npr.org/unfit-for-work/>.

disabled workers alleged back problems (difficult-to-verify), but now the number exceeds one-third of all DI recipients.

An October 2013 investigation into the DI program by CBS News' 60 Minutes show exposed a program that was well summarized by one of the 1,500 Administrative Law Judges who helps administer the program, Marilyn Zahm:

If the American public knew what was going on in our system, half would be outraged and the other half would apply for benefits.<sup>4</sup>

This White Paper builds on a survey that had been taken of TSCL's members and provided to Congress in August 2015,<sup>5</sup> to evaluate and propose specific ways in which the financial hemorrhaging can be brought to an end, with the financial stability of both Trust Funds protected, through Congressional adoption of meaningful reforms.

TSCL is continuing to work on other ideas for reform of the DI Program, using the Freedom of Information Act to use never-before released information as to the specific problems in the system, and then obtain that information to craft legislative proposals for common-sense reform in the program.

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<sup>4</sup> S. Kroft, "Disability, USA," 60 Minutes (October 10, 2013) <http://www.cbsnews.com/news/disability-usa/>.

<sup>5</sup> See [http://seniorsleague.org/assets/The-Senior-Citizens-League\\_Top10Ways\\_SSDI-Statement.pdf](http://seniorsleague.org/assets/The-Senior-Citizens-League_Top10Ways_SSDI-Statement.pdf).

## ANALYSIS

The federal Disability Insurance Program is hemorrhaging money. In 2015, the DI Trust Fund had total receipts of \$118.6 billion, against \$146.6 billion in total expenditures, resulting in a decrease in trust fund assets of \$28.0 billion for that one year. At the end of 2015, the total Disability Insurance Trust Fund balance was only \$32.3 billion,<sup>6</sup> with the certainty it would be unable to pay all claims before the end of FY 2016. As a result, in late 2015, Congress rearranged payroll taxes to shift billions of dollars from the retirement trust fund to the disability trust fund during 2016, 2017, and 2018. The abusive nature of this stop-gap measure illustrates why every person who receives Social Security retirement benefits or expects to receive them in the future should be concerned as to how this problem occurred and how to fix it.

### **I. DISABILITY INSURANCE PROGRAMS ADMINISTERED BY THE SOCIAL SECURITY ADMINISTRATION.**

#### **A. Overview of DI Programs.**

The principal Social Security program — the **Old-Age and Survivors Insurance** (“OASI”) Program — provides benefits to certain:

- (i) retired workers and their dependent family members, and
- (ii) survivors of deceased workers.

In 1956,<sup>7</sup> Congress created a **Disability Insurance** (“DI”) Program which provides benefits to certain:

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<sup>6</sup> <https://www.ssa.gov/OACT/STATS/table4a2.html>

<sup>7</sup> See Social Security Act Amendments of 1956.

- (i) disabled workers,
- (ii) spouses and widows/widowers of disabled workers, and
- (iii) children of disabled workers.

The Social Security Administration (“SSA”) administers these programs, managing them with two separate trust funds:

- (i) the **Old Age Survivors’ Insurance** (“OASI”) Fund, and
- (ii) the **Disability Insurance** (“DI”) Fund.<sup>8</sup>

## **B. History of Expansion of SSA Programs.**

President Franklin D. Roosevelt signed the **Social Security Act** (“the Act”) into law on August 14, 1935. As originally designed, it paid benefits only to retired workers aged 65 and older. Since then, however, the Act has been changed many times, almost always increasing the number of persons receiving benefits, increasing the amount of the benefits paid, and expanding the purposes for which benefits are paid — often without providing the additional revenues to pay those benefits. The following brief review of the expansion of Social Security program by Congress demonstrates how the **75-year unfunded obligation** of the OASDI Trust Funds now has reached **\$14.2 trillion**.<sup>9</sup> The Act was amended in 1939 to add two major new categories of benefits:

- (i) payments to the spouse and minor children of a retired worker (known as dependents benefits); and
- (ii) payments to the family of a deceased worker (known as survivors benefits).

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<sup>8</sup> <http://www.ssa.gov/OACT/ProgData/describedi.html>

<sup>9</sup> See R. Boccia & R. Greszler, “[Social Security Programs Face Depletion in Near Future](#),” The Daily Signal (June 28, 2016); see also 2016 Trustees Report at 75, Table IV.B6.

The Social Security Act has been modified many times since then in ways beyond the scope of this paper.

The federal **Disability Insurance** program dates to August 1, 1956, when President Dwight Eisenhower signed legislation providing for cash benefits to disabled workers age 50-64, after a six-month waiting period, and to adult disabled children of retired, disabled, or deceased workers, if the children had been disabled before the age of 18.

Disability Insurance was broadened in 1958 to provide benefits to disabled workers' dependents. The program was again broadened in 1960 to permit disabled workers under the age of 50 to qualify for benefits. And the Act was again broadened in 1967 to provide benefits for disabled widows/widowers aged 50-64, at reduced benefits levels.

In 1972, the waiting period was reduced from six months to five months, and the age before which a "childhood disability" must have begun was increased from 18 to 22. Also, Medicare coverage was extended to persons receiving disability benefits for 24 consecutive months.

The singular federal effort to bring restraint to spending on Disability Insurance occurred in 1980, after Congress witnessed unexpected growth in the program, with few persons receiving disability benefits ever returning to work. The 1980 legislation limited disability benefit levels, established a periodic review of continuing disability requirements, enhanced rehabilitation and work incentive provisions, and withheld payment of benefits to incarcerated felons.

## Special Note on Supplemental Security Income (SSI) Program

SSA also administers the Supplemental Security Income (“SSI”) program which is designed to supplement the income of low-income elderly persons (over age 65), blind or disabled adults and children with few assets. The SSI program was established as a needs-based program as a replacement to the Old-Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled programs.

There are numerous differences between the DI program and the SSI program.

For example, unlike DI, for children to receive SSI benefits, they must have certain disabilities based on medical conditions (defined to include, low birth weight) from the date of birth. (The manner in which benefits for children are determined was significantly expanded by the U.S. Supreme Court in Sullivan v. Zebley, 493 U.S. 521 (1990).)

Persons who apply to the SSA for DI benefits automatically are considered to also have applied for SSI benefits, and thus the programs are administered together. Benefits for children can begin at birth, to age 18 (or to age 22 if a student is regularly attending school).

Looking at both DI and SSI programs together, of the approximately 200 million persons aged 18-64, as of December 2014, **13.0 million** people (about 6.5 percent of the population) received benefits on the basis of disability, as follows:

- **8.1 million people** (62 percent of beneficiaries) received benefits from the Social Security DI Program only;
- **3.5 million people** (27 percent of beneficiaries) received benefits from the SSI Program only; and
- **1.4 million people** (11 percent of beneficiaries) received benefits from both programs concurrently.

Benefits under the SSI program (almost \$52 billion in federal funds in FY 2014) are paid from general tax revenues — not OASDI taxes paid into the OASI and DI Trust Funds — and are beyond the scope of this Paper.

In 1982, Congress was back to expanding the program, passing legislation ensuring that benefits could continue during an appeal of a decision to cease benefits, and giving claimants the right to a face-to-face evidentiary hearing at the reconsideration level of appeal.

The Social Security Act Amendments of 1983 (which raised the age to qualify for full Social Security retirement benefits) allowed disabled workers and widows/widowers to remain on the DI rolls for up to an additional two years before “converting” to age-based benefits.<sup>10</sup>

### **C. Current Operation of Disability Insurance Program.**

Under the Disability Insurance program as currently constituted, once a person is determined to be disabled, the following monthly cash benefits are available:

- a. Disabled worker, so long as the worker reaches full retirement age or dies.
- b. Wife (husband) of a disabled worker, if
  - she/he is aged 62 or older, or
  - has in her/his care a child under the age of 16, or a disabled adult child who is entitled to benefits on the worker’s earnings record.
- c. Unmarried children of a disabled worker until they reach age 18, or until age 19 if they are a full-time elementary or secondary school student.
- d. Disabled widow/widower or a disabled surviving divorced spouse who is aged 50 to full retirement age.

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<sup>10</sup> Additional changes to the Disability Insurance were made during the 1980's and 1990's, which are technical, and beyond the scope of this White Paper.

- e. Disabled adult children of disabled, retired, or deceased workers, 18 or older (with no 5-month waiting period).

Although the program originally was designed to cover only persons with “established work histories, who were unable to continue working because of disability,”<sup>11</sup> the program is not now so limited. Beneficiaries have expanded to include what are termed “auxiliary benefits” to both children and spouses of disabled workers.

Although one would anticipate that all Disability Insurance benefits would be paid from the Disability Insurance Fund, this is not the case. Two types of disability benefits are paid directly from the OASI Fund:

- (i) survivors benefits to young widows (widowers) with a child under age 16 or a disabled child in his or her care; and
- (ii) survivors benefits to widows (widowers) (between 50 and retirement age).<sup>12</sup>

As of December 2014, the following chart reflects DI benefits paid<sup>13</sup>:

	No. of Beneficiaries	Avg. Annual Benefit	Total Annual Benefits Paid
Disabled Workers	8,954,518	\$13,985	\$125,226,000
Children	1,827,619	\$4,188	\$7,654,000
Spouses	148,955	\$3,774	\$562,000
<b>Total</b>	<b>10,931,092</b>		<b>\$133,442,000</b>

<sup>11</sup> SSDI at Age 60.

<sup>12</sup> See SSA Types of Beneficiaries. <https://www.ssa.gov/oact/progdata/types.html>

<sup>13</sup> See SSA Issue Paper, “Social Security Disability Insurance at Age 60: Does It Still Reflect Congress’ Original Intent?” [https://www.ssa.gov/policy/docs/issue\\_papers/ip2015-01.html](https://www.ssa.gov/policy/docs/issue_papers/ip2015-01.html).

The average annual payment to Disabled Workers of \$13,985 in 2014 exceeded the poverty level that year, which was \$11,670. Additionally, many beneficiaries also receive DI benefits for their spouses and/or their children. Moreover, the average annual payments does not include all of the public benefits which the disabled **workers** and their families receive. They can be eligible to receive, for example:

- Medicare benefits (given to all persons who had been receiving disability benefits for 24 consecutive months as of 1972)<sup>14</sup>
- Supplemental Nutrition Assistance Program (“SNAP”) program benefits (formerly known as Food Stamps)<sup>15</sup>
- Student Lunch Programs
- Medicaid
- Certain State Welfare premiums
- Private assistance

## II. STATUS OF SOCIAL SECURITY TRUST FUNDS.

The crisis in the DI program is demonstrated by how its status was described in the summaries of the last three Social Security and Disability Insurance annual reports.

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<sup>14</sup> See 42 U.S.C. § 1395c.

<sup>15</sup> Fraud in the SNAP program has been rampant for years. In 2012, the Office of the Inspector General of the U.S. Department of Agriculture (which administers the program) directed 48 percent of its budget to investigating SNAP fraud. SNAP fraud includes fraud by retailers, and fraud by SNAP recipients, including those who have “exchanged benefits for drugs, weapons, and other contraband.” See Statement of the USDA Inspector General Phyllis K. Fong before the House Committee on Oversight and Government Reform (Mar. 8, 2012). <https://oversight.house.gov/wp-content/uploads/2012/03/3-8-12-Food-Stamp-Fraud-Fong.pdf>. See also transcript of March 8, 2012 House hearing on food stamp fraud. <https://oversight.house.gov/hearing/food-stamp-fraud-as-a-business-model-usdas-struggle-to-police-store-owners/>.

The summary of the 2014 Annual Report of the Trustees of the Social Security and Medicare Trust Funds warned that the DI Trust Fund would be depleted in late 2016:

Social Security's Disability Insurance (DI) program **satisfies neither the Trustees' long-range test** of close actuarial balance nor their **short-range test** of financial adequacy and faces the most immediate financing shortfall of any of the separate trust funds. DI Trust Fund reserves expressed as a percent of annual cost (the trust fund ratio) declined to 62 percent at the beginning of 2014, and **the Trustees project trust fund depletion late in 2016, the same year projected in the last Trustees Report.** DI costs have exceeded non-interest income since 2005 and the trust fund ratio has declined in every year since peaking in 2003. While legislation is needed to address all of Social Security's financial imbalances, the need has become most urgent with respect to the program's disability insurance component. Lawmakers need to act soon to avoid **automatic reductions in payments to DI beneficiaries in late 2016.**<sup>16</sup>

The summary of the 2015 Annual Report of the SSA Trustees again explained the urgency of the crisis affecting the DI Fund:

Social Security's Disability Insurance (DI) Trust Fund **now faces an urgent threat of reserve depletion, requiring prompt corrective action by lawmakers if sudden reductions or interruptions in benefit payments are to be avoided.** Beyond DI, Social Security as a whole as well as Medicare cannot sustain projected long-run program costs under currently scheduled financing. Lawmakers should take action sooner rather than later to address these structural shortfalls, so that the uncertainty now facing disability beneficiaries will not eventually be experienced by other programs' participants, and so that a broader range of solutions can be considered and more time will be available to phase in changes while giving the public adequate time to prepare. Earlier action will also help elected officials minimize adverse impacts on vulnerable

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<sup>16</sup> "A Message to the Public," A Summary of the 2014 Annual Reports, Social Security and Medicare Boards of Trustees, 2014 Trustees Annual Report, <https://www.ssa.gov/oact/TRSUM/2014/tr14summary.pdf>.

populations, including lower-income workers and people already dependent on program benefits.<sup>17</sup>

The summary to the 2016 Trustees report provided an update to the status of the DI Trust Fund based on the 2015 Congressional action:

The Bipartisan Budget Act of 2015 was projected to **postpone the depletion** of Social Security Disability Insurance (DI) Trust Fund **by six years, to 2022 from 2016**, largely by temporarily reallocating a portion of the payroll tax rate from the Old Age and Survivors Insurance (OASI) Trust Fund to the DI Trust Fund. The effect of updated programmatic, demographic and economic data extends the DI Trust Fund reserve depletion date by an additional year, to the third quarter of 2023, in this year's report. While legislation is needed to address all of Social Security's financial imbalances, **the need remains most pressing with respect to the program's disability insurance component.**<sup>18</sup>

The problem of inadequacies in the DI Trust Fund is not new. As The Senior Citizens League has reported,<sup>19</sup> on 11 occasions before 2015 Congress reacted to DI Trust Fund insolvency problems with short-term solutions, by **“borrowing” funds from the OASI Fund**<sup>20</sup> — as a **short-term funding fix** for the SSDI. This short-term rebalancing or reallocation of funds has been decried by many for years as an unsatisfactory method of avoiding the urgency of the DI Trust Fund solvency problem, and not facing up to the need for an actual legislative solution to protect

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<sup>17</sup> “A Message to the Public,” A Summary of the 2015 Annual Reports, Social Security and Medicare Boards of Trustees, 2015 Trustees Annual Report, <https://www.ssa.gov/oact/TRSUM/tr15summary.pdf>.

<sup>18</sup> “A Message to the Public,” A Summary of the 2016 Annual Reports, Social Security and Medicare Boards of Trustees, 2016 Trustees Annual Report, <https://www.ssa.gov/oact/trsum/>.

<sup>19</sup> See “Are Social Security Benefit Cuts More Likely?”, The Social Security and Medicare ADVISOR, March 2015, <http://seniorsleague.org/social-security- benefit-cuts-likely/>.

<sup>20</sup> <http://www.ssa.gov/OACT/ProgData/describeoasi.html>.

the solvency of the DI Trust Fund without impinging on the OASI Trust Fund reserves. In other words, it is like rearranging the deck chairs on the Titanic.

In late 2015, the 114<sup>th</sup> Congress again took the easy way out in passing Section 833 of the Bipartisan Budget Act of 2015, as mentioned above. This legislation, passed on October 28, 2015 and signed by President Obama on November 2, 2015, made several changes to the Social Security Act.<sup>21</sup> Of relevance here, Section 833 of the Budget Act of 2015 increased the share of the FICA payroll tax paid on wage and self-employment income to the DI Trust Fund by **an additional 0.57 percentage points**, making a corresponding reduction in the trust fund used to pay retirement benefits. This change resulted in a total of 2.37 percentage points of the total combined 12.4 percent payroll tax) moving from OASI to DI in 2016, 2017, and 2018. This increased allocation from the payroll tax to the DI Trust Fund is projected to extend the date of depletion of the DI Trust Fund reserves from the end of 2016 until the end of 2022. Of course, it also has the corollary effect of hastening the date of depletion of the OASI Trust Fund Reserves.<sup>22</sup> For this reason, every person receiving or who expects to receive Retirement Benefits should be concerned about excessive spending for the Disability Insurance program.

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<sup>21</sup> See, e.g., <http://dailysignal.com/2015/10/27/budget-deal-kicks-the-can-on-disability-insurance-robs-150-billion-from-social-security/>; <http://rgglaw.net/congressional-budget-deal-prolongs-life-of-disability-trust-fund/>.

<sup>22</sup> <http://ssab.gov/Facts-and-Figures/Did-You-Know-Charts/Disability-Trust-Fund-Solvency>. See, e.g., H.R. 1314, enacted as Public Law No. 114-74 (11/2/15), Sec. 833 (Reallocation of Payroll Tax Revenue).

The Bipartisan Budget Act of 2015 was in direct conflict with a rule that had been adopted by the House of Representatives at the outset of the 114<sup>th</sup> Congress, on January 6, 2015, designed to prevent consideration by the House of any bill that would permit such a reallocation of the payroll tax.<sup>23</sup> That rule was designed to prohibit legislation authorizing the transfer of funds from the OASI Trust Fund to the DI Trust Fund, unless Congress first enacted legislation to address and improve the program's long-term finances.<sup>24</sup>

At present, both Congress and the SSA are treating the immediate DI Trust Fund solvency problem as having been cured until the end of 2022.<sup>25</sup> It is not clear when the window for further legislative reform will next open. However, without public pressure from those who rely on Social Security retirement benefits and

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<sup>23</sup> The rule, H. Res. 5, was introduced by Congressman Kevin McCarthy (R-CA-23). The provision governing Trust Funds was supported by Chairman of the Subcommittee on Social Security Sam Johnson (R-TX-3).

<sup>24</sup> See <https://www.congress.gov/bill/114th-congress/house-resolution/5>. Specifically, Section 3(q) of House Resolution 5 provides:

(q) Social Security Solvency.—

(1) POINT OF ORDER.—During the One Hundred Fourteenth Congress, it shall not be in order to consider a bill or joint resolution, or an amendment thereto or conference report thereon, that reduces the actuarial balance by at least .01 percent of the present value of future taxable payroll of the Federal Old-Age and Survivors Insurance Trust Fund established under section 201(a) of the Social Security Act for the 75-year period utilized in the most recent annual report of the Board of Trustees provided pursuant to section 201(c)(2) of the Social Security Act.

(2) EXCEPTION.—Paragraph (1) shall not apply to a measure that would improve the actuarial balance of the combined balance in the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for the 75-year period utilized in the most recent annual report of the Board of Trustees provided pursuant to section 201(c)(2) of the Social Security Act.

<sup>25</sup> See, e.g., [www.ssab.gov/Facts-and-Figures/Did-You-Know-Charts/Disability-Trust-Fund-Solvency](http://www.ssab.gov/Facts-and-Figures/Did-You-Know-Charts/Disability-Trust-Fund-Solvency).

those who expect to receive them, Congress can be expected to avoid the next crisis in the DI Trust Fund in the same way — again, robbing Peter to pay Paul.

### III. PROCEDURES FOR OBTAINING DISABILITY BENEFITS.

The procedures for determining eligibility for disability benefits and the amount of those benefits for eligible persons (“the DI claim procedure) are complicated. As discussed in Chapter V, *infra*, certain of those procedural steps may be in need of amendment to help arrive at a fairer and more adequately functioning system.

The steps involved in the DI claim procedure<sup>26</sup> can be broadly summarized as follows:

#### 1. Initial Claim Procedure.

A Disability applicant (“claimant”) begins the process by **filing a claim** with SSA. The claimant must not be working (or working and earning \$1,090 or less per month, based on 2015 levels). The application must be submitted either online or by delivering the application to SSA. The application consists of various forms and a substantial amount of personal and medical information and records. This is a pure document-based approach, with no advocacy, argument, or other interaction between the claimant and SSA.<sup>27</sup> The claimant can be assisted by an attorney,<sup>28</sup> but the initial application does not present an opportunity to engage in advocacy or argument with respect to SSA’s consideration of the claim. These matters are determined by SSA offices — the Disability Determination Services (DDS) office — located in the claimant’s home state. According to SSA, a team (consisting of a State disability examiner and a State agency medical or psychological consultant) usually makes an initial determination at the first

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<sup>26</sup> See <https://faq.ssa.gov/link/portal/34011/34019/Article/3718/How-do-I-apply-for-Social-Security-disability-benefits>.

<sup>27</sup> The claimant can file online, and may be assisted by SSA personnel in completing the application.

<sup>28</sup> SSA Publication No. 05-10075 describes a claimant’s right to have representation in pursuing disability claims.

level.<sup>29</sup> After reviewing the application to make sure of its completeness and that the applicant has met the basic requirements for disability benefits (*e.g.*, number of work years, current work activities and earnings), SSA transmits that application to the Disability Determination Services (“DDS”) office in the applicant’s state. It is the state agency that makes the initial disability determination in each case.

If the SSA awards benefits to the claimant, the matter is concluded — without a hearing. However, even if there is a benefit award, the duration of any financial benefits is a significant issue, since disability awards are subject to future modification in the form of increases, decreases, or termination.

Approximately 65 percent of disability applications are initially denied — because of technical failures in the application (*e.g.*, insufficient work credits) or the claimant’s inability to demonstrate that his disability meets the impairment listing for his condition — leaving the claimant with two options: to refile another disability application at later time, or to appeal.

If the claimant wishes to contest the SSA denial of benefits, there are four levels of appeal<sup>30</sup>: (i) reconsideration; (ii) hearing; (iii) Appeals Council review; and (iv) filing suit in federal district court.

**2. Reconsideration.** The claimant may request that SSA reconsider the application previously submitted. (SSA considers “**reconsideration**” a first-level appeal.) The claimant must submit a request for reconsideration within 60 days of receipt of the SSA decision denying a claim for disability. (If that deadline were missed, the application process would need to be begun again.) The same office that handled the initial application would handle the request for reconsideration, but with a different examiner. According to SSA, “[a] team consisting of a State agency disability examiner and a medical or psychological consultant, neither of whom were involved in making the initial

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<sup>29</sup> See Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the Committee on Ways and Means, Subcommittee on Social Security (June 27, 2012), [https://www.ssa.gov/legislation/testimony\\_062712.html](https://www.ssa.gov/legislation/testimony_062712.html).

<sup>30</sup> See SSA Publication 05-10058. See also Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the Committee on Ways and Means, Subcommittee on Social Security (June 27, 2012), [https://www.ssa.gov/legislation/testimony\\_062712.html](https://www.ssa.gov/legislation/testimony_062712.html).

determination, reviews the claimant’s case [and] [i]f necessary, the team will request additional evidence or a new consultative examination.”<sup>31</sup>

SSA advises claimants to review rejected applications for missing or overlooked information. On reconsideration, the application also can be updated (e.g., visits to physicians, new treatments, any increase/decrease of work activity). As with the initial application, the claimant may be assisted by an attorney — including a written submission by the attorney — but there is no opportunity for interaction between the attorney and SSA at this stage. SSA estimates a period of between 3-5 months to complete the reconsideration process, and obtain a letter decision.

It is estimated that between 10 and 15 percent of claimants receive their disability award through the reconsideration process. *See SSA Statistical Report*, n.5, *supra*.<sup>32</sup>

**3. Hearing before ALJ.** The SSA’s Office of Disability Adjudication and Review (“ODAR”) manages the hearings and Appeals Council levels of the disability administrative review process. If the claimant’s reconsideration request is denied, the second level in the appeal process permits the claimant to seek a hearing **before an administrative law judge (“ALJ”)**. The claimant must again notify SSA — within 60 days of receipt of an adverse decision on reconsideration — that the decision will be appealed.<sup>33</sup> At the hearing on the appeal — the first trial-like procedure in the claims process — the claimant may appear with a lawyer (or other representative) before the ALJ, who considers all of the evidence (including the testimony of other

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<sup>31</sup> *See* Astrue, [https://www.ssa.gov/legislation/testimony\\_062712.html](https://www.ssa.gov/legislation/testimony_062712.html).

<sup>32</sup> *See also* <http://www.ssdrc.com/section-4.html> (Social Security Resource Center); <http://invisibledisabilities.org/coping-with-invisible-disabilities/disability-benefits/social-security-disability-denial-rates/> (Invisible Disabilities Ass’n); <https://www.allsup.com>.

<sup>33</sup> “When a hearing office receives a request for a hearing from a claimant, the hearing office staff prepares a case file, assigns the case to an ALJ and schedules a hearing. The ALJ decides the case de novo, meaning that he or she is not bound by the determinations made at the initial and reconsideration levels. The ALJ reviews any new medical and other evidence that was not available to prior adjudicators. The ALJ will also consider a claimant’s testimony and the testimony of medical and vocational experts called for the hearing. If a review of all of the evidence suggests that we can issue a decision that is fully favorable to the claimant without holding a hearing, an ALJ or attorney adjudicator may issue an on-the-record, fully favorable decision. If an on-the-record decision is not possible, an ALJ holds a hearing....” Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the Committee on Ways and Means, Subcommittee on Social Security (June 27, 2012) [https://www.ssa.gov/legislation/testimony\\_062712.html](https://www.ssa.gov/legislation/testimony_062712.html).

witnesses, if called). **Importantly, at such hearings, the government is not represented by a lawyer.** There are over 750,000 such hearings annually.<sup>34</sup> Between 45 and 66 percent of claimants who request a hearing before an ALJ are awarded benefits.<sup>35</sup>

The ALJ may rule for the claimant without holding a hearing. ALJ hearings range from under an hour to several hours depending on the types and amount of evidence, using less formal than procedures in most courts. The claimant has a right to an in-person hearing. Video conferencing may be used if agreed to. The hearing may take place in an office building or hotel conference room. The ALJ may wear a black robe and sit on an elevated platform. In all cases, witnesses testify under oath, and proceedings are recorded. Normally, a vocational expert (“VE”) is present, as well as a medical expert. The VE’s function is to address the disability question directly by testifying as to what jobs, if any, a person who has limitations similar to those of the claimant can perform, as well as the availability of such jobs. The claimant can also bring witnesses to testify to his specific limitations.

The ALJ receives the testimony of the claimant and the witnesses, including the VE and any medical experts, with questions posed by the ALJ or claimant’s counsel, if present. Even though the claimant has counsel, **there is no attorney representing SSA at the hearing to ask questions.** Even after a hearing, the ALJ may seek additional evidence.<sup>36</sup> Again, although statistics vary from year to year, it appears that the rate of success of disability claimants at the ALJ hearing stage of the appellate process is very high, ranging between 45 to 66 percent.

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<sup>34</sup> “Even though **claimants can be represented by lawyers at the hearings on disability eligibility/damages claims before an administrative law judge, the government has no lawyer in that proceeding.** Thus, the government has no advocate during the hearing which is that part of the claims process — similar to a trial in other venues — where evidence is presented, debated, and ruled upon. Although the ALJ may challenge claims that are made and come to his/her own conclusion about the matters that are presented, there is **no provision to challenge the claims made** by the person seeking benefits, either as to his eligibility, or the amount of benefits to which he is entitled.” Statement of Michael J. Astrue, *supra*.

<sup>35</sup> See [www.allsup.com](http://www.allsup.com), *supra*; [www.invisibledisabilities.org](http://www.invisibledisabilities.org), *supra*; <http://www.ssdrc.com/10-3.html> (Social Security Resource Center).

<sup>36</sup> “If, following the hearing, the ALJ believes that additional evidence is necessary, the ALJ may leave the record open and conduct additional post-hearing development; for example, the ALJ may order a consultative exam. Once the record is complete, the ALJ considers all of the evidence in the record and makes a decision. The ALJ decides the case based on a preponderance of the evidence in the administrative record.” Statement of Michael J. Astrue, *supra*.

4. **Appeals Council review.** If the ALJ decision is not favorable, the claimant may request review by the **Appeals Council**, which is considered the third level of appeal. The claimant again must notify SSA — within 60 days of receipt of an adverse ALJ decision — that the decision will be appealed, requesting a review of the ALJ decision by the Appeals Council. The Appeals Council will review the ALJ decision to determine if it was rendered properly, in accordance with law. Reportedly, Appeals Council reverse a denial of award in very few decisions — approximately 1 percent.

5. **Federal Court review.** If the Appeals Council decision is unfavorable, the claimant may then file a **civil action** in U.S. district court, seeking reversal of the administrative denial and a disability award. This is considered the fourth level of appeal. Reportedly, very few disability claimants (less than 1 percent) avail themselves of this option, and most such suits (70 percent or more) are unsuccessful. Only at this stage of review, in federal court, is the government represented by legal counsel.

Using these procedures, SSA reports on the number of claims found to be valid:

“The **final award rate** for disabled-worker claimants has varied over time, averaging nearly **45 percent** for claims filed from 2001 through 2010. The percentage of claimants awarded benefits at the **initial claims level** averaged **28 percent** over the same period and ranged from a high of 37 percent to a low of 26 percent. The percentage of claimants awarded at the **reconsideration and hearing levels** are averaging **3 percent** and **13 percent**, respectively. **Denied** disability claims have averaged nearly **53 percent**.” Annual Statistical Report on the Social Security Disability Insurance Program, 2014 (November 2015).  
[https://www.ssa.gov/policy/docs/statcomps/di\\_asr/2014/di\\_asr14.pdf](https://www.ssa.gov/policy/docs/statcomps/di_asr/2014/di_asr14.pdf).

The balance of this report explains how the DI Trust Fund can be protected from waste, fraud, and abuses.

#### **IV. PROPOSALS TO REFORM THE DISABILITY INSURANCE PROGRAM.**

##### **A. Government Agency Proposals.**

Proposals for reform have come from various government agencies. In July 2012, the **Congressional Budget Office** (“CBO”) issued a report called “Policy

Options for the Social Security Disability Insurance Program.”<sup>37</sup> The CBO had presented other options in its November 2014 report on the overall federal budget: “Option for Reducing the Deficit: 2015 to 2024.”<sup>38</sup>

The **Social Security Administration** testified about reforms for disability insurance on February 11, 2015.<sup>39</sup>

The **Social Security Advisory Board**, an independent government agency, maintains charts and data on disability insurance as well as policy papers on the issues.<sup>40</sup> It held a forum on March 8, 2013, “Social Security Disability: Time for Reform.”<sup>41</sup> Presentations<sup>42</sup> included the following:

Reform Proposals: Toward Fiscal and Structural Balance

David Autor

Professor and Associate Department Head, Department of Economics

Massachusetts Institute of Technology

[Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System](#)

Jason Turner

Executive Director

Secretary’s Innovation Group

[Reforming Disability – Secretary’s Innovation Group](#)

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<sup>37</sup> [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance\\_print.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance_print.pdf).

<sup>38</sup> <https://www.cbo.gov/budget-options/2014>.

<sup>39</sup> See Statement of Carolyn W. Colvin, Acting Commissioner, Social Security Administration, Before the Senate Budget Committee, Feb. 11, 2015, [https://www.ssa.gov/legislation/testimony\\_021115.html](https://www.ssa.gov/legislation/testimony_021115.html).

<sup>40</sup> <http://www.ssab.gov/Disability-Policy>.

<sup>41</sup> <http://www.ssab.gov/FORUM2013>.

<sup>42</sup> <http://www.ssab.gov/Forum-Presentations>.

David Stapleton  
Senior Fellow & Director, Center for Studying Disability Policy  
Mathematica Policy Research  
[A Process for Reforming Disability Policy](#)

Jack Smalligan  
Acting Deputy Associate Director of the Education, Income Maintenance and  
Labor Division  
Office of Management and Budget (OMB)  
[An Evidence-Based Path to Disability Insurance Reform](#)

Finally, the **Government Accountability Office** released a report on March 14, 2016 entitled “Social Security Disability: SSA Could Increase Savings by Refining Its Selection of Cases for Disability Review.”<sup>43</sup>

#### **B. Think Tank Proposals.**

The **American Enterprise Institute** and The Brookings Institute cosponsored a two-day symposium with the Secretary’s Innovation Group in April 2013, where they discussed the problems facing SSDI and proposals for reform.<sup>44</sup>

Former Congressman Jim McCrery (R-LA) and Former Congressman Earl Pomeroy (D-ND), also both former Chairmen of the House Ways and Means Committee Social Security Subcommittee, co-chair the SSDI Solutions Initiative,<sup>45</sup> a project of the **Committee for a Responsible Federal Budget**. SSDI Solutions

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<sup>43</sup> <http://www.gao.gov/products/GAO-16-250>.

<sup>44</sup> <http://www.aei.org/events/disability-insurance-inherent-problems-practical-solutions-and-action-for-reform-part-1/>.

<sup>45</sup> <http://ssdisolutions.org/ssdi-about>. Resources – <http://ssdisolutions.org/ssdi-resources>.

held a conference on August 4, 2015. The Agenda and papers were published<sup>46</sup> and a video of the conference is also available.<sup>47</sup>

Some of former Congressman Pomeroy's comments at the conference indicated he was not focusing on improving SSDI's solvency:

- "Eleven million people dependent on this program."
- "We are not even talking about solvency.... It is about advancing the ball for a better program."

Similarly, former Congressman McCrery explained that some of the SSDI proposals would increase the costs of the program, and some would reduce the costs, but he thought that the proposals are good ideas.

With respect to the November 2, 2015 budget deal, McCrery and Pomeroy issued the following press release<sup>48</sup>:

Last week, Congress approved a budget deal which would make several changes to the Social Security Disability Insurance (SSDI) program, including a reallocation of the payroll tax from the old-age trust fund sufficient to **extend the life of the SSDI trust fund for six years**. In response to the deal, former Congressmen Jim McCrery and Earl Pomeroy, co-chairs of the McCrery-Pomeroy SSDI Solutions Initiative, said the following:

**We are pleased the pending insolvency** of the Social Security Disability Insurance trust fund **has been addressed**, removing the threat of steep benefit cuts through 2022. With the near-term funding crisis now behind it, we hope lawmakers will work together to truly improve the SSDI program for claimants and taxpayers alike.

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<sup>46</sup> <http://ssdisolutions.org/sites/default/files/conferenceprogramfinal.pdf>.

<sup>47</sup> <http://ssdisolutions.org/2015-conference>.

<sup>48</sup> <http://ssdisolutions.org/ reps-mccrery-pomeroy-budget-deal-should-mark-beginning-ssdi-conversation>.

The package includes **several modest reforms to the SSDI program** -- some in the spirit of the many ideas we have been collecting and sharing with policymakers in recent months – including measures to reduce fraud and an extension of demonstration authority which we hope will be used to test some of the ideas we’ve been exploring to maintain workforce attachment. Yet there is much left to do, and the momentum to improve SSDI must be maintained beyond the immediate funding crisis. SSDI is without question the most important disability benefit program in the country, and Americans expect Congress to continue to look for ways to improve the program. While avoiding insolvency takes the pressure off, Congress needs to consider this step the beginning of the conversation about how to best support Americans with disabilities, not the last word. [Emphasis added.]

**The Heritage Foundation** has a proposal to change the SSDI benefit level to a flat benefit for each qualifying disabled worker to be equal to 100 percent of the federal poverty level (\$11,772, or \$981 per month). See Heritage Backgrounder, “Improving Social Security Disability Insurance with a Flat Benefit,” Rachel Greszler, Oct. 23, 2015.<sup>49</sup> See also R. Greszler, The Daily Signal, “Congress Needs to Fix Disability Insurance (for Real This Time),” Feb. 4, 2016.<sup>50</sup>

### **C. Congressional Legislative Proposals.**

In 2014 (113th Congress) Senator Tom Coburn (R-OK) (now retired) introduced a bill to comprehensively reform disability insurance with the Protecting Social Security Disability Act of 2014, S. 3003 (113<sup>th</sup> Cong.)<sup>51</sup> which proposed to:

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<sup>49</sup> <http://www.heritage.org/research/reports/2015/10/improving-social-security-disability-insurance-with-a-flat-benefit>.

<sup>50</sup> <http://dailysignal.com/2016/02/04/congress-needs-to-fix-disability-insurance-for-real-this-time/>.

<sup>51</sup> For a section by section, analysis: [https://web.archive.org/web/20141231021843/http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=c0a4e044-f7c7-454a-96ca-53e3a077e0cc](https://web.archive.org/web/20141231021843/http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=c0a4e044-f7c7-454a-96ca-53e3a077e0cc).

- Revise the DI program to declare any individual who is entitled to both an old-age insurance benefit and a disability insurance benefit for a given month to be **entitled only to the old-age insurance benefit** for that month, except those whose medical improvement is not expected.
- Direct the Commissioner of Social Security to establish a system for classifying any individual who is determined to be entitled to DI benefits or to monthly OASDI benefits in a specified manner on the basis of the expectation of medical improvement.
- Revise continuing disability review standards.
- Establish a time-limit disability benefits for certain individuals.
- Prohibit age from being considered a vocational factor for any individual who has not attained the age 12 years below the retirement age.
- Eliminate the reconsideration review level for an initial adverse determination of an application for disability insurance benefits, and require any such determination to be reviewed before an administrative law judge (ALJ).
- Modify the deadline for the submission of medical evidence.
- Direct SSA to establish: (1) **disability hearing attorney positions** within the Office of Appellate Operations of the Social Security Administration (SSA), as well as (2) procedural rules for hearings.
- Require attorneys to certify to the Commissioner that they have never been disbarred or suspended from any court or relinquished a license in the face of a misconduct investigation.
- Subject ALJs to the Code of Conduct for United States Judges.
- Direct the Commissioner to ensure that all ALJs within the Office of Disability Adjudication and Review receive training on how to evaluate medical evidence.
- Require the Commissioner to establish rules and regulations relating to the fees payable to representatives of individuals claiming entitlement to disability insurance benefits, in particular to prohibit SSA reimbursement of a representative's travel expenses.

- Require the Inspector General to review the practices of a sample of the highest-earning claimant representatives to ensure compliance with SSA policies.
- Direct the Division of Quality of the SSA Office of Appellate Operations to: (1) review a sample of determinations by outlier ALJs that individuals are entitled to disability insurance benefits, and (2) identify any determinations not supported by the evidence.

In the recently ended 114<sup>th</sup> Congress, **Senator Orrin Hatch (R-UT)**, Chairman of the Senate Finance Committee, introduced three bills on August 4, 2015 related to SSDI:

- [S. 1922](#), Improving the Quality of Disability Decisions Act of 2015, would require quality reviews of hearing dispositions and would require an annual report to Congress regarding those reviews.
- [S. 1923](#), Promoting Opportunity for Disability Benefit Applicants Act, provides that when disability applicants are rejected, they will be provided information regarding private entities that provide employment service, vocational rehabilitation services, and other support services.
- [S. 1929](#), Disability Fraud Reduction and Unethical Deception (FRAUD) Prevention Act, would create several methods to reduce and prevent fraud, as well as increase the penalties for disability insurance fraud.

There are numerous other legislative proposals that were introduced in the last Congress for reforming the disability insurance program as well<sup>52</sup>:

- [H.R. 918](#), Social Security Disability Insurance and Unemployment Benefits Double Dip Elimination Act, Rep. Sam Johnson (R-TX-3)<sup>53</sup>
- [H.R. 1419](#), Social Security Fraud and Error Prevention Act of 2015, Rep. Xavier Becerra (D-CA-34)

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<sup>52</sup> Some of these provisions may have been enacted as part of other legislative packages.

<sup>53</sup> Double dipping is inherently inconsistent. An applicant for unemployment indicates that he is ready, willing, and able to work, whereas an applicant for disability is claiming he cannot work because of a disability.

- [H.R. 2135](#), Promoting Opportunity for Disability Benefit Applicants Act, Rep. Sam Johnson (R-TX-3) (similar to Hatch’s S. 1923)
- [H.R. 2136](#), Improving the Quality of Disability Decisions Act of 2015, Rep. Sam Johnson (R-TX-3) (similar to Hatch’s S. 1922)
- [H.R. 2359](#), Disability Fraud Reduction and Unethical Deception (FRAUD) Prevention Act, Rep. Sam Johnson (R-TX-3) (similar to Hatch’s S. 1929)
- [H.R. 3482](#), Disability Insurance Protection and Fraud Prevention Act of 2015, Rep. Sam Graves (R-MO-6)
- [S. 343](#), Reducing Overlapping Payments Act, Sen. Jeff Flake (R-AZ)
- [S. 499](#), Social Security Disability Insurance and Unemployment Benefits Double Dip Elimination Act, Sen. Orrin Hatch (R-UT)
- [S. 2005](#), Social Security Disability Insurance and Unemployment Benefits Double Dip Elimination Act, Sen. David Vitter (R-LA)

**V. TSCL PROPOSALS TO REFORM THE DISABILITY INSURANCE PROGRAM ADDRESSING WASTE, FRAUD, AND ABUSE.**

What began as a modest federal program designed to help a small number of disabled workers in 1956 has become a vast federal program, where benefits paid far outstrip employment taxes paid for that program. Yet, for many years Congress has been impervious to making any meaningful changes in the program — whether by way of tightening eligibility, tempering benefits, or increasing payroll taxes. Each time the program was in danger of running in the red, Congress took the easy way out, reallocating payroll taxes from retirement benefits to disability benefits. Although every current and future recipient of federal retirement benefits should be concerned about this Congressional “sleight of hand,” Congress has had insufficient “push back” from seniors. Indeed, in the past, other than seniors who have learned

about this problem from TSCL and a few other sources, very few seniors even have been aware of the problem, but the tide on public awareness has been turning, with increasing press coverage.

In March 2013, National Public Radio broadcast a story and published an article that described how **states were hiring private companies** to help them transition workers from state welfare programs to the two federal disability programs — DI and SSI.<sup>54</sup>

In October 2013, the CBS television show “60 Minutes” exposed to the American people the process by which Disability Insurance determinations are made, including how an increasing amount of benefits are paid not to disabled persons, but rather **paid to attorneys** representing claimants who manipulate the system to the advantage of their clients, and themselves.<sup>55</sup>

The NPR and 60 Minutes programs were followed by numerous other exposés which have demonstrated that the broken Disability Insurance system did not occur by accident. Rather, there are politically powerful forces which benefit from the continuation of a system which grants disabled status to those who are not truly disabled, and which allows large fee awards to lawyers. What few understand is that both federal and state governments are, in large part, to blame.

**1. Incumbent federal office holders look better when large numbers of unemployed persons are re-classified as disabled.** Persons receiving DI benefits are not counted among those who are unemployed — unless they

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<sup>54</sup> See C. Joffe-Walt, “Unfit for Work: The startling rise of disability in America,” *supra*.

<sup>55</sup> See <http://www.cbsnews.com/news/disability-usa/>.

actively have been seeking employment, which is extremely rare. Generally then, the more persons classified as disabled, the fewer unemployed persons that are actually counted as unemployed, resulting in an understatement of the rate of unemployment, and giving the false appearance that the economy is healthier than it truly is.<sup>56</sup>

**2. State governments would prefer for residents to be re-classified as disabled than to remain on welfare.** Persons receiving DI benefits do not receive benefits on state welfare rolls. States do not appear to care that the federal government must pay disability benefits which are not deserved, so long as their state budgets are balanced.<sup>57</sup>

**3. Individuals prefer to receive DI benefits than state unemployment welfare benefits.** There is a time limit imposed by each state for receiving unemployment benefits, but no such limit for DI benefits. And, after two years on DI, individuals qualify for Medicare. Although receiving approximately \$13,000 annually in DI benefits (which can add up to an average of \$300,000 in lifetime benefits), and Medicare benefits that could be worth many thousands more annually, and the various other non-cash benefits that may be available, may not seem like a great amount of money, compare that to \$14,500, which is the amount that an individual would earn working 50 weeks (2,000 hours) at a job at the current federal minimum wage of \$7.25 per hour.<sup>58</sup> The actual net earnings of working versus receiving DI benefits is about \$1,500 — or 75 cents per hour.

**4. Lawyers who represent claimants are a well funded lobby for the current system.** The current system works beautifully for the lawyers for claimants. Lawyers for claimants have no attorney opposition. Some law firms make scores of millions of dollars annually for assisting disability claimants in presenting claims before SSA.<sup>59</sup>

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<sup>56</sup> See, e.g., [http://money.cnn.com/2011/06/01/news/economy/disabled\\_workers/](http://money.cnn.com/2011/06/01/news/economy/disabled_workers/).

<sup>57</sup> See, e.g., <http://cagw.org/media/wastewatcher/disability-new-welfare>.

<sup>58</sup> However, those who live in states where welfare benefits are extremely liberal may view the matter differently, such as Hawaii, the District of Columbia, and Massachusetts. See, e.g., “Welfare Payouts top \$20 per hour in eight states.” Downtrend.com (Jan. 9, 2014), reporting on a study by the CATO Institute, <http://downtrend.com/robertgehl/welfare-payouts-top-20-per-hour-in-eight-states>.

<sup>59</sup> See, e.g., <http://www.wsj.com/articles/SB10001424052970203518404577096632862007046> (two attorneys in Binder law firm earned \$88 million in fees during 2010).

Last year, TSCL submitted to Congress its report on “Top 10 Ways Seniors Would Fix the Social Security Disability Insurance Program.”<sup>60</sup> Now, TSCL again urges that those proposals be adopted, but until seniors understand that the system is broken, Congress will come under no pressure to fix it in a meaningful way. To that end, TSCL urges seniors to make their views known to Congress, that reform of the DI program should begin with the following four reforms.

**1. Based on the Testimony of the SSA Itself, Require SSA to Expend Additional Funds on Fraud Investigations.** SSA regularly claims that it is aggressively moving against DI fraud. For example, it reports that:

One of our most effective measures to guard against fraud is the **Cooperative Disability Investigations** program. Under the program, we **investigate suspicious disability claims** early, before making a decision to award benefits. In effect, we proactively stop fraud before it happens. **In fiscal year 2012**, with the help of state and local law enforcement, the program reported nearly **\$340 million in projected savings** to the disability programs. This resulted in a return on investment of \$17 for each \$1 spent. [Emphasis added.]<sup>61</sup>

The annual savings of \$340 million from the DI program, presumably calculated as occurring over multiple years, must be compared against the total benefit payments of the program of about \$143 billion in calendar year 2015. The fraud being caught is only the tip of the iceberg. Prosecutions for fraud should be brought, as necessary.<sup>62</sup> If it is true, as has been reported, that there is a **\$17 savings for each \$1 spent**, then SSA should be required to dramatically increase spending on programs such as the Cooperative Disability Investigations program, at least until the ratio of 17:1 drops to near 1:1.

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<sup>60</sup> See [http://seniorsleague.org/assets/The-Senior-Citizens-League\\_Top10\\_Ways\\_SSDI-Statement.pdf](http://seniorsleague.org/assets/The-Senior-Citizens-League_Top10_Ways_SSDI-Statement.pdf).

<sup>61</sup> SSA Disability Facts, <https://www.ssa.gov/disabilityfacts/facts.html>.

<sup>62</sup> See, e.g., Social Security Disability Insurance Fraud Scheme in New York, Office of the Inspector General, SSA, (Jan 16, 2014). <https://oig.ssa.gov/newsroom/congressional-testimony/jan16>; Social Security Disability Insurance Fraud Conspiracy in Puerto Rico, Office of the Inspector General, SSA (Sept. 18, 2013). <https://oig.ssa.gov/newsroom/congressional-testimony/sept19>

**2. The DI Adjudicatory Process Should Be Restructured.** It was reported by SSA that, in mid-2016, there were over 1 million cases currently awaiting a hearing decision.<sup>63</sup> Part of the reason for this backlog is that the process is unduly complex, with too many types of appeals. The SSA has reacted to this backlog in exactly the wrong way. SSA Deputy Commissioner Gruber was criticized in a Congressional hearing for choosing not to use appropriated funds to hire sufficient numbers of ALJs to hear and resolve the rising backlog of cases, but rather moving many thousands of pending cases from ALJs to attorney examiners, who are SSA employees, lacking “requisite decisional independence.” The subcommittee chair reasonably asked whether such a delegation to attorney examiners violates the Administrative Procedure Act, and whether it could have other adverse legal consequences. *See id.*, Opening Remarks of Senator James Lankford, p. 2. SSA should entrust the authority to hear appeals of DI claims only to ALJs.

**3. The First Level Appeal Step of “Reconsideration” Should Be Eliminated and All Determinations Should Be Reviewed by ALJs for Compliance with Federal Law.** This proposal is consistent with legislation introduced by Senator Tom Coburn. Four levels of appeal make no sense. An initial decision by an examiner is subject to review by an ALJ, and should not be subject to being overturned by another examiner. Moreover, no decision of an examiner should commit the agency until it has been reviewed by an ALJ for compliance with the law. In this way, erroneous initial decisions to grant benefits can be reversed. No one SSA employee should have the unreviewable power to grant benefits which can last a lifetime.

**4. Require SSA to Be Represented by Counsel at Hearings.** Three of the authors who contributed to the 2015 SSDI Solutions Initiative Conference, discussed *supra*, presented a paper entitled “Social Security: Restructuring Disability Adjudication.”<sup>64</sup> A key component of the suggested restructuring process would transform the role of SSA from that of an “uninvolved non-party in the hearings and appeals process,” to that of a party, “directly represented and engaged in individual disability hearings before ALJs.” *Id.*, p. 1. Arguing that involvement of SSA “adversary” counsel at the hearing stage would promote administrative justice for all parties in a disability hearing, the authors pointed

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<sup>63</sup> *See* Testimony of Theresa L. Gruber, Deputy Commissioner, Disability Adjudication and Review, U.S. Social Security Administration, before the Subcommittee on Regulatory Affairs and Federal Management, U.S. Senate Committee on Homeland Security & Governmental Affairs, p. 1 (May 12, 2016). <http://www.hsgac.senate.gov/hearings/examining-due-process-in-administrative-hearings>

<sup>64</sup> *See* [http://ssdisolutions.org/sites/default/files/engelglendeningwolfe\\_0.pdf](http://ssdisolutions.org/sites/default/files/engelglendeningwolfe_0.pdf).

out that the presence of a SSA legal representative would benefit the claimant, “enabling a range of activities designed to expedite hearings and appeals; and, where possible, to reach early decisions in substantial numbers of cases, leaving only those claims where there is a significant question, for hearing.” *Id.* at 9. These three authors also proposed a number of rules, including a revision of the attorney fee standards set forth in 20 C.F.R. Part 404. Pointing out that the current system inherently rewards delay — “the longer a case is pending, the greater the attorney’s fee [*id.* at 14]” — such a circumstance contravenes not only widespread concern over the case backlog, but also a claimant’s need for financial assistance.

**Postscript” TSCL is Developing Additional Reform Proposals.**

The SSA has not been transparent in revealing the problems inherent in the DI program. For this reason, TSCL has filed two Freedom of Information Act (“FOIA”) Requests with the SSA to obtain additional information about the DI program which is designed to enable TSCL to develop additional meaningful proposals to reform and improve the DI system.

Based in part on the information received from its FOIA requests, TSCL will be drafting legislation to urge Congress to enact to reform of the DI System.

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