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July 20, 2018

United States House of Representatives
Committee on Ways and Means
Subcommittee on Social Security

Re: Statement of Professor and Associate Dean Jon C. Dubin, Rutgers Law School, for “Hearing on Examining Changes to Social Security’s Disability Appeals Process,” July 25, 2018

Dear Honorable Members of the Committee and Subcommittee:

I write this statement solely on my own behalf as a scholar of social security disability law, procedure and adjudication. You should read it with the understanding that I have served on the Administrative Conference of the United States (ACUS) Social Security Disability Adjudication Working Group, am an elected member of the National Academy of Social Insurance, and the co-author of the only hard cover, law school coursebook in Social Security Law, Policy and Practice as well as an annually updated treatise on Social Security Practice and Procedure in Federal Court. I have published law review articles on social security disability law and adjudication which have been cited by the U.S. Supreme Court and multiple U.S. Courts of Appeal. I have also maintained a law school clinical legal educational social security disability practice, supervising law student representation of real claimants in need, for nearly 30 years. I have appeared as counsel for clients with my program in social security disability cases before the U.S. Supreme Court, the U.S. Courts of Appeal for the Third and Fifth Circuits, multiple U.S. District Courts, and at each of the stages of the Social Security Administration’s (SSA) four-stage adjudicative process.

I. Introduction

I write in opposition to the SSA’s proposal to reinstate reconsideration in all states and instead urge the opposite—the complete elimination of the reconsideration stage of SSA adjudication in all states, together with a diversion of administrative resources to other stages in the administrative process. I was selected by the non-partisan, Committee for a Responsible Federal Budget’s, SSDI Solutions Initiative to prepare a paper on the topic and have documented how such a restructuring of the four-stage adjudicative process to three-stages would avert wasteful bureaucratic duplication and promote a streamlined and more efficient process, and ultimately more timely and accurate decisionmaking. *See A Modest, Albeit Heavily Tested Social Security Disability Reform Proposal: Streamlining the Adjudicative Process By Eliminating Reconsideration and Enhancing Initial Stage Development*, 23 GEO. J. OF POVERTY, L. & POL’Y 203 (2016). The position advocated herein, is not new and is one broadly held by public policy

actors with widely differing perspectives on the social security disability programs, from former Senator Tom Coburn’s (R-OK) relatively recent, “Protecting Social Security Disability Act of 2014,” § 201¹ to the recommendations of the former Director of the National Center for Administrative Justice, Milton Carrow, nearly 25 years ago.²

II. Reconsideration is the Least Meaningful of the SSA’s Four-Stage Administrative Adjudicative Process and Is Repetitive of the Initial Stage

The SSA’s system of administrative adjudication of disability claims has been referred to as “the largest adjudicative agency in the western world.”³ It processes nearly three million new claims and issues over four million decisions at various stages each year.⁴ The SSA system contains a four-stage adjudication process. The original rationale for this multi-tiered administrative review system of claim denials for Social Security benefits is grounded in the program’s mandatory contributory nature; because payment of benefits appears as the return of contributions, “the erroneous denial of benefits appears as a form of theft.”⁵ As Fordham Law Dean Matthew Diller has explained: “Extensive possibilities for administrative review were intended to assure claimants that denials of benefits would be carefully scrutinized in recognition of the contributions they have made.”⁶

In the SSA’s four-stage administrative adjudicative process for the disposition of claims under the Social Security Disability Insurance (SSDI) and Supplemental Security Income Disability (SSID) programs, a claimant initiates the process by filing an application online using the SSA’s website or at one of the SSA’s district or branch offices.⁷ The SSA district office determines financial or non-disability eligibility and, if such eligibility is found, forwards the claim to a state agency operating as the state’s federally funded Disability Determination Service (DDS) pursuant to SSA regulations.⁸ The state DDS then proceeds to develop the claim by seeking medical records and reports from the claimant’s treating sources, hospitals, and clinics.⁹

If those records or documents are unavailable or insufficient to make a determination, “the DDS will arrange for a consultative examination (CE) to obtain the additional information needed.”¹⁰ Although SSA regulations designate the claimant’s treating physician as the preferred

¹ S. 3003, 113th Cong. 2d Sess., §201, <https://www.congress.gov/bill/113th-congress/senate-bill/3003/text>.

² Milton M. Carrow, *A Tortuous Road to Bureaucratic Fairness: Righting the Social Security Claims Process*, 46 ADMIN. L. REV. 297, 297 (1994);

³ JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM at XI (1978).

⁴ SOC. SEC. ADMIN., OFFICE OF DISABILITY PROGRAM MGMT. INFO., JUSTIFICATION FOR ESTIMATES FOR APPROPRIATIONS COMMITTEES IN FISCAL YEAR 2016 at 143 tbl. 3.27 (Feb. 2015), <https://www.ssa.gov/budget/FY16Files/2016FCJ.pdf>.

⁵ Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 383–84 & n.66 (1996); see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1324 (1997).

⁶ Diller, *supra*, at n.66.

⁷ See 20 C.F.R. §§ 404.611, 404.614, 422.505(a) (2018).

⁸ See Disability Determination Process, SOC. SEC. ADMIN., www.ssa.gov/disability/determination.htm; see also 20 C.F.R. § 404.1620 (2018).

⁹ See Disability Determination Process, *supra*.

¹⁰ *Id.*

source for the CE,¹¹ the DDS rarely obtains the CE from other than non-treating sources.¹² After completing its development of the evidence, the DDS then usually employs a two-person team consisting of an internal medical or psychological consultant and a disability examiner to determine the DDS's initial disability decision.¹³ After rendering its decision, the DDS returns the case to the SSA field office for appropriate action. If the DDS finds that the claimant is disabled, the SSA completes any outstanding non-disability development, computes the benefit amount, and begins paying benefits. If the DDS finds that the claimant is not disabled, the file is kept in the field office in case the claimant decides to appeal the determination to the next stage to obtain reconsideration.¹⁴

The reconsideration stage is handled under the identical procedures as the initial application stage, except that different personnel within the respective DDS offices make the reconsidered decisions.¹⁵ The claimant can submit additional evidence at the reconsideration stage, although she is not required to do so. In addition, DDS does not inform the claimant of specific evidence which was lacking or ways to remedy those deficiencies through additional evidence.¹⁶ Nor is the DDS mandated to solicit additional evidence to address identified deficiencies at the initial stage, and additional development is largely focused on obtaining evidence only in the relatively limited situations where there is significant worsening in condition, new ailments, or newly developed evidence.¹⁷ With the exception of a pilot project conducted during the mid-1980s,¹⁸ the claimant ordinarily does not appear in person before SSA or DDS decision-makers during reconsideration of initial applications.

The average processing time at the reconsideration level is approximately 108 days.¹⁹ To put this 108-day average reconsideration processing time in context, the SSA has acknowledged

¹¹ See 20 C.F.R. §§ 404.1519(h), 416.919(h) (2018).

¹² See DAVID WITTENBERG, GORDON STEINAGLE, SHANE FROST & RON FINE, AN ASSESSMENT OF CONSULTANT EXAMINATION (CE) PROCESSES, CONTENT, AND QUALITY: FINDINGS FROM THE CE REVIEW DATA, FINAL REPORT 26 (NOV. 4, 2012), <http://www.socialsecurity.gov/disabilityresearch/documents/CE%20Report%202.pdf> (finding from a study of CE evaluations that treating sources were requested to perform a needed CE evaluation in less than 5% of cases and that none of the CEs in the study were ultimately performed by treating sources).

¹³ Medical/Professional Relations, SOC. SEC. ADMIN., <http://www.ssa.gov/disability/professionals/bluebook/general-info.htm>.

¹⁴ *Id.*

¹⁵ See DI 27001.001 The Reconsideration Process, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0427001001> (noting the requirement of a different two-person DDS team than that used for the initial determination); see also DI 12005.020 Processing a Reconsideration Determination Following the Disability Determination Services (DDS) Review, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0412005020> (noting that the process is essentially the same for reconsideration as in initial application determinations except when there is a continuing disability review (CDR) in the case of a benefits termination decision, which triggers resort to a DDS hearing examiner at the reconsideration stage).

¹⁶ See *id.*

¹⁷ See DI 27001.001 The Reconsideration Process, *supra* (“Once a reconsideration case on an initial claim has been received . . . , the disability examiner is responsible for reviewing the case to determine if additional development is warranted. If further case development is warranted, the disability examiner: [1.] Obtains additional information needed to document new allegations or a worsening of the claimant’s condition (e.g., SSA-3373 Function Report) [; and 2.] Contacts all medical sources from which the claimant received examination or treatment since the initial determination for any medical evidence they may be able to provide.”).

¹⁸ See, e.g., Testing Modifications to the Disability Determination Procedures, 58 Fed. Reg. 54,532, 54,533 (proposed Oct. 22, 1993) (codified at 40 C.F.R. §§ 404.916, 416.1406) (describing the 1984–87 Personal Appearance Demonstration (PAD) Pilot).

¹⁹ See *id.* at 108.

before the United States Supreme Court,²⁰ and a lower court has ruled,²¹ that a reconsideration processing time in excess of ninety days is excessive and violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed. Furthermore, the extended reconsideration processing times exacerbate significant delays in a four-stage process with time lapses at each stage. Adjudicative delays at the other stages are also substantial. For example, median adjudicative delays at the third stage (ALJ hearing) are over 400 days from hearing request to decision.²²

Thus, by largely duplicating the initial application stage, the reconsideration stage is not designed to produce meaningful additional adjudicative benefits or results beyond those achieved at the prior stage. Its limited alteration rate is an inevitable byproduct of its limited design. As such, the reconsideration stage lacks meaningful or sound public policy justification. This additional adjudicative stage mandates devotion of agency personnel and administrative costs for approximately 750,000 annual reconsideration decisions,²³ imposes significant delays for the vast majority of claims initially denied, and produces limited tangible benefits.

III. Testing of Elimination of Reconsideration in Ten States for Nearly Two Decades Has Revealed Beneficial Results in Delay Reduction and Improvement in Decisional Accuracy

Apart from the manifest desirability of eliminating a largely repetitive and redundant administrative stage and reducing bureaucratic inefficiency and waste, the testing of elimination of reconsideration has revealed other positive benefits. Although smaller scale testing of the elimination of reconsideration commenced even earlier, in 1999, the SSA formally announced that it was selecting ten states, representing approximately 20% of all disability benefits applicants, for more focused testing of three aspects of the disability redesign process which included elimination of reconsideration.²⁴ Then, in 2001, the SSA issued a notice of proposed rulemaking indicating its intent to apply these three process modifications nationally, including elimination of reconsideration, over the following year until they were implemented in every state, with a “projected completion date” of no later than 2003.²⁵ The Agency went on to supply the rationale for making these changes permanent based on its analysis of the costs and benefits from the years of testing and identified benefits. It stated:

We found that these actions resulted in better determinations at the initial level, with more allowances of claims that should have been allowed. We believe that many claims that would have been allowed only after appeal under the old process

²⁰ *Heckler v. Day*, 467 U.S. 107, 111 (1983) (The SSA conceded before the U.S. Supreme Court that a ninety-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed.).

²¹ *Barnett v. Bowen*, 665 F. Supp. 1096, 1099, 1101–102 (D. Vt. 1987) ((a) finding that delays in reconsideration determinations exceeding ninety days from reconsideration request are unreasonable and violate § 405(b), and (b) ordering injunctive relief for delayed claimants).

²² See SOC. SEC. ADMIN., FY 2016 BUDGET OVERVIEW 23 (2015), <http://www.ssa.gov/budget/FY16Files/2016BO.pdf>.

²³ See *id.* at 81.

²⁴ Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47,218 (Aug. 30, 1999).

²⁵ New Disability Claims Process, 66 Fed. Reg. 5,494 (Jan. 19, 2001).

were allowed at the initial step under the new process. **These claimants were able to receive benefits months sooner than they otherwise would have, an important protection for individuals who are unable to work.** By eliminating the reconsideration step, claimants who appealed reached the hearing level an average of 2 months sooner than claimants who went through the reconsideration step and therefore had an opportunity to receive their hearing decisions sooner. **Also, the quality of our determinations improved. . . . [T]he new process improved the accuracy of initial decisions to deny claims from 92.6 percent to 94.8 percent.** If implemented nationally, this would translate to approximately **34,000 fewer disabled claimants being erroneously denied benefits and facing the prospect of a lengthy appeal.** We believe that these positive results were due to a number of factors. For example, **we know that removing the reconsideration step permitted the State agencies to redirect their resources so that the individuals who formerly worked on reconsideration claims could work on initial claims. This permitted increased contact with the claimants and improved documentation of the disability determinations.**²⁶

The agency had also concluded that, “although the prototype is continuing and we continue to gather information and gain operational experience, we believe that we now have sufficient information to propose changes to our regulations.”²⁷ Accordingly, further “public comments received on these proposed changes” would assist only to the extent of “fine-tuning these changes.”²⁸

However, rather than moving towards the promised national implementation, SSA Associate Commissioner for Disability Kenneth Nibali issued a DDS administrators’ letter just five months later explaining that, because “preliminary data from the prototypes have raised questions about the program costs of national implementation[,] . . . final decisions about rollout will be reserved until more complete data are available,” which was expected by the end of the year.²⁹ This letter further explained in somewhat ambiguous language that significant additional program costs for national rollout were anticipated, “since some of the people we are paying at the DDS level would not have appealed and been paid by OHA [now OHO] under the old process.”³⁰

In 2010, former SSA Commissioner, Michael J. Astrue, signaled a potential change in policy direction on the elimination of reconsideration. In his testimony before the House Ways and Means Committee at a hearing on the backlog of hearing-stage cases, Commissioner Astrue revealed that one way the agency was evaluating possible improvements in the disability process and hearing backlog concerns was by taking a “new look” at the disability caseloads in prototype states which have been testing elimination of reconsideration.³¹ As a function of that “new look,”

²⁶ *Id.* at 5,495. (emphasis added).

²⁷ *Id.* at 5,494.

²⁸ *Id.*

²⁹ Soc. Sec. Admin., Office of Disability, Disability Determination Services Administrators’ Letter, No. 566 (May 1, 2001).

³⁰ *Id.*

³¹ *Statement of Michael Astrue, Commissioner of Social Security Administration, before the House Ways and Means Committee Subcommittee on Income Security and Family Support and Subcommittee on Social Security, SOC. SEC. ADMIN.* (April 27, 2010), www.ssa.gov/legislation/testimony_042710.html.

the Commissioner proposed reducing the testing by removing Michigan and perhaps Colorado from the tests. He observed:

We expected that eliminating the reconsideration step in the Prototype States would result in earlier decisions and reduced waiting times for claimants; however, we have found the opposite is true. In 1998, prior to the start of the Prototype test, the proportion of initial decisions that ended up at the hearings level was 1.4 percentage points higher in the Prototype States than in the non-Prototype States. By 2007, that difference between Prototype and non-Prototype States had grown to 7.5 percentage points

In Michigan, an economically hard-hit State, we have concluded that too many cases are needlessly going to the hearings level from the DDSs. Therefore, we plan to reinstate reconsideration in Michigan next fiscal year. Of all the Prototype States, Michigan has the highest percentage of hearing requests, not to mention some of the most backlogged hearing offices in the country. Reinstating reconsideration would allow a significant number of cases to be allowed at reconsideration, resulting in earlier payment to those claimants and a reduction in the number of hearing requests. Moreover, those cases that do go to hearing would be more thoroughly developed, having already been through the reconsideration step In addition to Michigan, we are also looking at reinstating reconsideration in Colorado³²

The only public rationale supplied for not nationally eliminating reconsideration stems from (1) concerns raised by the Associate Commissioner for Disability in his May 2001 DDS Administrators' Letter 566 and (2) the former Commissioner's 2010 testimony to Congress. However, a closer look at those statements and the rationales supplied for retaining the reconsideration stage demonstrates that they lack sufficiently supportable public justification. First, the May 2001 DDS administrators' letter did not attempt to reconcile (a) the somewhat cryptic and unelaborated "anticipation" that significant new net program costs would be generated from the prototype with (b) the agency's extensive contrary prior findings. Nor did the letter address the glowing accounts of prototype successes in the notice of proposed rulemaking, which had been issued just five months earlier in January 2001 based on the results of several years of testing.³³ More fundamentally, the letter did not explain how (a) the administrative costs of additional hearings for the small percentage of claimants who would have been granted benefits under the non-prototype reconsideration system were now calculated to significantly exceed (b) the costs of devoting personnel, resources, and time for a full reconsideration process for the much larger percentage of persons whose reconsideration would amount to little more than a rubber stamp denial at the initial stage.

Perhaps the ambiguous language of the DDS administrators' letter also meant to suggest that the agency could further escape the additional costs from hearings and eventual benefit awards in prototype states attributable to claim abandonment by otherwise eligible claimants. That is,

³² *Id.*

³³ Soc. Sec. Admin., Office of Disability, Disability Determination Services Administrators' Letter, No. 566 (May 1, 2001).

some claimants improperly denied at the initial stage, who in non-prototype states would also be denied benefits at both the initial and reconsideration stages, become discouraged or frustrated with the process after the second improper DDS denial and then abandon pursuit of a meritorious appeal to a hearing. However, an administrative process which is principally justified by its ability to produce “bureaucratic disenfranchisement” of otherwise eligible claimants produces neither cost-effective decisional accuracy nor fairness; is contrary to public policy;³⁴ and calls into question statutory and constitutional prohibitions against unjustified, excessive, or unreasonable delay in social security adjudication.³⁵

Moreover, one month after the DDS administrators’ letter, on June 25, 2001, the SSA’s Management Information and Evaluation Workgroup issued a Draft Disability Prototype Interim Report that described successes and challenges identified by mid-2001. It stated:

Perhaps the most significant observation regarding successful aspects of the Prototype at this time is that **generally there is a consensus among DDS managers and staff that the new process results in better initial determinations.** A common theme in Prototype discussions is the comment that the new process is ‘the right way to do business.’ [1] One of the goals of the Prototype is to allow claimants who should be allowed as early as possible in the process. The increased allowances in the DDSs under the Prototype are meeting that goal by processing as many allowances in one step as these States did in two steps under the old process. In addition, some claimants may be allowed under the process who might have been denied under the old but would never be allowed because of their not appealing to a higher level. [2] Quality Review data indicate that allowances being made under the Prototype are appropriate. **Prototype accuracy is better than the historical accuracy in Prototype sites.**[3] Customer survey data indicate that claimants are better satisfied with a process that offers a claimant conference and increased contact with the adjudicators who decide their claims. [4] For those claimants who appeal for a hearing, it is clear that their cases reach OHA considerably faster under the new process.³⁶

Thus, whatever could be determined about the public policy desirability of the prototype by the middle of 2001 after issuance of DDS Letter 566, the quantified benefits in terms of increased initial decisional quality and accuracy; the significant reduction in unjustified delays for those

³⁴ See generally, Michael Lipsky, *Bureaucratic Disenfranchisement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

³⁵ See, e.g., *Heckler v. Day*, 467 U.S. 104, 111 (1984) (SSA concedes before the U.S. Supreme Court that a ninety-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act’s requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed); *Barnett v. Bowen*, 665 F. Supp. 1096 (D. Vt. 1987) (excessive delays in reconsideration and hearing determinations defined, in the context of reconsideration determinations, as decisions exceeding greater than ninety days from reconsideration request, violates § 405(b) and entitles delayed claimants to various forms of injunctive relief); *White v. Mathews*, 434 F. Supp. 1252, 1259–61 (D. Conn. 1976) (excessive delays in SSA hearing decision times violate both the Fifth Amendment’s Due Process Clause and the Social Security Act, 42 U.S.C. § 405(b)), *aff’d on other grounds*, 559 F.2d 852 (2d Cir. 1977), *cert. denied sub nom.* *Califano v. White*, 435 U.S. 908 (1978). See generally Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disenfranchisement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591 (1987–88).

³⁶ Soc. Sec. Admin. Management Information and Evaluation Workgroup, *Disability Prototype Interim Report-Draft* 26 (June 25, 2001) (emphasis added).

proceeding to hearing; and the increased customer satisfaction appeared to outweigh any serious identified countervailing detriments.

Second, with respect to the Commissioner's 2010 Congressional testimony, the agency again failed to reconcile (a) its new conclusion on the waiting times for decision in prototype states with (b) the agency's earlier statistical and empirical findings and contrary conclusions after years of testing as documented in the 2001 NPRM or conclusions in the Interim Prototype Report. The Commissioner also failed to supply a basis for the conclusion that the mere 11% to 14% reversal rate for reconsideration would result in earlier payment to a number of claimants significant enough to justify the delays and administrative costs of continuing reconsideration for the other 86% to 89% of claimants, who would experience a rubber stamp of the initial denial decision from a reconsideration process and a delay from that process to an ultimate administrative decision.

Indeed, during the same April 27, 2010 hearing (on hearing level delays and backlog) at which the former SSA Commissioner testified, the SSA's Inspector General explained the delay issues alluded to by the Commissioner through the elimination of reconsideration.³⁷ The IG noted that the SSA had reassessed its policy on reconsideration elimination since commencing the prototype in 1999, "believing that reinstating this process will get benefits to deserving beneficiaries more quickly than an administrative hearing."³⁸ The IG assessed four scenarios from the planned reinstatement of reconsideration in Michigan in FY 2011, finding that: "[i]f SSA reinstates and fully funds the reconsideration process in Michigan, Initial claims will take 123 days; Reconsideration claims will take 276 days; and Claims requiring hearings will take 915 days."³⁹ However, "[i]f SSA does not reinstate the reconsideration process in Michigan, and there is no additional funding: Initial claims will take 123 days; and Claims requiring hearings will take 762 days."⁴⁰

The IG then discussed the administrative opportunity costs or savings from reconsideration elimination by noting that "**[i]f SSA does not reinstate the reconsideration process in Michigan, and the funding that would be used for reconsideration is instead devoted to processing initial claims: The DDS could process 25,300 additional claims.**"⁴¹ Similarly, "[i]f SSA does not reinstate the reconsideration process in Michigan, and the funding that would be used for reconsiderations is instead devoted to processing hearings: **ODAR could process 17,600 additional hearings per year.**"⁴² The IG concluded:

In summary, by reinstating the reconsideration step, some individuals who appeal will get an allowance decision sooner and some would get an allowance decision later. For example, if SSA reinstates the reconsideration step in Michigan, the claimant denied at the initial level could get an allowance decision in 276 days, which is 486 days sooner than if they had to appeal to ODAR without going through

³⁷ *Statement of the Honorable Patrick P. O'Carroll, Jr., Inspector General, Social Security Administration Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittees on Social Security and Income Security & Family Support, SOC. SEC. ADMIN. (2010), <http://oig.ssa.gov/sites/default/files/04272010testimony.txt>.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

the reconsideration step. However, if the claimant is denied at the reconsideration level and appeals to ODAR, it would take 915 cumulative days for a decision, which is 153 days longer than the current processing time (762 days) for cases that go to ODAR without a reconsideration step.⁴³

As described above, there are eight to nine times as many claimants denied at the reconsideration level than approved, and therefore potentially subject to the latter delays, in comparison to the much smaller percentage benefited with a quicker final decision from the very low reconsideration approval rate.⁴⁴ Accordingly, it is hard to determine how or why the Commissioner quantified the delay factor as supporting the imposition of reconsideration based on the IG's data and conclusions.

Furthermore, the increase in the rate of hearing requests in prototype states which the Commissioner also identified in his testimony as a justification supporting the reconsideration stage, is explainable in part by the likelihood that most of those whose claims would have been approved at the reconsideration stage (persons in the 11% to 14% reconsideration approval rate) would request a hearing and become additional hearing appellants in prototype states. It is also likely that some persons, including those with meritorious claims, would have become discouraged and surrendered their pursuit of benefits when forced to endure the long delays culminating in yet another administrative denial decision at the reconsideration stage in non-prototype states. In addition, because of the only sixty-day appeal or limitations period for challenging decisions between each level, it is also likely that some claimants, perhaps understandably preoccupied with serious medical and mental health concerns or financial hardships and exigencies, would have simply failed to complete an appeal in that relatively short time-frame through this additional step and would therefore be barred from proceeding to the hearing stage in non-prototype states. In short, none of these likely explanations for an increased hearing rate in prototype states suggest end results or meaningful public policy justifications for continuing the reconsideration stage.⁴⁵

⁴³ *Statement of the Honorable Patrick P. O'Carroll, Jr., Inspector General, Social Security Administration Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittees on Social Security and Income Security & Family Support, SOC. SEC. ADMIN. (2010), <http://oig.ssa.gov/sites/default/files/04272010testimony.txt>.*

⁴⁴ An argument could be made that the delays in successful hearing decision receipt attributable to the reconsideration stage, relative to those in prototype states where reconsideration has been eliminated, may be somewhat overstated because the reduction of the 11% of cases in which benefits are awarded at the reconsideration stage also reduces the flow of cases and the hearing backlog in such states relative to prototype states. However, the General Accounting Office (GAO) found that the approval rate in one stage (initial) in prototype jurisdictions (40.4%) was actually slightly higher than the approval rate after two stages (initial and reconsideration), in non-prototype jurisdictions (39.8%). See U.S. GEN. ACCOUNTING OFFICE, DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 16 (2002), <http://www.gao.gov/assets/240/233481.pdf>. Therefore, the increases in hearing requests in the prototype states are less likely attributable to claimants who otherwise would have prevailed earlier at reconsideration in non-prototype states and more likely due to the lesser attrition of claimants who would otherwise have been discouraged from appealing further due to the frustration of receiving two administrative denials after a longer pre-hearing process, if rejected after the reconsideration.

⁴⁵ If stealth or "under the radar" benefit reductions for trust fund savings were the governing rationale, it would undermine the Social Security Act's purposes to arbitrarily identify for the sole brunt of reduced benefits, an otherwise eligible class of claimants, disproportionately represented with persons too physically or mentally impaired or financially destitute to persevere through an extra and unnecessary stage of administrative review. It would also have a disparate deleterious impact on the most vulnerable claimants—working class laborers, educationally challenged, mentally impaired, lower income, and disproportionately, claimants of color. Cf. Jon C. Dubin, *The Labor Market Side of Disability-Benefits Law and Policy*, 20 S. CAL. REV. OF L. & SOC. JUST. 1, 50–51 (2011) (discussing the likely

Finally, the former Commissioner's only other suggestion of tangible benefit for continuing the reconsideration stage is the unexplained suggestion that cases that have proceeded to a hearing "would be more thoroughly developed having been through the reconsideration step."⁴⁶ However, this conclusion is questionable on two grounds. First, the reconsideration process does not generally compel meaningfully additional case development, but only a similar claim reevaluation by a different DDS team.⁴⁷ Second, as described above, the SSA has, on multiple occasions determined that prototype DDSs are diverting resources and personnel from the eliminated reconsideration stage to case development tasks at the initial stage. This produces ultimately better developed, more accurate and higher quality decisions in the one-stage DDS process than in the two-stage process in non-prototype cases.⁴⁸

IV. Conclusion

Approximately twenty-five years ago, Milton Carrow, the former Director of the National Center for Administrative Justice, observed that "reforms recommended by congressional committees, the GAO, the Administrative Conference of the United States, the Advisory Committee to the Commissioner of Social Security, and the studies of responsible organizations such as the American Bar Association,"⁴⁹ **all** proposed the elimination of reconsideration and steps to enhance initial-stage record development.⁵⁰ Carrow decried the slow pace in implementing these needed and obvious reforms and argued that further proposed testing was unnecessary, as it was time for these changes simply and finally to be enacted.⁵¹ He concluded that SSA "has been dilatory in implementing sound recommendations" and that it "is unconscionable to delay further."⁵² The SSA's current proposal to reinstate reconsideration nationally, flies in the face of this long-acknowledged and widely held consensus supported by the results of years of testing, and should be discouraged.

disparate impact on lower income and working class claimants and claimants of color from proposal to require all claimants to establish listing level impairments due to the need for expensive testing and medical procedures and extensive claimant produced documentation).

⁴⁶ *Statement of Astrue*, *supra* note 30, at 3.

⁴⁷ See SOC. SEC. ADMIN, *supra* note 15, and accompanying text.

⁴⁸ See *supra* notes 25 & 35 and accompanying text (describing the 2001 NPRM and draft Interim Prototype Report).

⁴⁹ Carrow, *supra* note 2, at 304.

⁵⁰ *Id.* at 302 ("[T]he studies recommend eliminating the entire reconsideration stage of the initial claims process."); see also *id.* at 297–301 (describing and summarizing those studies and reports). Indeed, as Professor Gay Gellhorn has observed, although one might have expected ALJs facing a hearing case backlog and pressures to adjudicate cases more rapidly to express opposition to "the removal of a buffer between them and disappointed claimants, in fact the National Conference of Administrative Law Judges favor[ed] abolition of Reconsideration." Gay Gellhorn, *Disability and Welfare Reform: Keep the Supplemental Security Income Program But Reengineer the Disability Determination Process*, 22 FORDHAM URB. L.J. 961, 989 (1995); see also *id.* at 990 n.150 (citing a former SSA ALJ's article, also recommending elimination of reconsideration which had reasoned that "under the current system, DDS is simply doing half the job, but doing it twice." (quoting Christine M. Moore, *SSA Disability Adjudication in Crisis!*, 33 JUDGES J. 2, 43 (Summer 1994)).

⁵¹ See Carrow, *supra* note 2, at 304.

⁵² *Id.*