



The American Civil Liberties Union

Written Statement
For a Hearing on

**Service and Delivery Aspects of Social Security Administration Field
Offices**

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The American Civil Liberties Union (“ACLU”) commends the Senate Finance Committee (“Committee”) for holding a hearing on the Service and Delivery Aspects of the Social Security Administration (“SSA”) field offices and appreciates the opportunity to submit testimony for the record. The current Social Security disability claims backlog is both unreasonable and violates due process. In recent years the SSA has struggled to fulfill one of its principal functions of administering disability claims. At a time when over half of all calls placed to SSA field offices do not get answered by an SSA employee, Congress is seriously considering imposing a new sweeping duty on the SSA – the verification of all workers nationwide including U.S. citizens. A bill pending in the Senate – Secure America Through Enforcement and Verification Act of 2007 (“SAVE” Act, S. 2368) – would institute a mandatory electronic employment verification system (“EEVS”) and would place that verification duty squarely on the SSA. There is no doubt that the imposition of such a sweeping national mandate would exacerbate the already unreasonable delays in processing claims for Social Security disability benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401, et seq., and the Supplemental Security Income Program, Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, et seq.

While the SAVE Act presents serious privacy, due process, and civil rights problems, the ACLU’s testimony for this hearing focuses on the devastating impact that a mandatory EEVS regime would have on the SSA field offices’ capacity to serve Americans dependent on Social Security disability, survivor, and retirement benefits. The ACLU urges the Senate to reject the ill-conceived SAVE Act which would flood the SSA field offices with an additional 45 million visits per year.

The ACLU is a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals. The ACLU consists of more than half a million members, countless activists and supporters, several national projects, and 53 affiliates nationwide. The ACLU has been active in protecting the rights of people with disabilities for over 35 years. At the dawn of the disability rights movement the ACLU challenged the institutionalization of people with mental illness in cases in Alabama (Wyatt v. Rodgers, Wyatt v. Stickney), New York (Willowbrook State School on Staten Island, Index No. 72 Civ. 356, 357 (JRB) and Florida (O’Connor v. Donaldson, 422 U.S. 563 (1975)). In recent years the ACLU has participated in landmark litigation under the Americans with Disabilities Act (“ADA”) including Bragdon v. Abbott, 524 U.S. 624 (1998); Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Chevron, USA, Inc. v. Echazabal, 122 S. Ct. 2045 (2002). The ACLU has also played a national leadership role in drafting and negotiating the ADA of 1990 and the ADA Restoration Act of 2007.

I. The Social Security Disability Backlog Is Unreasonable and Violates Due Process

Delays in processing and deciding Social Security disability claims have been held to violate the Due Process Clause of the Constitution and the Administrative Procedures Act

(“APA”), 5 U.S.C. § 706(1).¹ Although the Supreme Court has rejected “the imposition of mandatory deadlines on agency adjudication of disputed disability claims,” Heckler v. Day, 467 U.S. 104, 119 (1984) and prevented courts from imposing class-wide mandatory deadlines, courts retain other traditional equitable powers where delay is unreasonable and “where, in the particular case, the court finds that the interest of justice so require[s].”² As a general matter, courts have not definitively determined what length of time constitutes “unreasonable delay.” However, the Supreme Court in Day left standing the undisputed trial court finding that the delays suffered by the named respondents were unreasonable,³ which was not disputed by the federal government.⁴ In analyzing claims of unreasonable delay under the APA, the courts have noted that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,” and Social Security disability claims clearly involve “human health and welfare.”⁵

The current delays in Social Security disability hearings and determinations are clearly unreasonable. The SSA’s “data as of the end of January 2008 indicate that the number of cases waiting for a hearing decision was 751,767, leading to average waiting times for FY 2008 of 499 days.”⁶ “In fiscal year 2006, 30 percent of [disability] claims processed at the hearings stage alone, took 600 days or more.”⁷ The SSA estimates that for fiscal year 2008 the average wait time for disability claims at the hearing level will be 535 days, nearly twice what it was in 2000.⁸ Many disabled individuals are forced to wait up to three years before receiving disability payments.⁹ Of those waiting for disability claims hearings, over 90,000 are veterans. These Social Security processing delays are undoubtedly unreasonable and infringe on disability claimants’ due process rights.

¹ See *White, et al., v. Mathews*, 434 F.Supp. 1252 (D. Conn. 1977), *aff’d* 559 F.2d 852 (2d Cir. 1977), cert. denied 435 U.S. 908; *Caswell, et al. v. Califano*, 435 F Supp 127 (D. Me. 1977), *aff’d* (1st Cir.) 583 F. 2d 9.

² *Rivera v. Apfel*, 99 F.Supp.2d 358 (S.D.N.Y. 2000), vac’t on other grounds, No. 00-6241, 2000 WL 33647061 (2d Cir. Nov 14, 2000) (citing *Day*, 467 U.S. at 119 n. 33, 104 S.Ct. 2249).

³ Respondent Day was forced to wait 340 days between his hearing request and reconsideration determination; respondent Maurais waited 280 days between his hearing request and reconsideration determination. See *Day*, 467 U.S. at 107 nn. 6-7.

⁴ See *Id.* 467 U.S. at 111 & n. 15. “[T]he District Court’s declaratory judgment that the plaintiff class is entitled to relief is not at issue.” *Id.* at 120, (Marshall, J., dissenting). See also, *Barnett v. Bowen*, 794 F.2d 17, 22 (2d Cir. 1986) (“The [Supreme] Court stated that the Secretary did not challenge the district court’s determination that hearings must be held in a reasonable time or that the delays encountered by plaintiffs violated that requirement.”).

⁵ *Telecommunications Research and Action Ctr., et al. v. FCC*, 750 F.2d 70, 80 (citing with approval *Blankenship v. Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978).

⁶ The Disability Backlog at the Social Security Administration, Before the H. Comm. on Appropriations, Subcomm. on Labor, Health and Human Services, Education, and Related Agencies, 110th Cong., 2d Sess. (2008) (statement of Patrick P. O’Carroll, Jr., Inspector General, SSA), February 28, 2008. Available at http://www.ssa.gov/oig/communications/testimony_speeches/02282008testimony.htm.

⁷ United States Government Accountability Office, *Social Security Disability, Better Planning, Management, and Evaluation Could Help Address Backlogs* at 3 (December 2007). (“GAO Management Report”). Available at <http://www.gao.gov/new.items/d0840.pdf>.

⁸ *Social Security Disability: Better Planning, Management, and Evaluation Could Help Address Backlogs*, GAO-08-40 (Dec. 2007) (“GAO Report”), p. 22.

⁹ Mayor, Mara. “Testimony Before the House Committee on Ways and Means on the Social Security Administration’s Service to the Public.” AARP. April 23, 2008.

According to a Governmental Accountability Office Report published in December 2007, over half of the 60 million telephone calls placed to SSA Field Offices each year do not get answered by an SSA employee.¹⁰ Moreover, the SSA is closing field offices around the country. Since FY 2006, at least 18 field offices have been closed or merged.¹¹ The SSA's staffing is at its lowest level since 1972, despite the fact that SSA today has twice the number of beneficiaries that it had in 1972.¹² Due to budgetary constraints, employees who retire or otherwise leave SSA are not being replaced, and by FY 2009, the SSA will have lost 9 percent of its staff in just four years.¹³ Despite the shortage of personnel, the SSA is facing an extremely heavy workload with the recently added duties of processing Medicare Part D and prescription drug claims, as well as processing retirement claims for the nearly 80 million baby boomers now beginning to hit retirement age.¹⁴ Social Security retirement benefits claims are expected to increase by 13 million – or 40 percent – over the next decade.¹⁵ Disability claims are expected to rise 10 percent.¹⁶ It is evident that the SSA field offices – overburdened and under-resourced – are presently struggling to administer their principal duties of processing retirement, survivor, and disability benefits applications. In the wake of this overwhelming workload, Congress is now considering heaping yet another duty on the SSA – the verification of all workers in the U.S.

II. Instituting a Mandatory Electronic Employment Verification System Would Capsize the SSA Field Offices and Exacerbate the Disability Backlogs.

The SAVE Act (S. 2368) would impose a mandatory electronic employment verification system (“EEVS”) on all employers in the U.S. In addition to having to screen everyone in the U.S. for work authorization, the SSA would be tasked with responding to the majority of erroneous EEVS findings, which would include fielding telephone calls and responding to in-person queries at SSA Field Offices. The SSA has testified numerous times before Congress that approximately 10 percent of the 240 million Wage and Tax Statements (W-2 forms) received annually by SSA do not match the names and Social Security numbers in SSA's records. According to the SSA's Office of Inspector General,

¹⁰ *Id.*

¹¹ Mayor, Mara. “Testimony Before the House Committee on Ways and Means on the Social Security Administration's Service to the Public.” AARP. April 23, 2008.

¹² *Id.*

¹³ Skwierczynki, Witold. “Statement Before the United States House of Representatives Committee on Ways and Means on Clearing the Disability Backlog – Giving the Social Security Administration the Resources it Needs to Provide The Benefits Workers Have Earned.” American Federation of Government Employees, AFL-CIO. April 23, 2008.

¹⁴ Mayor, Mara. “Testimony Before the House Committee on Ways and Means on the Social Security Administration's Service to the Public.” AARP. April 23, 2008.

¹⁵ The Disability Backlog at the Social Security Administration, Before the H. Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, 110th Cong., 2d Sess. (2008) (statement of Richard Warsinsky, National Council of Social Security Management Associations, Inc.) Feb. 8, 2008. Available at <http://socsecperspectives.blogspot.com/2008/02/social-security-advocacy-group-written.html>

¹⁶ Schieber, Sylvester J. “Clearing the Disability Backlog – Giving the Social Security Administration the Resources It Needs to Provide the Benefits Workers Have Earned [Statement] to the Committee on Ways and Means, U.S. House of Representatives.” Social Security Advisory Board. April 23, 2008.

the Social Security database has a 4.1 percent error rate. These errors are normally corrected at the time of Social Security benefit application and would not necessarily affect individuals' ability to obtain benefits. These errors would, however, prevent workers from being able to keep their jobs. According to SSA's testimony in 2007, under a national system, six percent of workers would need to visit an SSA field office in person in order to correct their records, or lose their jobs. This translates into approximately 3.6 million workers who would have to visit an SSA field office each year in order to keep their jobs (this calculation is based on data from the Bureau of Labor Statistics reflecting approximately 60 million new hiring decisions per year).

Notwithstanding the 3.6 million workers who would have to visit an SSA field office annually, an additional 45 million workers would have to visit an SSA field office each year in order to prove their identity and their earnings reported on their W-2 forms.¹⁷ The SAVE Act (S. 2368) would require every worker with earnings reported by two or more employers to visit an SSA field office to prove their identity and their earnings. If the workers fail to do so, none of their earnings would be posted to their earnings record, thereby denying them credit towards Social Security eligibility and reducing the amount of their future Social Security benefits. This requirement in the SAVE Act would even apply to employees of a business that changes hands during the course of the year.

Hence, if Congress institutes a mandatory EEVS regime, the SSA field offices will be flooded by an additional 45 million visits per year from irate workers desperate to fix their records in order to work and to get their earnings posted to their records. Under its present workload, SSA cannot answer over half of telephone calls placed to the field offices. Forcing an additional 45 million workers into the SSA field offices every year would crush the field offices and cripple their ability to process disability, retirement, and survivor claims.

III. Mandatory Electronic Employment Verification Poses Serious Privacy, Due Process, and Civil Rights Concerns.

In addition to crippling the SSA's ability to process disability claims, a mandatory employment verification system raises serious privacy, due process, and civil rights concerns. A mandatory EEVS would require the creation of a new data-exchange system between the SSA and the Department of Homeland Security ("DHS"). SSA would be required to share data with DHS based on discrepancies in SSA's database that have nothing to do with immigration status. According to SSA, reasons for errors in its database include clerical errors made by employees in completing their W-2's; the fact that workers might have used one name convention (such as a hyphenated name or multiple surnames) when applying for a Social Security card and a different one when applying for a job; or name changes due to marriage, divorce, religious conversion, or other reasons. The SSA database does not contain complete information about workers' immigration status, and the limited immigration status information that does exist in the database is not

¹⁷ April 3, 2008 Rangel-McNulty Dear Colleague Letter.

automatically updated when a worker's immigration status or work authorization status changes.

According to the Office of the Inspector General at SSA, by conservative estimates, at least 3.3 million non-citizen records in the SSA database contain incorrect citizenship status codes. A mandatory EEVS regime would result in the SSA erroneously divulging the private information of U.S. citizens (including their Social Security numbers) to the DHS because SSA is unable to accurately identify an individual's citizenship status via its databases. And the DHS has proven that it cannot be trusted with private information. The House Oversight and Government Reform Committee gave a "D" to the DHS in computer security for 2006 (up from an "F" for the previous three years). The DHS's failure to comply with Federal Information Security and Management Act standards since its inception demonstrates that it cannot be relied upon to make significant improvements in this area, which translates down the road into workers' private information being left vulnerable to hackers and other cyber-threats.

Furthermore, the information-sharing provisions set forth in S. 2368 do not require independent review, monitoring of disclosure, privacy protections, notice to workers that their private information or records have been disclosed, or recourse if overbroad information is sought or misused.

Finally, moving to a mandatory EEVS would subject many lawful workers to illegal employment discrimination on the basis of race and/or national origin. Some employers facing a mandate of verifying all workers will fire workers or refrain from hiring candidates on the basis of their race, surname, accent, or other proxies for unlawful discrimination.

The ACLU appreciates the opportunity to submit this written statement and urges the Committee to reject imposing the new radical duty of mandatory electronic employment verification on the SSA.