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The American Civil Liberties Union

Written Statement
For a Hearing on

Backlog of Social Security Disability Claims

Submitted to the House Ways and Means Committee

Wednesday, April 23, 2008

Caroline Fredrickson, Director
ACLU Washington Legislative Office

Joanne Lin, Legislative Counsel
ACLU Washington Legislative Office

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

The American Civil Liberties Union ("ACLU") commends the House Ways and Means Committee ("Committee") for holding a hearing on the Backlog of Social Security Disability Claims and appreciates the opportunity to submit testimony for the record. The current Social Security disability claims backlog is both unreasonable and violates due process. At a time when the Social Security Administration ("SSA") is struggling to fulfill one of its principal functions of administering disability claims, Congress is now seriously considering imposing a new radical duty on SSA – the checking and verification of all workers in the U.S. Two bills pending in the House of Representatives -- Secure America Through Enforcement and Verification Act of 2007 ("SAVE" Act, H.R. 4088) and the New Employee Verification Act of 2008 (H.R. 5515) – would impose a mandatory electronic employment verification system ("EEVS") on all employers 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 ACLU has serious privacy, due process, and civil rights concerns with these proposals, we urge the Committee to reject any type of mandatory EEVS proposal primarily in order to ensure that the SSA can focus on performing its historic and critical function of processing disability claims in a timely and fair manner.

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

[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.

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] Between 2000 and 2006, Social Security disability claims processing times for hearing and decisions nearly doubled.[8] These delays are undoubtedly unreasonable and infringe on disability claimants' due process rights.

According to a Governmental Accountability Office Report published in December 2007, approximately 60 million phone calls are placed to SSA Field Offices each year, and over half of these callers receive a busy signal.[9] The SSA's staffing is at its lowest level since 1972. 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 baby boomer generation now hitting retirement age. Social Security retirement benefits claims are expected to increase by 13 million over the next decade.[10] As the SSA struggles to administer its primary

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[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] *Id*. at 14.

[9] *Id*.

[10] 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 Warsinskey, National Council of Social Security

duties of processing retirement and disability claims, Congress is now considering heaping yet another duty on the SSA – the verification of all workers in the U.S.

II. A Recipe for Exacerbating the Social Security Disability Processing Backlogs -- Adding Mandatory Electronic Employment Verification to SSA's Mandate

Two bills (H.R. 4088, H.R. 5515) introduced in this Congress would impose a mandatory electronic employment verification system ("EEVS") on all employers in the U.S. Both mandatory EEVS bills propose that the SSA would play the critical function of checking and verifying work authorization for all workers in the U.S. This massive overhaul calls for sweeping changes to SSA's historic functions of processing disability and retirement benefits claims. The SSA has never performed the complicated task of verifying people's immigration status. The ACLU urges Congress to reject any type of mandatory EEVS proposal, in order to ensure that people with disabilities are not further harmed by the already unreasonable delays in Social Security disability claims processing.

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, the Social Security database has a 4.1 percent error rate. The vast majority of errors involve U.S. citizens. The mandatory EEVS proposal contained in the SAVE Act (H.R. 4088) would strip workers of Social Security credit for their earnings if they work more than one job during a year — unless they visit a SSA field office to prove with documentation that they, in fact, worked two jobs. This provision will apply to anyone who works more than one job, who changes jobs, or whose employer changes ownership in a calendar year.

By its own estimates, the SSA calculates that making EEVS mandatory would result in an additional 3.6 million visits or telephone calls to SSA field offices per year, which would result in 2,000 to 3,000 more work years for the SSA. Considering that currently over half of all telephone calls placed to SSA field offices do not get answered, moving to a mandatory EEVS regime would result in a practical shutdown of SSA field offices as SSA is swarmed by irate workers who are desperate to fix their Social Security records in order to work.

Furthermore, in April 2008 the Congressional Budget Office released a score report for the SAVE Act (H.R. 4088) and estimated that the SAVE Act would decrease Social Security trust fund revenue by more than $22 billion over 10 years by increasing increase the number of employers that will pay workers in the cash economy, outside of the tax system.

Management Associations, Inc.) Feb. 8, 2008. Available at http://socsecperspectives.blogspot.com/2008/02/social-security-advocacy-group-written.html

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 employers 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 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 both H.R. 4088 and H.R. 5515 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.