



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Social Security Administration Federal Courts Analysis

Committee on Judicial Review

Proposed Recommendation | December 13, 2016

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with sources shown in the margin).

1 The Administrative Conference recommends that the Judicial Conference of the United
2 States develop special procedural rules for cases under the Social Security Act in which an
3 individual seeks district court review of a final administrative decision of the Commissioner of
4 Social Security pursuant to 42 U.S.C. § 405(g).social security litigation commenced in federal
5 court involving claims for benefits arising under Titles II and XVI of the Social Security Act.¹ The
6 Rules Enabling Act delegates authority to the United States Supreme Court (acting initially
7 through the Judicial Conference) to prescribe procedural rules for the lower federal courts.² The
8 Act does not require that procedural rules be trans-substantive (that is, be the same for all types of
9 cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so
10 drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules'
11 general procedural governing scheme.³ In the case of social security litigation in the federal courts,
12 several factors warrant an additional set of exceptions. These factors include the extraordinary
13 volume of social security litigation, the Federal Rules' failure to account for numerous procedural

Commented [CMA1]: Conference Member
Amendment: Committee on Judicial Review voted to change the recommendation title to "Special Procedural Rules for Social Security Litigation in District Court."

Commented [CMA2]: Conference Member
Amendment: Liu Amendment: For an explanation about this amendment, see <https://www.acus.gov/public-comment/conference-member-amendment-0>.

¹ 42 U.S.C. § 301 *et seq.* (2012).

² *See* 28 U.S.C. § 2072(a) (2012).

³ FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 ("Special Proceedings").



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14 issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by
15 the various local rules fashioned to fill those procedural gaps.⁴

* * *

16 The Social Security Administration (SSA) administers the Social Security Disability
17 Insurance program and the Supplemental Security Income program, two of the largest disability
18 programs in the United States. An individual who fails to obtain disability benefits under either
19 of these programs, after proceeding through SSA's extensive administrative adjudication system,
20 may appeal the agency's decision to a federal district court.⁵ In reviewing SSA's decision, the
21 district court's inquiry is typically based on the administrative record developed by the agency.

22 District courts face exceptional challenges in social security litigation. Although
23 institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the
24 federal district courts act as appellate tribunals in their review of disability decisions. That fact
25 alone does not make these cases unique; appeals of agency actions generally go to district courts
26 unless a statute expressly provides for direct review of an agency's actions by a court of appeals.⁶
27 However, social security appeals comprise approximately seven percent of district courts' dockets,
28 generating substantially more litigation for district courts than any other type of appeal from a
29 federal administrative agency. The high volume of social security cases in federal court is in no
30 small part a result of the enormous magnitude of the social security disability program. The
31 program, which is administered nationally, annually receives millions of applications for benefits.
32 The magnitude of this judicial caseload suggests that a specialized approach in this area could
33 bring about economies of scale that probably could not be achieved in other subject areas.

⁴ This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the University of Arizona Rogers College of Law. *See* Jonah Gelbach & David Marcus, *A Study of Social Security Litigation in the Federal Courts* 127–42, 148–59 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

⁵ 42 U.S.C. § 405(g) (2012).

⁶ *See* *Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007).



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34 The Federal Rules were designed for cases litigated in the first instance, not for those
35 reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules
36 fail to account for a variety of procedural issues that arise when a disability case is appealed to
37 district court. For example, the Rules require the parties to file a complaint and an answer.
38 Because a social security case is in substance an appellate proceeding, the case could more sensibly
39 be initiated through a simple document akin to a notice of appeal or a petition for review.
40 Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as “part
41 of” the government’s answer, there is no functional need at that stage for the government to file
42 anything more than the record. In addition, the lack of congruence between the structure of the
43 Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants
44 should file in order to get their cases resolved on the merits. In some districts, for instance, the
45 agency files the certified transcript of administrative proceedings instead of an answer, whereas
46 other districts require the agency to file an answer. In still other districts, claimants must file
47 motions for summary judgment to have their case adjudicated on the merits,⁷ whereas such motions
48 are considered “not appropriate” in others.⁸

49 Social security disability litigation is not the only type of specialized litigation district
50 courts regularly review in an appellate capacity. District courts entertain an equivalent number of
51 habeas corpus petitions,⁹ as well as numerous appeals from bankruptcy courts. But habeas and
52 bankruptcy appeals are governed by specially crafted, national rules that address those cases’
53 specific issues.¹⁰ No particularized set of rules, however, accounts for the procedural gaps left by
54 the Federal Rules in social security appeals.

⁷ See, e.g., Order Setting Schedule, *Donvan-Terris v. Colvin*, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

⁸ See, e.g., S.D. Iowa Local R. 56(i).

⁹ During the twelve months that ended on September 30, 2014, the district courts received 19,185 “general” habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3–4.

¹⁰ See R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.



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55 When specialized litigation with unique procedural needs lacks a tailored set of national
56 procedural rules for its governance, districts and even individual judges have ~~an incentive~~ to craft
57 their own. This is precisely what has happened with social security litigation. The Federal Rules
58 do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic
59 access of nonparties to filings in social security cases,¹¹ but, otherwise, they include no specialized
60 procedures. As a result, numerous local rules, district-wide orders, and individual case
61 management orders, addressing a multitude of issues at every stage in a social security case, have
62 proliferated. Whether the agency must answer a complaint, what sort of merits briefs the parties
63 are required to file, whether oral arguments are held, and the answers to a host of other questions
64 differ considerably from district to district and, sometimes, judge to judge. Such local variations
65 have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this
66 fact reflects the district courts' own recognition that social security cases pose distinctive
67 challenges.

68 Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal
69 Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous
70 briefing—the practice in some districts that requires both parties to file cross motions for resolution
71 of the merits and to respond to each other's briefs in simultaneously filed responses—effectively
72 doubles the number of briefs the parties must file. Some judges employ a related practice whereby
73 the *agency* is required to file the opening brief.¹² Because social security complaints are generally
74 form complaints containing little specificity, courts that employ this practice (known as
75 “affirmative briefing”) essentially reverse the positions of the parties, leaving to the agency the
76 task of defining the issues on appeal. The questionable nature of some of these local variations
77 may be attributable in part to the fact that they can be imposed without observance of procedures
78 that would assure sufficient deliberation and opportunities for public feedback. Proposed
79 amendments to the Federal Rules must go through several steps, each of which requires public

¹¹ FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

¹² *See, e.g.*, Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, *Barnes v. Colvin*, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.



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80 input. So-called “general orders” and judge-specific orders, on the other hand, can be issued by a
81 district or individual judge with very little process.

82 The disability program is a national program that is intended to be administered in a
83 uniform fashion, yet procedural localism raises the possibility that like cases will not be treated
84 alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing
85 schedules, can increase delays and litigation costs for some claimants, while leaving other similarly
86 situated claimants free from bearing those costs. Further, many of the attorneys who litigate social
87 security cases—agency lawyers and claimants’ representatives alike—maintain regional or even
88 national practices. Localism, however, makes it difficult for those lawyers to economize their
89 resources by, for instance, forcing them to refashion even successful arguments in order to fit
90 several different courts’ unique page-limits or formatting requirements.

91 Procedural variation can thus impose a substantial burden on SSA as it attempts to
92 administer a national program and can result in arbitrary delays and uneven costs for disability
93 claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform rules
94 that recognize the appellate nature of disability cases. Indeed, several districts already treat
95 disability cases as appeals.¹³ Many of these districts provide, for example, for the use of merits
96 briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

97 The Supreme Court has recognized that the exercise of rulemaking power to craft
98 specialized procedural rules for particular areas of litigation can be appropriate under the Rules
99 Enabling Act.¹⁴ Yet, in recommending the creation of special procedural rules for social security
100 disability and related litigation, the Administrative Conference is cognizant that the Judicial
101 Conference has in the past been hesitant about amending the Federal Rules to incorporate

¹³ See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm’r of Soc. Sec.’s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm’r of Soc. Sec.’s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.1.

¹⁴ See *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft procedural rules for habeas corpus litigation).



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102 provisions pertaining to particular substantive areas of the law. That hesitation has been driven,
103 at least in part, by reluctance to recommend changes that would give rise to the appearance, or
104 even the reality, of using the Federal Rules to advance substantive ends, such as heightened
105 pleading standards that would disfavor litigants in particular subject areas. The proposals offered
106 herein have very different purposes. Indeed, the Administrative Conference believes that rules
107 promulgated pursuant to this recommendation should not favor one class of litigants over another
108 or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of
109 rules that would promote efficiency and uniformity in the procedural management of social
110 security disability and related litigation, to the benefit of both claimants and the agency.¹⁵ Such a
111 commitment to neutrality would also serve to dampen any apprehensions that the proposed rules
112 would violate the Rules Enabling Act’s proscription of rules that would “abridge, enlarge, or
113 modify any substantive right.”¹⁶ Rules consistent with these criteria could potentially address a
114 variety of topics, including setting appropriate deadlines for filing petitions for attorneys’ fees, or
115 establishing judicial extension practices, or perhaps authorizing the use of telephone,
116 videoconference, or other telecommunication technologies. In developing such rules, the Judicial
117 Conference may wish to consult existing appellate procedural schemes, such as the Federal Rules
118 of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of
119 Appeals for Veterans Claims.

120 The Administrative Conference believes that a special set of procedural rules could bring
121 much needed uniformity to social security disability and related litigation. In routine cases, page
122 limits, deadlines, briefing schedules, and other procedural requirements should be uniform to
123 ensure effective procedural management. At the same time, such rules should not apply to cases
124 that do not fit within the ordinary mold, such as class action disability lawsuits, in which, for
125 example, the usual page limits and deadlines would be too confining. More generally, the new

¹⁵ This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. *See, e.g.*, Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

¹⁶ 28 U.S.C. § 2072(b) (2012).



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126 rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature
127 of social security litigation justifies such separate treatment.¹⁷ In this way, the drafters can avoid
128 the promulgation of a special procedural regime that sacrifices flexibility and efficiency for
129 uniformity in certain cases.

130 The research that served as the foundation for this report focused on social security
131 disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district
132 court review of SSA old age and survivors benefits decisions, as well as other actions related to
133 benefits. Because such non-disability appeals do not differ procedurally from disability cases in
134 any meaningful way,¹⁸ it is the Conference's belief that this recommendation should apply to all
135 cases under the Social Security Act in which an individual seeks district court review of a final
136 administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. §
137 405(g) non-class action social security cases commenced in federal court arising under Titles II
138 and XVI of the Social Security Act.

139 The Conference recognizes that some cases might be brought under section 405(g) that
140 would fall outside the rationale for the proposed new rules. This could include class actions and
141 other broad challenges to program administration, such as challenges to the constitutionality or
142 validity of statutory and regulatory requirements, or similar broad challenges to agency policies
143 and procedures. By citing these examples, the Conference does not intend to preclude other
144 exclusions. The task of precisely defining the cases covered by any new rules would be worked
145 out by the committee that drafts the rules, after additional research and more of an opportunity for
146 public comment on the scope of the rules than has been possible for the Conference. It may also
147 be necessary to include specific rules explaining the procedure for the exclusion of appropriate
148 cases.

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Commented [CMA4]: Conference Member Amendment: Liu Amendment: For an explanation about this amendment, see <https://www.acus.gov/public-comment/conference-member-amendment-0>.

¹⁷ See FED. R. CIV. P. 81(a)(6) (“[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.”).

¹⁸ Further, they only constitute about four percent of total social security cases appealed to district courts annually. See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.



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RECOMMENDATION

- 149 1. ~~The Judicial Conference, in consultation with Congress as appropriate, should develop~~
150 ~~for the Supreme Court's consideration a uniform set of procedural rules for social~~
151 ~~security cases commenced in federal court that involve claims for benefits arising under~~
152 ~~Titles II and XVI of the Social Security Act. Class action lawsuits should be excluded~~
153 ~~from the scope of such rules.~~ The Judicial Conference, in consultation with Congress as
154 appropriate, should develop for the Supreme Court's consideration a uniform set of
155 procedural rules for cases under the Social Security Act in which an individual seeks
156 district court review of a final administrative decision of the Commissioner of Social
157 Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions and
158 other cases that are outside the scope of the rationale for the proposal.
- 159 2. Examples of rules that should be promulgated include:
- 160 a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be
- 161 substantially equivalent to a notice of appeal;
- 162 b. A rule requiring the agency to file a certified copy of the administrative record as
- 163 the main component of its answer;
- 164 c. A rule or rules requiring the claimant to file an opening merits brief to which the
- 165 agency would respond, and providing for the filing of appropriate subsequent
- 166 responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the
- 167 proceedings;
- 168 d. A rule or rules setting deadlines and page limits as appropriate; and
- 169 e. Other rules that may promote efficiency and uniformity in social security disability
- 170 and related litigation, without favoring one class of litigants over another or
- 171 impacting substantive rights.

Commented [CMA5]: Conference Member
Amendment: Liu Amendment: For an explanation about
this amendment, see [https://www.acus.gov/public-
comment/conference-member-amendment-0](https://www.acus.gov/public-comment/conference-member-amendment-0).