

BACKGROUND

No. 3351 | SEPTEMBER 19, 2018

The Making DI Work For All Americans Act of 2018: How It Would Improve Social Security Disability Insurance

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Abstract

Countless problems plague Social Security's Disability Insurance (SSDI) program, ranging from flaws and inefficiencies in the determination process to outdated standards and significant misuse and abuse. Consequently, the disability insurance program's costs and enrollment have skyrocketed, and it is on track to become insolvent in 2032. A new bill introduced by Representative Todd Rokita (R-IN)—the Making DI Work For All Americans Act of 2018 (H.R. 6532)—would make the SSDI program more responsive to the needs of individuals with disabilities, while minimizing its use among work-capable individuals. It would also return disability insurance to its original goal of poverty prevention and make the program solvent over the long run. Additional measures, such as a private disability insurance component and needs-based benefit periods, would further improve the program.

Social Security's Disability Insurance (SSDI) program is riddled with problems, including flaws and inefficiencies in the determination process, outdated measures of disability, work disincentives, fraud and abuse, inadequate continuing disability reviews, uncoordinated and complex interaction with other government programs, and inflexibility toward recipients' wide range of disabilities and work capacities. These problems have contributed to skyrocketing costs and enrollment, and a near-depletion of the program's finances in 2016. While the SSDI program received a financial reprieve by taking roughly \$150 billion from Social Security's Old Age and Survivors Insurance (OASI) program, it nevertheless faces future shortfalls that will require either benefit cuts or tax increases.

KEY POINTS

- Ongoing fraud, misuse, and abuse of the Social Security Disability Insurance (SSDI) program have demonstrated the need for a fairer and more rational process to determine who receives benefits; and excessive cost growth calls for more targeted benefits.
- A new bill in Congress—the Making DI Work For All Americans Act of 2018—would improve the disability insurance program for individuals with disabilities and make it solvent over the long run.
- In particular, the act would advance program integrity, improve the disability insurance application process, ensure poverty-prevention benefits, and limit unintended use of the program among able-bodied workers.
- Additional measures, such as an optional, private disability insurance component and needs-based benefit periods, would further improve the program.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3351>

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The SSDI program's many problems have allowed it to function as a long-term unemployment and early retirement program, instead of strictly benefiting individuals with disabilities. This is apparent in the existence of an entire industry targeting potential disability insurance beneficiaries. A recent advertisement that popped up in a disability insurance-related online search showed a man in a suit and tie with his pockets pulled out empty—indicating he was “broke.” The bottom of the ad read, “Apply for disability insurance.” Allowing people who are capable of working to receive disability benefits drains the system for those who truly cannot work and support themselves. The lost productivity that comes from idleness among otherwise work-capable individuals also hurts the economy and increases government spending.

A new bill introduced by Representative Todd Rokita (R-IN)—the Making DI Work For All Americans Act of 2018 (H.R. 6532)—would make significant strides toward fixing the SSDI program so that it can better serve individuals with disabilities that prevent them from working and providing for themselves.¹ The act would make the SSDI program more responsive to the needs of individuals with disabilities while minimizing its use among work-capable individuals. It would also return disability insurance to its original goal of poverty prevention and make the program solvent over the long run. The sections below summarize the components of the bill, explaining how they will fix or improve existing flaws in the disability insurance system.

The Making DI Work For All Americans Act of 2018

The proposed act consists of four titles.

Title I: Administrative Changes. Administrative reforms can seem insignificant, but in the case of the SSDI system, administrative shortcomings and inconsistencies lead to serious problems. The Making DI Work for All Americans Act would improve the program's administration by:

- **Adding reviews for outlier judges.** Approval rates

for SSDI benefits vary widely among administrative law judges (ALJs), even when those judges operate in the same office or hear similar cases. For example, a 2017 Government Accountability Office (GAO) study found that even after controlling for the type of diagnosis, there was a 42 percentage point difference in approval ratings among the bottom 5 percent and top 5 percent of ALJ approval ratings. (The bottom 5 percent granted favorable decisions in 44.7 percent of cases compared with 86.7 percent among the top 5 percent.)² Representative Rokita's bill would require the Social Security Administration (SSA) to review a sample of decisions from judges that have higher approval ratings or who issue more total decisions than 90 percent of all ALJs. This provision would help to improve consistency across cases by adding an incentive for judges to adhere to benefit-determination rules and specifications, and would help prevent rubber-stamping judges from awarding benefits to unqualified recipients.

- **Applying the judicial code of conduct to administrative law judges.** The bill would also apply the judicial code of conduct—as opposed to the current administrative code of conduct—to ALJs. Recent exposure of corruption and collusion among ALJs within the SSDI system underscores the need to enforce greater judicial accountability. Judges—including ALJs deciding SSDI cases—should have a clear code of conduct, with well-defined and consistently enforced consequences for violating that code. Applying the judicial code of conduct to ALJs has significant support, including from the American Bar Association, which said that making ALJs subject to and accountable under standards set forth in the judicial code of conduct would “promote fairness and public trust in administrative adjudication.”³
- **Reporting on the number of additional administrative law judges and staff needed to eliminate the SSDI backlog.** Despite improvement, the average SSDI applicant waits 600 days for a hearing before an ALJ, and about 900,000 appli-

1. H.R. 6532, Making DI Work For All Americans Act of 2018, 115th Congress.

2. Government Accountability Office, “Social Security Disability, Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions,” GAO-18-37, December 2017, <https://www.gao.gov/assets/690/689209.pdf> (accessed August 20, 2018).

3. Thomas M. Susman, letter to the Honorable Senators James Lankford and Heidi Heitkamp on behalf of the American Bar Association, June 1, 2016.

cants remain in the SSDI backlog.⁴ The Rokita bill would require a report on additional ALJ and staff needed to eliminate the backlog. Although these changes would almost certainly generate savings by leading to more accurate determinations and fewer favorable awards, improved program integrity and more timely disability determinations would be the primary benefits.

- **Preventing the Social Security Administration from playing middleman in representation payments.** Currently, the SSA dictates the allowable fees that SSDI representatives can charge their clients. The SSA then acts as the representatives' bill collector by directly withholding money (more than a billion dollars per year) from SSDI beneficiaries' first payments.⁵ This effectively prevents SSDI beneficiaries from having any say in the matter; it allows representatives to receive payment without necessarily providing valuable services; it causes representatives to seek out individuals to apply for SSDI benefits; and it encourages representatives to delay cases as doing so leads to higher payments.⁶ An Inspector General report found that only 37 percent of representatives assisted their clients throughout the application process while 41 percent assisted only with the application and 22 percent provided no assistance at all—yet all received full payment.⁷ The Making DI Work For All Americans Act would prevent the SSA from setting the representative fee structure and from directly withholding benefits and paying representatives. Instead, SSDI applicants would gain the same control over their representation as

all other individuals who contract for legal services. The act would also help ensure the integrity of SSDI representatives by allowing the SSA to refuse to recognize representatives who have been disbarred or otherwise disqualified from appearing before other federal programs and agencies.

- **Ending double-dipping.** A condition for receiving SSDI benefits is an inability to work (for at least the past six months). A condition for unemployment insurance benefits is being ready and able to work. The two cannot coexist and yet, some workers receive both SSDI benefits and unemployment insurance benefits. The Rokita bill would end this so-called “double dipping” by disqualifying individuals for SSDI benefits in any month in which they receive unemployment insurance benefits. This would save an estimated \$4.9 billion over 10 years.⁸
- **Eliminating reconsideration stage.** Applying for SSDI benefits is a lengthy and time-consuming process that, for many people, involves three different levels of applications and hearings. The second reconsideration stage is particularly inefficient; in 2015, fewer than 11 percent of applicants had their initial decision reversed at the reconsideration stage, which requires applicants to wait another 108 days, on average, before moving on to the next stage in the appeal process.⁹ Individuals are far more likely to receive an SSDI allowance at the next appeal level before an ALJ. In 2015, 56 percent of decisions at the ALJ level or above received allowances.¹⁰ A 10-state test of removing the reconsideration stage found that doing

4. Social Security Administration, “Average Wait Time Until Hearing Held Report,” July 2018, https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (accessed September 12, 2018), and Social Security Administration, “Hearing Office Workload Data FY 2018,” https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html (accessed August 20, 2018).

5. Social Security Administration, “Attorney and Representative Fee Amounts by Month and Year,” <https://www.ssa.gov/representation/statistics.htm#2015> (accessed August 31, 2018).

6. Rachel Greszler, “Time to Cut Out the SSA as Middleman in SSDI Representation,” Heritage Foundation *Issue Brief* No. 4489, November 24, 2015, <https://www.heritage.org/budget-and-spending/report/time-cut-out-the-ssa-middleman-ssdi-representation>.

7. Office of the Inspector General, Social Security Administration, *Audit Report: Claimant Representatives at the Disability Determination Services Level*, February 2014.

8. Savings estimate comes from the Social Security Office of the Chief Actuary, estimated for years 2014–2023, as reported by William R. Morton, “Concurrent Receipt of Social Security Disability Insurance (SSDI) and Unemployment Insurance (UI): Background and Legislative Proposals,” Congressional Research Service, July 31, 2015, <https://fas.org/sgp/crs/misc/R43471.pdf> (accessed August 20, 2018).

9. Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2016*, p. 153, Table 61. Medical decisions at the initial adjudicative level, by year of application and program, 1992–2015, https://www.ssa.gov/policy/docs/statcomps/di_asr/2016/di_asr16.pdf (accessed August 28, 2018).

10. *Ibid.*, p. 155, Table 62. Medical decisions at the reconsideration level, by year of application and program, 1992–2015.

so resulted in more accurate decisions at the initial level and significantly shorter wait times for applicants.¹¹ Removing the reconsiderations stage would save administrative costs and allow better allocation of resources, leading to more accurate and timely decisions.

Title II: Eligibility. By far the biggest problems in the SSDI system boil down to eligibility. Too many people enter the program and too few exit it to return to work. The program’s statutory eligibility criteria are quite restrictive; to qualify, individuals must be unable “to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”¹² SGA—\$1,180 per month in 2018—is a minimum income level considered necessary to support oneself. Despite the program’s narrow definition of eligibility, far more people enter and remain on the program than intended.

Thus, one of the biggest components to making the program work better for its intended population is making sure that only people who truly cannot work and support themselves receive benefits. The Making DI Work For All Americans Act would help do this through a number of important measures. It would:

- **Update the medical vocational grids.** Nearly half—48 percent—of all SSDI awards granted in 2015 relied on non-medical factors known as the

“grids.”¹³ These factors— age, experience, and education (including the inability to speak English)—do not cause an individual to be physically or mentally unable to work. An evaluation commissioned by the SSA to determine the practicability of using the grids to determine individuals’ ability or inability to perform work confirmed that the grid factors do not cause disability. That study “found no rigorous evidence of the independent effects of age, education, and work experience on the ability to perform new work.”¹⁴ The Rokita bill would require the SSA to update the medical vocational grids, which currently require an individual to receive SSDI benefits if they are 45 or older, cannot speak English, and can only perform sedentary work. The updates would include accounting for new employment opportunities, treatments, rehabilitation, and prevalent language considerations. Ultimately, Congress or the Secretary of Health and Human Services¹⁵ should eliminate the grids and disability determinations should rely solely on medical conditions.¹⁶

- **Allow social media use in eligibility determinations.** Social media can provide valuable evidence to support or deny individuals’ disability claims. For example, a disability claimant may say that she is unable to leave her home, while her social media pictures show her out and about regularly. The Rokita bill would correct this shortcoming by allowing social media as evidence in the disability determination process.

11. Jon C. Dubin, “Social Security Disability Adjudicative Reform: Ending the Reconsideration Stage of SSDI Adjudication after Sixteen Years of Testing and Enhancing Initial Stage Record Development,” Ch. 7 in *SSDI Solutions*, The Committee for a Responsible Federal Budget, <http://www.crfb.org/sites/default/files/dubin.pdf> (accessed August 29, 2018).

12. Social Security Administration, “Disability Evaluation Under Social Security, Part I: General Information,” <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm> (accessed August 27, 2018).

13. Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2016*, p. 159, Table 64. Number and percentage distribution of final medical allowances, by year of application and reason for allowance, 1992–2015.

14. David R. Mann, David C. Stapleton, and Jeanette de Richemond, “Vocational Factors in the Social Security Disability Determination Process: A Literature Review,” Mathematica Center for Studying Disability Policy *Working Paper* No. 2014-07, July 21, 2014, http://www.disabilitypolicyresearch.org/-/media/publications/pdfs/disability/drc_wp_2014-07_voc_factors_determinations.pdf (accessed August 22, 2018).

15. The Secretary of Health and Human Services has the authority to determine what constitutes “disability” and to promulgate regulations and could therefore eliminate the non-medical grid factors from the disability determination process.

16. Rachel Greszler, “Vocational Factors of Age, Education, and Work Experience in the Adult Disability Determination Process,” response to the Social Security Administration’s request for input regarding the vocational factors of age, education, and work experience in the adult disability determination process, November 14, 2015, <https://www.heritage.org/testimony/vocational-factors-age-education-and-work-experience-the-adult-disability-determination>.

- **Update the list of official jobs in the national economy.** A criterion for receiving disability insurance benefits is not being able to perform any job in the national economy. The current list of jobs, a so-called Depression-era relic,¹⁷ has not been updated since 1991 and still includes jobs such as seal killer (a practice outlawed in 1972), telegram messenger, and mule driver.¹⁸ Internet-based jobs are nonexistent in the listings. The absence of many new jobs from the listings—particularly online jobs that can be done sedentarily and sometimes even from home, or gig-economy jobs that let workers choose their own hours—can lead claimants to appear disabled when there are actually jobs that they can perform. The Rokita bill would require the SSA to update the list of official jobs in the national economy within five years and then every year thereafter.

Title III: Continuing Disability Reviews. Each year, fewer than 1 percent of all SSDI beneficiaries leave the program to return to work. The only procedure the program uses to prevent individuals from continuing to receive disability insurance benefits even after they recover is to conduct Continuing Disability Reviews (CDRs). Arguably, the program conducts too few CDRs, too infrequently, and too inadequately. As a result, many people receive SSDI benefits for life even if they are able to work. The Rokita bill would improve the integrity of the CDR process through:

- **More frequent CDRs.** Based on disabled workers' initial disability determinations, the SSA performs CDRs either every three years or when the commissioner determines them appropriate. Often these CDRs consist of nothing more than mailing beneficiaries check-the-box postcards to ask if they are still disabled. Comprehensive CDRs are an important component to maintaining program integrity and preventing individuals who are no longer unable to work from continuing to receive benefits. The Rokita bill would require individuals with expected improvement

to receive a CDR every two years (instead of the current three years), and all other individuals to receive a CDR every seven years (instead of only when the commissioner determines).

- **A study on the impact of the Medical Improvement Review Standard.** When the SSA performs CDRs to determine if individuals are still unable to work, it uses a Medical Improvement Review Standard (MIRS). This standard dictates that an individual remains disabled if his condition has not improved since the initial determination. Initial determinations are sometimes inaccurate, however (whether due to rubber-stamping judges or false reports), or individuals could have multiple disabling conditions and recover from some but not all. The MIRS can allow individuals who would not otherwise qualify to receive benefits to continue doing so. CDRs should rely on the same disability determination standards as the original determination process. The Rokita bill calls for a study (and report within six months) to examine whether using the initial disability determination standard as opposed to the MIRS would lead to more people exiting the rolls and returning to work.

Title IV: Benefits. Disability insurance was designed as a backstop against poverty for people who lose the ability to work. Yet, because of the progressive benefit structure, which provides higher benefits to individuals with higher earnings, SSDI provides the highest benefits to individuals with the greatest resources, and below-poverty-level benefits for those with the least resources. The benefit structure also encourages individuals to use the SSDI system as an early retirement option and extends benefits beyond the program's objectives. The Rokita bill would improve these shortcomings through:

- **A flat benefit to prevent poverty.** The SSDI program was designed to prevent workers who become unable to work from living in poverty, yet it provides the highest benefits to individuals with the greatest means while failing to provide above-

17. David Fahrenthold, "'It's Just Maddening. There's Nothing You Can Do.' The Social Security Office of Judges Who Hear Appeals for Disability Benefits Is 990,399 Cases Behind," *The Washington Post*, October 18, 2014, https://www.washingtonpost.com/sf/national/2014/10/18/the-biggest-backlog-in-the-federal-government/?utm_term=.f762862150d6 (accessed August 29, 2018).

18. GovtUSA, "Dictionary of Occupational Titles (DOT) Job Descriptions," <http://www.govtusa.com/dot/> (accessed August 25, 2018).

poverty-level incomes for many disabled workers.¹⁹ The Rokita bill would institute a flat, anti-poverty benefit for all new disability insurance beneficiaries. The Heritage Foundation's Social Security model estimates that this change would increase benefits for more than a third of new beneficiaries and would reduce the program's costs by \$188 billion over the next decade and by \$459 billion over the next two decades. This would preserve the financial solvency of the disability insurance program, ensuring that it remains available to those who truly need it, and clear the path for an eventual reduction in the disability insurance payroll tax.

- **Reduced benefits for those at or above Social Security's early retirement age of 62.** Individuals who opt to retire and collect Social Security benefits early (between the ages of 62 and the normal retirement age—currently 66) receive reduced benefits. Individuals who apply for and receive DI benefits between the ages of 62 and 66, however, receive the full amount of their Social Security benefit. This can encourage individuals who are capable of work to apply for disability benefits instead of collecting reduced early Social Security benefits. The Rokita bill would reduce this incentive to use SSDI as an early retirement program by applying the same actuarial reduction to new SSDI benefit awards for individuals who are 62 years of age or older (excluding those for whom medical improvement is not expected). The Congressional Budget Office estimates that a similar policy would reduce SSDI costs by \$17.4 billion over the next decade.²⁰ Savings under the Rokita bill's provision, which maintains full benefits for individuals for whom medical improvement is not expected, would be somewhat lower.
- **Limited retroactive payments to six months, instead of the current 12 months.** SSDI is a long-term disability insurance program. Thus, individuals must wait five months from the date of their dis-

ability onset before applying to receive disability insurance benefits. If awarded benefits, individuals can receive retroactive benefits, going back as many as 12 months prior to their application. The Rokita bill would limit those retroactive payments to six months, bringing them close to the five-month waiting period to apply. This proposal would save roughly \$19 billion over the next decade.²¹

- **Inclusion of unearned income in measure of substantial gainful activity.** Currently, only income earned through work counts toward SGA, but this allows individuals with significant unearned income from investments and other sources to receive disability insurance benefits that are intended to be for workers who do not have enough income to provide for themselves. The Rokita bill would include unearned income in SGA, potentially reducing or eliminating benefits for individuals with significant non-SSDI income. Although individuals can choose when to realize certain unearned income, this provision would at least help prevent benefits from going to those who have significant other means of income to provide for themselves.

Additional Measures to Further Strengthen and Improve Disability Insurance

The Rokita bill would make tremendous strides in improving the efficiency and integrity of the disability insurance program while preserving its financial viability for those who truly need it. Additional measures, such as an optional private disability insurance component and a needs-based benefit period, among others, could further strengthen the program.

Optional, Private Disability Insurance Component. In addition to the SSDI system's financial shortfalls and gratuitous and inconsistent benefit awards, the program fails to help individuals recover and return to work. Most individuals with true physical and mental disabilities desperately want to recover and they aspire

19. Rachel Greszler, "Improving Social Security Disability Insurance with a Flat Benefit," Heritage Foundation *Backgrounder* No. 3068, October 23, 2015, <http://thf-reports.s3.amazonaws.com/2015/BG3068.pdf>.

20. Congressional Budget Office, "Options for Reducing the Deficit: 2017 to 2026, Option 23: Eliminate Eligibility for Starting Social Security Disability Benefits at Age 62 or Later," December 8, 2016, <https://www.cbo.gov/budget-options/2016/52189> (accessed September 11, 2018).

21. Author's estimates based on payroll data provided in the 2018 Social Security Trustees report, and Marc Goldwein and Ed Lorenzen, "Options to Address SSDI's Financial Shortfall," Committee for a Responsible Federal Budget, http://www.crfb.org/sites/default/files/options_to_address_ssdi_financia_shortfall.pdf (accessed September 11, 2018).

to return to work, yet the program does almost nothing to support them in that process. In some ways, it even hinders their recovery by making individuals wait two years before they qualify to receive Medicare benefits.

Private disability insurance (PDI), on the other hand, strives to help workers remain in their jobs through accommodations or to rehabilitate into new ones. It also provides higher benefits at a lower cost than SSDI and massively shorter wait times.²² Congress could improve the well-being of individuals with disabilities, and the efficiency and solvency of the SSDI program, by allowing employers to receive a payroll tax credit against their disability insurance tax if they choose to provide their employees with qualified PDI (covering at least the first two years of disability benefits).²³

Needs-Based Benefit Lengths. Many individuals with disabilities want to participate in the labor force, but instead of encouraging and helping workers gain independence, the SSDI system fosters government dependence. It does so both by permitting individuals to use the SSDI program as a long-term unemployment insurance program, as evidenced by the steep increase in enrollment during economic downturns, and by failing to cease benefits when individuals become capable of work. Even with a significant uptick in 2016, less than 1 percent of beneficiaries exited the rolls due to medical improvement or earning above the SGA level,²⁴ and less than 3 percent of SSDI beneficiaries ever exit the program in order to return to work.²⁵

The SSDI program needs to change its benefits-for-life perception into an expectation of work when and if the ability exists. Individuals enter the program with extremely different types of disabilities and potential of recovering, yet the program treats them large-

ly the same. Congress could help align the program's benefits with individual conditions through a needs-based benefit structure, placing time limits on benefits for individuals with temporary conditions that are expected to improve with treatment. Early intervention could help applicants return to work before entering the rolls, and other work incentives could help those on the rolls return to work when they are able. The Disability Insurance Return to Work Act of 2017 (H.R. 1540 and S. 656) would implement a needs-based benefit period along with incentives to help individuals transition back to work over time.²⁶

Conclusion

The SSDI program suffers from many flaws and inefficiencies, leading to widespread misuse and abuse of the program, excessive costs, and financial shortfalls that threaten the program's future. The Making DI Work For All Americans Act of 2018 addresses many of the program's problems and would solve its financial shortfalls through changes that would, among other things, create a more efficient and equitable determination process, reduce the number of able-bodied individuals receiving benefits, and implement a flat, anti-poverty benefit. All of these integrity-enhancing and efficiency-enhancing reforms are necessary to fix the SSDI's broken structure. Additional reforms, such as an optional PDI component and needs-based benefit periods, could further improve the program for those with disabilities as well as for taxpayers.

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22. Rachel Greszler, "Private Disability Insurance Option Could Help Save SSDI and Improve Individual Well-Being," Heritage Foundation Backgrounder No. 3037, July 20, 2015, <http://report.heritage.org/bg3037>.
 23. The author estimates that a payroll tax credit of roughly 0.35 percentage points out of the employer's current 0.9 percentage point tax would be an appropriate level to cover employers' costs of providing PDI while also reducing costs for the SSDI program.
 24. Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2016*, Benefits Terminated for All Disabled Beneficiaries, p. 131, Table 49. Number and Rate, 1960-2016.
 25. Larry J. Butler, testimony before the Subcommittee on Energy Policy, Health Care, and Entitlements, Committee on Oversight and Government Reform, U.S. Congress, June 27, 2013, https://oversight.house.gov/wp-content/uploads/2013/06/Butler_Statement_2013_06_271.pdf (accessed August 31, 2018).
 26. Romina Boccia, "A Pathway to Work for Social Security Disability Beneficiaries," The Daily Signal, March 17, 2017, <https://www.dailysignal.com/2017/03/27/a-pathway-to-work-for-social-security-disability-beneficiaries/>. The referenced House and Senate bill versions can be found at H.R. 1540, <https://www.congress.gov/115/bills/hr1540/BILLS-115hr1540ih.pdf> (accessed September 12, 2018), and S. 656, <https://www.congress.gov/115/bills/s656/BILLS-115s656is.pdf> (accessed August 29, 2018).