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SUSPENSION OF SOCIAL SECURITY BENEFITS TO INCARCERATED FELONS

David Z. Nisnewitz¹

In 1974, having suffered two heart attacks, a North Dakota resident applied for and began receiving Social Security disability benefits. Three years later, this claimant was convicted of murder, and was sentenced to twenty years in prison. In July, 1981, the claimant was notified by the Social Security Administration that his benefits were being suspended, as of October 1, 1980, pursuant to an amendment to the Social Security Act which barred the payment of such benefits to disabled incarcerated felons who are not involved in an approved rehabilitation program.²

The consternation and anger which this claimant, one Herbert O. Jensen, must have felt upon receiving this notification apparently prompted him to commence legal action against the Secretary of Health and Human Services, in an attempt to get back the suspended benefits.³ Mr. Jensen failed in that attempt, but the opinion of the Court of Appeals for the Eighth Circuit, in this case of *Jensen v. Heckler*, provides an instructive background to a discussion of this little known, but very interesting, section of the law.

This section of the law, 42 U.S.C. § 402(x), reads as follows:

(1) Notwithstanding any other provision of this subchapter, no monthly benefits shall be paid under this section or under § 423 of this title to any individual for any month during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

(2) Benefits which would be payable to any individual (other than a confined individual to whom benefits are not payable by reason of ¶ (1)) under this subchapter on the basis of the wages and self-employment income of such a confined individual

¹Administrative Law Judge, HHS/SSA. This article first appeared in *IOHA Law Journal* 24 (Nov., 1990) and is reprinted here with permission. This article was written by Judge Nisnewitz in his private capacity. No official support or endorsement by the Office of Hearings and Appeals, the Social Security Administration or the Department of Health and Human Services is intended or should be inferred. The author gratefully acknowledges the assistance of Supervisory Attorney Advisor Curtis Axelson and Attorney Advisors Rochelle Price and Michael Dineen in the preparation of this article.

²42 U.S.C. § 423(f) (1980), superseded by 42 U.S.C. § 402(x) (1983).

³*Jensen v. Schweiker*, 709 F.2d 1227 (8th Cir. 1983), *rev'd sub. nom. Jensen v. Heckler*, 766 F.2d 383 (8th Cir. 1985).

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but for the provisions of ¶ (1), shall be payable as though such confined individual were receiving such benefits under this section or § 423 of this title.

The statute, therefore, suspends payment, not only of disability benefits; also, of old age retirement benefits, and other monthly Social Security benefits, to anyone who has been convicted of a felony and is, because of that conviction, confined in a prison or similar correctional facility. Payments to the dependents of the incarcerated felon are not suspended, nor are payments to the disabled felon himself, provided he is participating in an approved rehabilitation program which meets certain requirements.

Other related legislation, enacted at the same time as the original prisoner nonpayment provision, provides, in general, that if a person sustains an impairment, or the aggravation of a pre-existing impairment in connection with a felony committed after October 19, 1980, for which he is convicted, such impairment will not be considered for purposes of determining eligibility for Social Security disability benefits, whether or not the felon is subsequently imprisoned. The same legislation provides, in general, that any impairment or aggravation of a pre-existing impairment which arises in connection with incarceration for a felony committed after the effective date of the statute will not be considered in determining disability for purposes of benefits payable during such incarceration.⁴

The Secretary of Health and Human Services has promulgated regulations which cast light upon these amendments. For example, § 404.468 of Regulations No. 4 states that "[a]n offense will be considered a felony if--(1) It is a felony under applicable law; or, (2) In a jurisdiction which does not classify any crime as a felony it is an offense punishable by death or imprisonment for a term exceeding one year."⁵

Sections 404.468(c) and 404.1506(d) of Regulations No. 4 clarify the meaning of a "jail, prison, or other penal institution or correctional facility" for purposes of the new statutes. These sections define such a facility as including "any facility which is under the control and jurisdiction of the agency in charge of the penal system" or any facility "in which convicted criminals can be incarcerated." Thus, a mental hospital for the criminally insane would be included in this definition, even though it is not run by the correctional authority.⁶ In addition, a person is "confined" in one of these facilities even though he is temporarily outside the facility, either because he has been hospitalized, or is in a furlough or work-release program. This person is so "confined" until he reaches his

⁴See, e.g., Social Security Act § 223(d)(6), 42 U.S.C. § 423(d)(6) (1988) (effective Oct. 19, 1980).

⁵20 C.F.R. § 404.468(b) (1990). See, also, *id.* § 404.1506(c) (1990).

⁶See *Dave! v. Sullivan*, 902 F.2d 559 (7th Cir. 1990).

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maximum release date or is paroled from the facility.⁷ However, it is evident that the definition of a correctional facility, for the purposes of the statute at issue, hinges on the conviction of a felony. A person who is acquitted by reason of insanity and committed civilly to a mental hospital does not lose his benefits.⁸

Finally, § 404.468(d) of Regulations No. 4 provides that if a disabled prisoner " is actively and satisfactorily participating in a rehabilitation program which has been specifically approved " for him by a court of law and which is determined by the Secretary to meet certain requirements, his payments will not be suspended. Specifically, this section provides that " the Secretary of Health and Human Services must determine that the program is expected to result in the individual being able to do substantial gainful activity upon release and within a reasonable time. " It should be noted that these provisions apply only to payment of disability benefits, not to payment of retirement benefits.⁹

The constitutionality of § 402(x) was called into question, not only by Mr. Jensen in the case at issue, but also by a great many other incarcerated persons who, prior to their confinement in prison, had been receiving either disability or retirement benefits. However, the constitutionality of this section has, in every case, been upheld.¹⁰

Plaintiffs have attacked the statute under a number of theories. Taking Mr. Jensen's case as a prototype, I note that, first of all, he argued that the new enactment constituted a bill of attainder, *i.e.*, a legislative act which imposes punishment without benefit of a judicial trial.¹¹ Alternatively, Mr. Jensen claimed that the statute was an *ex post facto* law, *i.e.*, a statute which " reaches back in time to punish acts which occurred before enactment of the law . . . [or which] adds a new punishment to the one that was in effect when the crime was committed. "¹² Bills of attainder and *ex post facto* laws are both

⁷*Id.* at 562.

⁸*Graves v. Heckler*, 607 F.Supp. 1186 (D.D.C. 1985).

⁹*See, e.g., Clary v. Bowen*, 637 F.Supp. 1186 (W.D.N.C. 1986).

¹⁰*See, e.g., Davis v. Bowen*, 825 F.2d 799 (4th Cir. 1987); *Wiley v. Bowen*, 824 F.2d 1120 (D.C. Cir. 1987); *Caldwell v. Heckler*, 819 F.2d 133 (6th Cir. 1987); *Andujar v. Bowen*, 802 F.2d 404 (11th Cir. 1986); *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir. 1986); *Peeler v. Heckler*, 781 F.2d 649 (8th Cir. 1986); *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985); *Buccheri-Bianca v. Heckler*, 768 F.2d 1152 (10th Cir. 1985); *Jensen v. Heckler*, 766 F.2d 383 (8th Cir. 1985); *Washington v. Secretary*, 718 F.2d 608 (3d Cir. 1983); *Graham v. Bowen*, 648 F.Supp. 298 (S.D. Tex. 1986); *Clary v. Bowen*, 637 F.Supp. 1186 (W.D.N.C. 1986); *Hopper v. Schweiker*, 596 F.Supp. 689 (M.D. Tenn. 1984).

¹¹*See, e.g., Hopper v. Schweiker*, 596 F.Supp. 689.

¹²*Peeler v. Heckler*, 781 F.2d at 651.

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forbidden by Article I, § 9, of the United States Constitution.¹³ Finally, Mr. Jensen argued that this legislation violated his right to the equal protection of the laws.¹⁴

Determination of the first of Mr. Jensen's claims required scrutiny of Congress' purpose in enacting this legislation. If its purpose was merely to further punish the already incarcerated felon, then the statute might well run afoul of the constitutional prohibition against bills of attainder and *ex post facto* laws. If, on the other hand, a rational relation is found between the legislation and a non-punitive goal, then the statute is not a bill of attainder or an *ex post facto* law.¹⁵ The person claiming the punitive intent of the disputed legislation has the burden of demonstrating "unmistakable evidence of punitive intent."¹⁶ The Court of Appeals for the Eighth Circuit found that Mr. Jensen had failed to meet this burden.

The policy behind the Social Security Act, the court observed, is that "of compensating for a loss of earnings without providing a disincentive for rehabilitation."¹⁷ The Social Security system is a form of social insurance, enacted by Congress as an exercise of its power to "spend money in aid of the general welfare."¹⁸ Although it is an earned benefit program,¹⁹ the amount of payment which a particular worker or his family may be entitled to receive is in no sense dependent on the amount of his actual contribution during his working years. Therefore, participation in the Social Security system is "a noncontractual benefit under a social welfare program,"²⁰ and Congress may suspend these noncontractual benefits without necessarily being motivated by the desire to punish.²¹ Indeed, Congress has the power to impose conditions upon the receipt of Social Security benefits, provided that those conditions are rationally related to a legitimate

¹³*Flemming v. Nestor*, 363 U.S. 603 (1960); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

¹⁴*Jensen v. Schweiker*, 709 F.2d 1227, 1229 (8th Cir. 1983).

¹⁵See *Flemming v. Nestor*, 363 U.S. 603.

¹⁶*Wiley v. Bowen*, 824 F.2d 1120, 1122 (D.C. Cir. 1987) (citing *Flemming v. Nestor*, 363 U.S. at 619).

¹⁷*Jensen v. Heckler*, 766 F.2d 383, 385 (8th Cir. 1985).

¹⁸*Fietvoring v. Davis*, 301 U.S. 619, 640 (1936).

¹⁹*Califano v. Jobst*, 434 U.S. 47 (1977).

²⁰*Flemming v. Nestor*, 363 U.S. at 611; see also *Weinberger v. Salfi*, 422 U.S. 749, 772-73 (1975).

²¹*Jensen v. Heckler*, 766 F.2d at 385.

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purpose.²² If these conditions are rationally connected to non-punitive ends, said the court in *Jensen*, then the statute is valid, despite the punitive motivation displayed by some of the legislators who enacted it.²³ Consequently, the court held, the statute was neither a bill of attainder nor an *ex post facto* law.²⁴

A similar analysis applies to consideration of Mr. Jensen's equal protection argument. Since incarcerated felons are not a suspect class,²⁵ the standard of review is the "rational relation" test, *i.e.*, in order for legislation affecting their rights to Social Security benefits to pass muster, such legislation must be rationally related to a legitimate governmental interest or purpose. Unlike legislation based on race, religion, sex, or national origin, all of which has been deemed "suspect," a statute affecting incarcerated felons will be held unconstitutional only if it "manifests a patently arbitrary classification utterly lacking in rational justification."²⁶ In other words, in this case it need not be shown that the statute furthers a "compelling" governmental interest,²⁷ only that it is rationally related to a "legitimate" one. The *Jensen* court held that 42 U.S.C. § 402(x) met the "rational relation" test.

In 1980, actuaries estimated that 6,000 incarcerated prisoners were receiving Social Security disability benefits. In reviewing the proposed bill,²⁸ the Senate Committee on Finance concluded that enacting the bill would result in the termination of benefits to some 3,750 incarcerated disabled persons. Such terminations would immediately reduce outlays in fiscal 1981 by 16 million dollars and would result in a million-dollar annual increase in savings for the Trust Fund until, by 1985, an estimated twenty million dollars would be saved. The committee expressed the belief that the basic purpose of the disability program, to "provide a continuing source of monthly income to those whose earnings are cut off because they have suffered a severe disability," was not served by unrestricted benefit payments to persons who were in prison, or whose eligibility for

²²*Washington v. Secretary of Health and Human Services*, 718 F.2d 608, 611 (3d Cir. 1983); see also *Richardson v. Belcher*, 404 U.S. 78 (1971).

²³*Jensen v. Heckler*, 766 F.2d at 386; see also *Pace v. United States*, 585 F.Supp. 399, 401 (S.D. Tex. 1954) (citing *Fleming v. Nestor*, 363 U.S. at 621).

²⁴*Jensen v. Heckler*, 766 F.2d at 386; see *Caldwell v. Heckler*, 819 F.2d 133 (6th Cir. 1987); *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985); *Hopper v. Schweiker*, 596 F.Supp. 689, 693 (M.D. Tenn. 1984).

²⁵See, e.g., *Zipkin v. Heckler*, 790 F.2d 16, 18 (2d Cir. 1986).

²⁶*Id.*

²⁷*Cf.*, *Craig v. Bowen*, 429 U.S. 190 (1976); *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁸H.R. 5295, 96th Cong., 2d Sess. (1980).

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benefits arose from the commission of a crime.²⁹ Congress " clearly intends the disability benefits to aid the injured worker in anticipation of the impact of the worker's loss of earnings. " ³⁰ The need for this continuing source of income, the committee found, is clearly absent in the case of an individual who is being maintained at public expense in prison.

Congress has wide latitude in creating classifications for the allocation of benefits. ³¹ The goal of the Social Security system is to replace a worker's lost earnings-- to provide for the basic human needs of individuals in economic distress. In light of that goal, the *Jensen* court, as well as other courts which have considered similar challenges as those made by Mr. Jensen, have universally found that the classifications created by 42 U.S.C. § 402(x) are rational. Recognizing that imprisoned beneficiaries have their basic needs (food, clothing, shelter, medical care, etc.) taken care of at public expense, courts have consistently found that prisoners are not in need of the financial aid that Social Security benefits, whether retirement benefits or disability benefits, provide. To pay benefits under such conditions would be wasteful of the scarce resources of the Social Security fund.³²

Furthermore, other goals are found to be served by this enactment. For example, the *Jensen* court stated:

As further evidence that the statute was tailored to the Act's goal of rehabilitation, the district court correctly noted that the statute did not suspend payments to an inmate who participated in an approved rehabilitation program and that benefits were not suspended to the inmate's dependents. We also agree with the district court that Congress had another permissible purpose in enacting the statute which was to avoid discipline problems which cash payments to inmates would create.³³

The statute has also been upheld against challenges by incarcerated felons who had been receiving retirement benefits, rather than disability benefits, before their incarceration, and who, for that reason, could not take advantage of the rehabilitation exception. As one court pointed out, this exception is rationally related to the goal of creating an incentive, for disabled prisoners, " to pursue physical and vocational rehabilitation programs which

²⁹S. Rep. No. 987, 96th Cong. 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 4787, 4794-95, 4799.

³⁰*Hopper v. Schweiker*, 596 F.Supp. 689, 693 (M.D. Tenn. 1984); see also *Mathews v. deCastro*, 429 U.S. 181, 185-86 (1976).

³¹*Califano v. Goldfarb*, 430 U.S. 199, 210 (1977); *Buccheri-Bianca v. Heckler*, 768 F.2d 1152, 1154 (10th Cir. 1985).

³²See, e.g., *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir. 1986).

³³*Jensen v. Heckler*, 766 F.2d at 385; see also *Pace v. United States*, 585 F.Supp. 399, 401 (S.D. Tex. 1984).

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would ultimately reduce or eliminate their disability benefits. ³⁴ In *Clary v. Bowen*, ³⁵ an imprisoned retiree who was involved in tutoring other inmates in preparation for GED diplomas and adult education courses claimed that he was thus entitled to receipt of his benefits. The court first pointed out that the rehabilitation exception did not apply to the claimant. The court went on, however, to observe that even if the exception did apply, the activities which the claimant was engaged in were in no way designed to teach him new vocational skills, but were merely ways for him to fill his time in prison. Therefore, the court concluded that the program at issue did not fulfill the aims of the legislature in enacting this part of the statute which was " to result in the claimant being able to engage in substantial gainful activity upon release and within a reasonable time. "³⁶

In sum, all of the courts which have considered challenges to 42 U.S.C. § 402(x) on equal protection grounds have upheld it as rationally related to the legislative goal it was designed to further. Indeed, as I have noted, all of the courts which have considered challenges to the statute based upon other constitutional provisions have also upheld it.

However, apart from a passing reference in *Wiley v. Bowen*,³⁷ no court has considered, or been faced with, a challenge to the statute on the ground that it does not suspend payments to incarcerated misdemeanants, whose basic needs are provided for by the incarcerating facility just as are those of incarcerated felons. Examination of the following hypothetical fact situation reveals that, in this context, and in this author's opinion, the statute seems rather less than " rationally related " to Congress' expressed goal.

A person residing in the State of New York steals an object worth less than \$1,000 (thus committing the misdemeanor of petit larceny), and, when apprehended, resists arrest and assaults the arresting officer by punching and kicking him. This person also has a prior record of misdemeanor convictions. If this person is convicted of both assault and petit larceny--both misdemeanors in New York, he may conceivably receive two consecutive one-year sentences based upon these convictions (one year being the most severe sentence which may be imposed in New York for a misdemeanor).³⁸ This person will then spend a maximum of two years in prison, but he will receive every single one of his monthly disability or retirement benefits while incarcerated.

³⁴*Zipkin v. Heckler*, 790 F.2d at 19.

³⁵637 F.Supp. 1186 (W.D. Cal. 1986).

³⁶*Id.* at 1188.

³⁷842 F.2d 1120, 1122 (D.C. Cir. 1987).

³⁸N.Y. Penal Law §§ 70.15, 155.25 (Consol. 1990).

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However, it is possible for a person to be convicted of a felony and spend less time than two years in prison. For example, suppose another New Yorker steals a credit card and uses it to purchase items in the amount of \$1,100. If that person is convicted of grand larceny in the fourth degree, a class E felony, he may receive a sentence of one year's incarceration or less.³⁹ But, that person will lose his benefits for the entire year.

It is difficult to reconcile this anomalous, but very possible, result with what we know about Congress' reasons for enacting this statute, and, indeed, with some of the decisions which have upheld it. First of all, if the goal of the statute is to prevent waste of Social Security funds by suspending their distribution to persons whose needs are already being supplied, it is difficult for this author to see why Congress chose not to suspend payments to incarcerated misdemeanants, as well as to incarcerated felons.

Whether this anomaly is the result of a mere oversight, or is due to some other rationale on the part of Congress, is difficult to determine, in the absence of some written memorandum on the subject. However, in my view, the only obvious reason for suspending benefits to felons and not to misdemeanants, where both are incarcerated, is that felonies are, by nature, more serious and thus, their commission wreaks greater havoc upon society than does the commission of misdemeanors. If the statute is not designed to be punitive, the degree of severity of the crime committed by the incarcerated person ought to be completely irrelevant. It is, therefore, worth noting that this disparity may well imply a punitive purpose, and, in a proper case, might thereby expose the statute to constitutional attack as an *ex post facto* statute or a bill of attainder. Or, the disparity may even expose the statute to attack on equal protection grounds. In this regard, it will be interesting to see whether Congress amends the section in the future to preclude payment of Social Security benefits to certain incarcerated misdemeanants.

I have noted that the statute contains a provision regarding rehabilitation programs for disabled incarcerated felons, which allows prisoners who participate in those programs to retain their benefits. In this author's view, it may be worthwhile for Congress to consider some measures through which a portion of those benefits might be recouped and utilized for these rehabilitation programs.

For example, when disabled incarcerated felons qualify for, and take advantage of, the rehabilitation program exception, they are once again entitled to receive their benefits. If these felons were indigent upon entering their period of incarceration, they are no longer so when they begin to receive their monthly payments. Although rehabilitation programs that are available to prisoners are generally provided without charge to participants because they are subsidized by public and/or private funds, there would seem to be, in this writer's opinion, no bar to requiring non-indigent prisoners who

³⁹*Id.* § 70.00(2)(e),(4) (Consol. 1990).

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are enrolled in such programs to contribute a reasonable fee toward the support of these programs. Although Social Security benefits are not, *per se*, subject to liens, garnishments or attachment, they may, and usually are, used by the individual to pay for such necessities as shelter, food, and clothing--indeed, as we have seen, that is their purpose. For many a disabled prisoner, especially one whose disability arises from drug addiction, a rehabilitation program is as necessary to that person's future well-being as food, shelter or clothing. Asking the disabled prisoner to contribute toward his own rehabilitation not only places upon him some responsibility for overcoming his disability and gives him some material stake in his own future, it might also allow for the funding of qualifying programs in prisons which are presently without them. It would seem that such a plan should leave the program participant with sufficient savings to provide a financial head start upon release from the program.

In conclusion, although the statute may be problematic in certain respects, it serves as a rather good illustration of the philosophical and legislative reasoning which underpins perhaps the entire Social Security Act. It strikes a careful balance between the need to preserve the Trust Fund from depletion, by eliminating unnecessary or unwarranted support, and the need to fulfill legitimate expectations of Social Security program participants that their basic human needs will be provided for in the event that their employment income ceases due to disability. At the same time, it encourages participation by disability beneficiaries in rehabilitative programs that are expected to result in the individual being able to engage in substantial gainful activity upon release and within a reasonable time.