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Robert E. Rains

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A SPECIALIZED COURT FOR SOCIAL SECURITY? A  
CRITIQUE OF RECENT PROPOSALS

Robert E. Rains <sup>1/</sup>

Three proposals have been made that would create a Social Security Court to hear appeals from Social Security claimants. House of Representatives bills 4419 and 4647 were placed before Congress in 1986. The third proposal is a draft bill on which the United States Department of Justice is working. The concept of such a court is favored by the secretary of Health and Human Services, Dr. Otis R. Bowen. The Justice Department draft was described in a February 1986 letter by Secretary Bowen to the Office of Management and Budget, but the bill itself is not yet publicly available.

On March 9, 1986, when knowledge of the draft legislation was disseminated, the Reagan Administration publicly articulated support for the "concept" of a Social Security Court. Within ten days, the first of two bills proposing the removal of Social Security cases from judicial review in federal district court and placing it in an Article I Social Security Court was introduced in the House of Representatives. These bills, H.R. 4419 and H.R. 4647, therefore may be viewed as trial balloons or stalking horses for the Administration.

Currently, the Social Security Act provides that an individual who is aggrieved by a final decision of the Secretary of Health and Human Services may bring an action within sixty days in the district court of the United States for the judicial district in which the plaintiff resides. Appeals from final district court decisions are heard by the United States Court of Appeals for that circuit. Decisions of the circuit courts may be reviewed by the United States Supreme Court on a writ of certiorari.

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<sup>1/</sup> Assistant Professor of Law and Supervisor of the Disability Law Clinic, The Dickinson School of Law. J.D., 1974, Harvard Law School. This article first appeared in 15 Florida State University Law Review 1 (Spring, 1987) and is reprinted here by permission. Most footnotes in the original article have been omitted.

The proposals would remove all or almost all Social Security appeals from the federal district courts and vest them in a new Social Security Court. The judges of this Social Security Court would not be article III judges entitled to "hold their Offices during good Behaviour." Rather, the judges of the Social Security Court would be article I judges serving fixed terms of ten years. Appeals from the Social Security Court would lie in the United States Court of Appeals for the Federal Circuit.

Four days prior to the introduction of H.R. 4419, forty-one members of the House of Representatives introduced a resolution strongly disapproving any proposal to establish a Social Security Court. Representative Peter Rodino, chairman of the House Committee on the Judiciary, published an open letter to the Editor of the New York Times condemning the proposed Social Security Court. The American Bar Association's House of Delegates passed a resolution at its August 1986 meeting opposing the proposal. <sup>2/</sup>

One cannot fully appreciate the concerns about establishing an Article I Social Security Court without understanding the administrative system it would review and that system's recent history. Thus, the author in this Article looks at the existing Social Security determination system, with an overview of some of its difficulties and malfunctions, particularly those occurring during this administration. The author then describes the Social Security Court proposals, the justifications for those proposals, and finally critiques the proposals.

## I. THE CURRENT SYSTEM

"The camel is a horse designed by a committee." - anon.

When President Reagan telephoned artificial heart recipient William J. Schroeder in December 1984 to wish him well, Mr. Schroeder complained that he was getting the "runaround" from the Social Security Administration on his claim for disability benefits filed that March. The next day, government officials delivered a Social Security check to Mr. Schroeder's hospital

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<sup>2/</sup> The issue has been raised again, however, and is now under study by the National Conference of Administrative Law Judges, Judicial Administration Division, ABA. - Ed.

room. Mr. Schroeder's predicament is symptomatic of problems within the administrative system. However, most claimants do not have the benefit of the publicity attendant to being a pioneer artificial heart recipient nor of the sympathetic ear of the President of the United States.

#### A. Administrative Review Process

An applicant for Social Security benefits enters a multi-tiered administrative process. The Social Security Act dictates that "the Secretary [of Health and Human Services] is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under [Subchapter II - Federal Old-Age, Survivors, and Disability Insurance Benefits]." The first level of the administrative process is an initial determination of eligibility, usually by a state agency under contract to the Secretary, with notice of the decision coming from the Social Security Administration (SSA). The claimant who receives an unfavorable or only partially favorable decision on the initial determination may file for "reconsideration," the second level of administrative decisionmaking. Reconsideration is usually performed by the state agency that made the initial determination.

If dissatisfied with the results of reconsideration, the claimant may obtain a hearing before an Administrative Law Judge (ALJ) of the Social Security Administration. The claimant may appear at the hearing with or without witnesses and present oral testimony to supplement the file of medical, vocational and other exhibits. Testimony is taken under oath, and a complete record is made. This ALJ hearing constitutes the third level of administrative decisionmaking.

Claimants dissatisfied with the result of the ALJ hearing may request the fourth level of administrative decisionmaking, review by the Appeals Council. The Appeals Council need not wait for a claimant to request review, and may initiate review of any ALJ decision, even one which is favorable to the claimant, on its own motion. There is limited opportunity for a personal appearance of the claimant or his representative before the Appeals Council which is located in Arlington, Virginia. The Appeals Council is the final level of administrative review.

#### B. Judicial Review Process

The decision of the Appeals Council is the final administrative decision of the Secretary. The aggrieved claimant

may then appeal this decision to the federal district court where the claimant resides. The district court reviews the record to determine whether the Secretary's decision is supported by "substantial evidence." Applying this test to Social Security appeals, the Supreme Court has stated that substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The definition has been applied to other statutory situations.

Describing the administrative process, Justice Powell has written rather glowingly: "[T]o facilitate the orderly and sympathetic administration of the disability program of Title II, the Secretary and Congress have established an unusually protective four-step process for the review and adjudication of disputed claims." While some aspects of the process may indeed be protective of claimants, all too often claimants find themselves mired in an administrative morass. Ironically, Justice Powell's description came in a challenge to admitted unreasonable delays in the process.

While the claimant is subject to a strict sixty-day limit to appeal each adverse determination to the next level, the Secretary is not bound to render decisions at any level within any specific time. Justice Powell noted that, "the legislative history makes clear that Congress [is] fully aware of the serious delays in resolution of disability claims." Largely because Congress had failed to impose time limitations on the Secretary, the Court overturned an order of the Second Circuit enjoining the Secretary to adjudicate all future disability claims according to judicially established deadlines and to pay interim benefits in all cases of noncompliance with those deadlines.

## II. RECENT PROBLEMS

Exacerbating the delays inherent in any four-tier, state/federal system has been the aggressive process of continuing disability reviews of current recipients, particularly in 1981 through 1984. The Social Security Disability Amendments of 1980 required the Secretary to review recipients of Social Security disability insurance benefits at least once every three years unless a finding had been made that the disability was permanent. The SSA spurred by this Congressional prod to review claimants, and finding it consistent with its own budgetary interests, undertook a massive purge of the disability rolls. The toll in human terms ultimately was well reported in the media. Horror stories abounded of the most seriously ill persons being found

no longer disabled. During the first two years of this purge, many of these individuals lost their monthly benefit checks while they appealed their disability status, even though they ultimately prevailed on their claims.

From a systems standpoint, the Secretary's equating of a direction to review with a mandate to purge created new pressures on the already heavily burdened adjudicatory systems at all levels. In the 1983 fiscal year, the Office of Hearings and Appeals received over 134,000 requests for hearings in Continuing Disability Review (CDR) cases, accounting for 36.4% of the requests received. The SSA's own reinstatement statistics bear witness to an unconscionably high rate of wrongful terminations during this period. By March 1984, federal officials were reporting that over 470,000 people had been removed from the disability rolls in the preceding three years, 160,000 had already been reinstated after appeals, and another 120,000 cases were pending. Suddenly, the administrative system had to cope with the influx of hundreds of thousands of terminated disability recipients appealing their cases.

#### A. Nonacquiescence

Further confusion has been caused by the Reagan Administration's aggressive use of the policy of "nonacquiescence." Nonacquiescence as practiced by the SSA is the policy of not applying the rule of law enunciated by a circuit court of appeals to other claimants who reside within that circuit.

The SSA has adopted two forms of nonacquiescence. The first and most obvious form is the issuance of a formal Social Security Ruling directing agency personnel, including ALJ's and employees of the state agencies, not to follow a specific circuit court decision. A variation involves Social Security Rulings instructing ALJ's and the Appeals Council as to the meaning of circuit court decisions with which the SSA does not acquiesce. While the ALJ's and Appeals Council apply the SSA's interpretation of these decisions, the state agencies would not even attempt to implement the decisions.

The most pernicious variation of nonacquiescence is silence. Rather than issue a public ruling of nonacquiescence, the administration simply disregards the holding of a case except as applied to the named plaintiff. Consider, for example, a situation in which the SSA nonacquiesced in a series of circuit court decisions governing the standards to be employed in its continuing disability reviews. The state agency, ALJ's and Appeals Council would continue to apply the invalidated

provision to claimants, including those who reside within the circuit, to deny them disability benefits. On appeal, of course, the district court applied the circuit precedent and reversed or remanded. However, since only a small percentage of claimants pursue their cases into the federal court system, many cases are never adjudicated under the relevant precedential decisions.

As with continuing disability reviews, the SSA policy of nonacquiescence is not a creation of the Reagan Administration, but under that administration it has been greatly expanded. Earlier rulings were extremely rare and usually concerned rather limited issues.

For many claimants nonacquiescence creates a dual system of adjudication in which their claim will be denied at all four administrative levels and granted an appeal to federal court, if they have the sophistication and resources to obtain judicial review. A useful analogy for understanding the application of nonacquiescence to a particular claimant would be a traffic system where the maximum legal speed is forty-five miles per hour to a policeman and in traffic court but fifty-five miles per hour on appeal to county court. A duty-bound policeman arrests the motorist who is doing fifty miles per hour on the highway. The motorist is taken to traffic court, found guilty of exceeding the speed limit, and his driver license is suspended. Many months or a year or two later, the reviewing county court reverses, finding that he was driving within the speed limit. His conviction is overturned and his license is ordered reinstated. To make the analogy complete, it takes the bureaucracy several more months to return the driver license. Needless to say, our unhappy motorist may have suffered rather severe consequences from his license suspension. Of course, most terminated disability recipients have lost something more vital than their driver licenses: their sole source of income.

The impacts of nonacquiescence on the adjudicatory system have been manifold. This dual system of adjudication increases both the number of cases appealed to federal court and the reversal and remand rates. Nonacquiescence has been challenged directly in complex class action litigation in the courts.

#### B. Bowen v. City of New York

Not only has the SSA failed to follow circuit court precedent, it has also been found to have ignored its own regulations in denying disability benefits. One would expect in a system of this size cases in which courts find that the agency

violated its regulations. However, in Bowen v. City of New York [106 S. Ct. 2022 (1986)], the SSA was found to have adopted a systematic, covert policy of avoiding its regulatory sequential evaluation process in adjudicating claims of disability based upon mental impairment.

In the sequential evaluation process, at each of the four administrative levels, each claim is evaluated through a flow chart of up to five steps. The first inquiry is to determine whether the individual is doing "substantial gainful activity." If so, he is not disabled, and the inquiry ends. If not, the adjudicator proceeds to the second consideration, whether the individual suffers from a severe impairment that meets the durational requirements. If not, he is not disabled. If so, the adjudicator proceeds to the third consideration: a determination of whether the individual has an impairment that meets or equals one on the "Listing of Impairments." If so, he is disabled. If not, the adjudicator is mandated to proceed to the fourth consideration: whether the individual can return to past relevant work. If he can, he is not disabled. If not, the adjudicator must proceed to the final consideration: whether the individual can do alternative work.

From 1978 to 1983, the SSA was found to have a "fixed clandestine policy against those with mental illness" in violation of the sequential evaluation process. Where such claimants did not meet the Listings, the SSA did not proceed to step four in the evaluation, but instead routinely denied their claims. The Court unanimously upheld relief for mentally disabled class members, including those who had failed to exhaust their administrative remedies and those who had failed to seek timely judicial review. The SSA was ordered "to reopen the decisions denying or terminating benefits and to redetermine eligibility." Although it is too early to quantify the impact of the Supreme Court's affirmance, there is no doubt that the administrative system will suffer a significant additional burden in handling these reopened cases. Moreover, this is not the only ruling by which a court has ordered SSA to reopen numerous cases because of surreptitiously adopted "illegal standards for denying disability benefits."

In City of New York, the Court noted the trial court's finding, not challenged by SSA on appeal, that: "SSA relied on bureaucratic instructions rather than individual assessments and overruled the medical opinions of its own consulting physicians that many of those whose claims they were instructed to deny could not, in fact, work." The trial court concluded that "the resulting supremacy of bureaucracy over professional medical

judgments and the flaunting of published, objective standards is contrary to the spirit and letter of the Social Security Act."

### C. Bellmon Review Program

Sadly, such pressures by the SSA during the Reagan Administration have not been limited to physicians. As it had done with the Continuing Disability Review program, the SSA responded to another Congressional mandate to tighten procedure and construed it to pressure ALJ's to deny benefits. The Bellmon Amendment to the Social Security Disability Amendments of 1980 required the Secretary to implement a program of reviewing ALJ's decisions for accuracy and reporting back to the Congress on his progress. The SSA's Bellmon Review Program initially targeted for review only ALJ's with high allowance rates; that is, those ALJ's who awarded benefits at a rate higher than average. Those ALJ's were targeted for possible "counseling," "behavioral modification" and "other steps." Although the justification for the program was to seek consistency in ALJ decisionmaking, no similar pressure was exerted on ALJ's having denial rates substantially above the national average. The reason given for focusing exclusively on high allowance ALJ's was that ALJ's denying benefits were already subject to review by claimants appealing their decisions. However, this disregards that a very substantial number of claimants who are denied at the ALJ level never take an appeal. Many ALJ's complained that pressure exerted on high allowance ALJ's compelled ALJ's to deny benefits.

Citing these and other abuses, the Association of Administrative Law Judges sued the Secretary and high SSA officials in the District Court for the District of Columbia to enjoin the Bellmon Review Program. The court denied relief on the ground that the defendants had "shifted their focus," making injunctive relief unnecessary "at this time." However, after reviewing the evidence, the court made several important findings of fact and conclusions of law. The court found no authority in the Bellmon Amendment or its legislative history for the SSA to target high allowance ALJ's for review, counseling and possible disciplinary action. The court found persuasive evidence that the SSA "retained an unjustifiable preoccupation with allowance rates" which put "pressure [on ALJ's] to issue fewer allowance decisions." Thus "the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof." The court also found that the SSA ignored the "decisional independence" afforded to ALJ's by the Administrative Procedure Act by "the injudicious use of phrases such as 'targeting', 'goals' and

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'behavior modification' [which] could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide."

D. The Social Security Disability Benefits Reform Act of 1984

Concerned about problems within the administrative system, Congress enacted the Social Security Disability Benefits Reform Act of 1984 (SSDBRA). The House Committee on Ways and Means found three areas where reform appeared necessary:

[I]n the standards for determining eligibility for disability benefits, both for new applicants and more particularly for current beneficiaries being reviewed; in the structure of the administrative process itself; and in the way in which the Social Security Administration [sic] makes disability policy, both on its own initiative and in conjunction with rulings of the Federal courts.

The enacted version of SSDBRA addresses these critical areas, and others, with varying degrees of precision.

SSDBRA provides a statutory standard of review for termination of disability benefits which requires substantial evidence either of the recipient's medical improvement or of one of several other medical or vocational scenarios. These provisions rejected the SSA's policy of evaluating continuing disability review (CDR) cases with the same standard as new applications and judging them on a "current evidence" of disability standard. SSDBRA ordered the courts to remand pending CDR termination cases to the SSA for redetermination under the new standards. Former recipients whose cases were remanded were authorized to elect to receive benefits until a new initial redetermination was made. Although the Act mandated the SSA to prescribe implementing new regulations no later than 180 days after the date of enactment, they were not promulgated until fourteen months later, in December 1985. Processing of affected individuals is ongoing--another burden on the administrative system that the SSA largely brought upon itself.

The Act also provided explicit language relating to the evaluation of claims of disability based on pain or other subjective symptoms, an area of frequent conflict between SSA and the courts. The Act overruled the SSA's refusal to consider any impairment unless it is itself "severe" and mandated that the combined effect of all of the claimant's impairments should be considered. In addition, the Act provided for a moratorium on mental impairment reviews until the SSA revised the criteria

embodied under "Mental Disorders" in the Listing of Impairments. Finally, the Act extended the temporary policy of allowing a recipient found to be no longer disabled to continue receiving benefits pending a hearing decision.

Although SSDBRA is reform legislation aimed at curing many of the deficiencies described above, it is not a panacea. Some areas were left vague, most were left for interpretation by the SSA, and the issue of nonacquiescence was not resolved. Unable to grapple fully with evaluation of pain as a disability, the Act mandated the Secretary to establish a Commission on the Evaluation of Pain to study the issue and report back to Congress. Although both the House Bill and the Senate amendment had spoken directly to the policy of nonacquiescence, the final enacted version mandated only that the Secretary establish "uniform standards" which shall be applied at all levels of determinations, review and adjudication. The Joint Explanatory Statement of the Committee of Conference noted that, in reaching this compromise, the conferees did not intend to approve "'nonacquiescence' by a federal agency to an interpretation of a United States Circuit Court of Appeals as a general practice." Thus, while SSDBRA offers the hope of real improvements in the administrative adjudication process, it does not solve all the problems, and it is too early to see its full impact, particularly because of the SSA's slow implementation.

### III. THE COURT PROPOSALS

Against this background of administrative and other difficulties, proposals to create a Social Security Court are resurfacing. The two bills introduced in the 99th Congress and the draft Justice Department bill have similarities and important differences.

#### A. H.R. 4419

The "Social Security Procedural Improvements Act of 1986," H.R. 4419, addresses both the administrative process and judicial review. Title I would empower the Secretary to decide unilaterally to take over a state agency's disability determination function and to convert the state employees to employees of the United States Department of Health and Human Services. Title II would abolish the fourth administrative step, the Appeals Council, but would not make the ALJ's decision the final decision of the Secretary. Rather, the bill contemplates that the Secretary must issue a final decision after the ALJ decision and provides for interim benefits where the ALJ decision rules

favorably and no final decision is issued within ninety days. Just what entity within SSA would issue this final decision is left unstated. Since the ALJ's decision is not the final decision, the purpose for abolishing the Appeals Court is unclear. It is worth noting that currently the Appeals Court is not mandated by statute.

Title II would create a Social Security Court to hear appeals of final administrative decisions. There would be twenty judges appointed by the President and confirmed by the Senate. Judges would serve terms of ten years and be subject to removal by the President for specified cause after the opportunity for a hearing. The chief judge would be empowered to appoint "commissioners" who are "to proceed under such rules and regulations as may be promulgated by the Court." The precise function of these commissioners is left unclear, but presumably they would perform a function akin to that of United States Magistrates in federal district court. The United States Court of Appeals for the Federal Circuit would have exclusive jurisdiction to hear appeals from the Social Security Court.

#### B. H.R. 4647

The "Social Security Reorganization Act of 1986," H.R. 4647, likewise addresses both administrative procedures and judicial review. Title I would establish the Social Security Administration as an independent agency separate from the Department of Health and Human Services and governed by a Social Security Board appointed by the President and confirmed by the Senate. The Board would in turn appoint a Commissioner of Social Security.

Title III would make major changes in the administrative process. A disability claimant or recipient "who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered" would be entitled to an evidentiary hearing held by a "hearing officer employed in the Department of Health and Human Services."

There would be substantial limitations on the scope and manner of the ALJ's review. The ALJ would review cases after the hearing and then only if he first determines that the application for review raises at least one of five enumerated issues. Thus, the current de novo ALJ hearing, the most favorable review step for claimants, would be eliminated. The ALJ could not consider an objection which has not been urged before the hearing officer below "unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

It is left unclear exactly how the frequently unrepresented claimant, in a supposedly nonadversarial hearing, is supposed to urge these factual and legal objections to a decision that is not yet issued at the time of the hearing. The ALJ would not be empowered to hear additional evidence, but under certain circumstances could order additional evidence to be taken before the hearing officer and made a part of the record.

Either party--the claimant or the Secretary--would be allowed to appeal to an ALJ an adverse hearing decision. However, if the Secretary appeals a decision granting benefits and the ALJ has not issued a decision within sixty days of the hearing officer's decision, the Secretary would have to pay interim benefits to the claimant.

In short, the hearing officer would assume functions akin to those performed by ALJ's currently, and ALJ's would assume functions similar to those performed by the Appeals Council. The ALJ's decision would "be binding on all parties, including the Secretary," and would become the final decision of the Secretary. The Secretary generally could not on his own motion review an ALJ decision favorable to a claimant. By implication, the Appeals Council, as such, would cease to exist.

Section 2001 would establish a Social Security Court to hear most appeals of final administrative decisions. There would be twenty judges appointed by the President and confirmed by the Senate. Judges would serve terms of ten years and be subject to removal by the United States Court of Appeals for the Federal Circuit for specified causes after the opportunity for a hearing.

Under Title II, the federal district courts would retain jurisdiction over Social Security appeals in actions which present a claim or cause of action arising under the Constitution, or a challenge to the validity of a Social Security regulation. This residual jurisdiction in the district courts would be "subject to a stipulation" between the parties that there is no dispute as to the material facts of the case and that a statutory or regulatory provision is the only bar to the alleged claim. Jurisdiction is unclear when the plaintiff alleges that only an illegal statute or regulation bars his recovery but the Secretary refuses to so stipulate. It appears that the Secretary could keep all cases out of district court by such a refusal.

Title II explicitly authorizes either the Secretary or the Social Security Board to file an appeal of a final decision favorable to a claimant in the Social Security Court. Thus,

although the ALJ's decision would be binding on the Secretary, he could appeal it. However, if the Secretary appeals an ALJ decision that is favorable to the claimant and if the Social Security Court does not render final judgment within sixty days of the ALJ decision, the Secretary would be required to pay interim benefits.

Section 2002 contains curious provisions concerning remands. If the Secretary moves for a remand before filing an answer, the court may remand the case "for further action by an administrative law judge or hearing examiner in the Administration." Also, the court may remand at any time under certain conditions for "additional evidence to be taken before a hearing examiner in the Administration." The hearing examiner, in turn, is to file his decision with an administrative law judge. This decision is reviewable by the ALJ "to the same extent as the original decision and findings." Given this language, it would appear that the "hearing examiner" in this title occupies the same position as the "hearing officer" in Title III.

Appeals from the Social Security Court would lie in the United States Court of Appeals for the Federal Circuit. Apparently appeals of stipulated cases in the federal district courts would also be vested in the Federal Circuit.

#### C. The Draft Justice Department Bill

The only information currently available to the author on the draft Justice Department bill is contained in Secretary Bowen's letter to the Office of Management and Budget of February 4, 1986. According to that letter, the draft bill would create a Social Security Court divided into "five regional divisions each with a chief judge and six associate judges, as well as a chief judge of the entire court." The court would have "exclusive jurisdiction at the initial stage of judicial review of virtually all actions arising under title II or title XVI of the Social Security Act." There would be an internal mechanism designed to ensure that the decisions of the various judges of the court would be "consistent and uniform." "Final decisions of the [c]ourt would be reviewable at the discretion of the Court of Appeals for the Federal Circuit, but review would be mandatory where the Secretary of Health and Human Services certified that a case presented a question with broad or significant implications in the administration or interpretation of the social security laws."

#### IV. JUSTIFICATIONS FOR A SOCIAL SECURITY COURT

The proponents of creation of a Social Security Court offer various justifications for their proposals. Representative Tauke, sponsor of the H.R. 4647, argues that:

Reforming the adjudication and appeals process for Social Security benefit claims will end the unfairness of the current complex, confusing, and often arbitrary system of determining eligibility, particularly for disability benefits. The current system, with four levels of administrative review plus judicial review by one of 94 federal district courts, one of 12 circuit courts, and the Supreme Court, was simply not designed to handle the approximately 1.5 million disability claims decided each year. (Over 50,000 cases are pending before the federal courts. Last year alone, 28,000 disability cases were appealed to the courts.) Not only is the system incredibly expensive and time-consuming, it is disjointed and creates rather than resolves controversies both within the administrative process and before the courts.

Representative Archer, sponsor of H.R. 4419, similarly argues that "[t]his should assure consistent, uniform, and more expert handling of court cases, and eliminates the potential for conflicting circuit court opinions."

One of the most vocal advocates of a Social Security Court, Fred Arner, a consultant to the SSA, has likewise emphasized that such a court would provide "more uniform decision-making." [Arner, The Social Security Court Proposal: An Answer to a Critique, 10 J. LEGIS. 324, 326-327 (1983).] Arguing that a Social Security Court would "alleviate the nonacquiescence problem," Mr. Arner has articulated the following objectives: "(a) increased uniformity in decisionmaking by the judiciary and a concomitant increase in uniformity at all levels of the adjudicative process, and (2) relief to an already overburdened federal judiciary and a vehicle for the more effective handling of social security cases." He also argues that the SSA's policy of nonacquiescence would be unnecessary under a Social Security Court. Further, Mr. Arner has cited the 1978 SSA-funded study of the National Center for Administrative Justice (hereinafter the Center Report) for the proposition that, while Article III judges might be superior in general intellectual ability to specialized court judges, specialized experience may produce greater technical expertise and heightened awareness of the potential impact of any particular decision on a program. Secretary Bowen likewise has cited the benefits of "uniformity

and timeliness of court decisions," avoidance of conflicts among the circuits, and improved judicial review process because the Social Security Court judges "would become more expert in Social Security and SSI cases than district judges." Finally, it has also been suggested that a Social Security Court might handle cases more speedily than the federal district courts.

Thus, the purported interrelated benefits of an Article I Social Security Court may be summarized as follows:

1. uniformity/fairness/alleviates need for non-acquiescence;
2. designed specifically for Social Security system/more expert handling;
3. relief of overburdened federal judiciary; and
4. more effective/efficient handling of cases.

## V. A CRITIQUE OF THE JUSTIFICATIONS AND THE PROPOSALS

In this section the author will examine the justifications for a new Social Security Court. Such justifications include uniformity, expertise and docket congestion. The author concludes that these justifications do not warrant creation of a new Article I Court. The perceived difficulties with the system can more readily be solved through return of the administrative process.

### A. The Uniformity Issue

It cannot be seriously questioned that uniform decision-making is a desirable, if unobtainable, goal in implementing a federal program. Vesting judicial review in one court has a certain superficial attraction in advancing that goal. Particularly if decisions are appealed from that court to one appellate court, uniform law would be expected to develop. Of course, the application of such uniform doctrines to individual cases will never be an exact science.

To justify abandoning of the current judicial review system on this basis, one must first posit that there is substantial, unresolved nonuniformity of decisional law on important issues among the circuits. Further, it must be posited that the SSA lacks appropriate means of resolving these differences.

Certainly there are important issues that have been recurrently addressed by the circuit courts: for example, allocating the burden of proof or persuasion, assessing subjective complaints, determining the weight to be given treating physicians' reports, setting standards for termination, and considering "non-severe" impairments. Obviously, the circuits do not always speak with one voice on these important issues; however, they are generally in substantial agreement.

Where nonuniformity on important issues exists among the circuits, there are two traditional and obvious sources of redress: Congress and the Supreme Court. As noted above, Congress did address certain important, vexing issues in SSDBRA, such as standards for termination, consideration of multiple complaints, and evaluation of subjective impairments. Of course, the Supreme Court often grants writs of certiorari to resolve splits among the circuits. For example, the Court has granted the Secretary's petition for a writ of certiorari in Yuckert v. Heckler [774 F. 2d 1365 (9th Cir., 1985)] to review the legality of the current regulations on evaluation of non-severe impairments.

Yuckert is instructive because, as is frequently the case, the split is more between the Secretary and the circuits, than among the circuits themselves. The Secretary's severity regulations have been struck down by the Third, Seventh, Ninth and Tenth Circuits. While the Sixth Circuit has upheld the challenged regulation, it has provided an interpretation of the regulation similar to that reached in the circuits that have held it invalid. Nevertheless, the Secretary appropriately sought Supreme Court review of the issue. [The Supreme Court has since reversed Yuckert v. Heckler, 107 S. Ct. 2287 - Ed.]

In other cases, the SSA's obstinate refusal to seek certiorari where there is either a split among the circuits or when the circuits simply all disagree with the SSA's position, perpetuates nonuniform interpretation. Nonuniformity exists largely between the SSA and the circuits rather than among the circuits themselves. The reality is that the SSA objects to relatively uniform adverse decisions largely brought about in recent years by the SSA's obstinance or, as in some instances described above, its lawlessness.

The cry of nonuniformity is a smokescreen. One can only suspect that the administration favors the establishment of the Social Security Court in the hope that such a court would abandon settled precedent and create new precedent more favorable to the Social Security Administration.

If the SSA truly wishes to obtain a more efficient system with more uniform results and better success on judicial review, it might start by correcting its own internal nonuniformity. As noted by Representative Tauke:

At the height of the continuing disability review controversy, SSA data disclosed that 98 percent of the disability cessation determinations issued by the state agencies handling the first and second steps of the review process were correct. Yet when the beneficiaries appealed to an Administrative Law Judge (ALJ), more than two-thirds were put back on the disability rolls. Something was clearly wrong with the way state agencies were evaluating these claims, but the ALJ decisions had no discernible impact on the practices of the state agencies.

As long as the SSA clings to the myth that the state agency determinations are ninety-eight percent accurate and continues to instruct the state agencies to nonacquiesce, it will maintain a system of internal nonuniformity. The SSA perpetuates the problem by refusing to recognize and implement the "corrective function of review."

Whatever the theoretical justifications for nonacquiescence as practiced by the SSA, a systemic need for such nonacquiescence based on nonuniformity simply does not withstand scrutiny. Since the judicial rulings to which the SSA objects are normally the ones it has lost, the decision to seek certiorari lies with the administration. No change in the structure of judicial review is necessary to remedy the nonuniform precedent as currently exists. It is necessary for the administration to file for certiorari in appropriate cases.

The argument for a Social Security Court premised on nonuniformity can only stand if the SSA can demonstrate that the Supreme Court has denied its requests for certiorari in a significant number of cases in which splits exist among the circuits on important Social Security issues. Currently, no such showing has been made.

#### B. Article I or Article III Judges?

Curiously, none of the published justifications for the Social Security Court proposal explain the supposed advantages of establishing such a court under Article I of the Constitution, instead of under Article III. Assuming that the justifications set forth above are realistic and desirable and that a Social Security Court is the way to obtain them, it

remains unclear why it should be an Article I court. Ironically, Representative Tauke, seeking cosponsors for H.R. 4647, asserted that the bill would result in "depoliticizing" the Social Security Administration. Even proponents of the Social Security Court have acknowledged the need to assure the independence of its judges. Mr. Arner has suggested extending the proposed term of the judges from ten to fifteen years, the same as exists for Tax Court judges.

The recent history of the Social Security Administration--replete with uncontested findings of improper pressure to deny benefits placed upon physicians and those administrative law judges who grant benefits "too often"--emphasizes the critical need for truly independent judicial review. Replacing Article III lifetime tenure judges with Article I judges hardly advances this independence. Varying the proposed term length of Article I judges may have some effect on the sense of independence of these judges, but it cannot provide the independence intended for Article III judges. All of the perceived benefits of a Social Security Court surely could be obtained by staffing such a court with Article III judges, without the detriment of diminished independence.

If the Social Security Court judges are not Article III judges, they become, essentially, another set of administrative law judges superimposed over the ALJ's who hear the administrative cases. If they are not to duplicate the function of the ALJ's, and are to provide judicial review, they should be Article III judges. If they are not to provide judicial review, their purpose is unclear.

### C. Matters of Expertise

The Social Security Court judges, however constituted, supposedly would gain increased expertise over district court judges in handling Social Security cases, thereby benefitting the system. It is clear that judges who exclusively address one area of the law gain enhanced expertise in that area; however, it is less clear what benefit will derive from an incremental gain in expertise. To posit a significant systemic gain, one must assume a lack of expertise on the part of sitting federal district judges. This is not only insulting to the bench, but is belied by the statistics. As of the spring of 1986, over 50,000 disability cases were pending in federal court, 28,000 of which were filed in 1985 alone. Although cases frequently are referred to a United States magistrate to make an initial report, usually it falls to the district judge to review these reports and rule on exceptions. Therefore, the number of cases

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reviewed, either initially or after a magistrate's report, by a typical federal judge is quite large. For proponents of a Social Security Court to argue that federal district judges are on the one hand overwhelmed by Social Security cases and on the other hand lack expertise in handling them is contradictory. Furthermore, this rationale relates to the SSA's underlying problems. It assumes that where the SSA is reversed, the decision of the federal judge is "wrong" and the administrative decision below is "right." This, of course, is one underlying premise behind the assumption of the ninety-eight percent accuracy rate at the initial determination level and behind nonacquiescence.

#### D. Meaningful Change in the Administrative System

Unquestionably, creation of a Social Security Court would relieve sitting federal district judges of a significant portion of their dockets, but it would do so at the expense of establishing a whole new judicial system to shoulder the burden. To truly relieve existing strain on judicial review, the SSA should improve its administrative decisionmaking. All too often, reconsideration and the Appeals Council Review are hollow exercises in rubber-stamping and delay. The Center Report found that with regard to the Appeals Council "[t]he most distinctive feature of judicial review in the disability area is . . . the high proportion of cases that result in a remand for further administrative proceedings . . . ." The Secretary is given an unqualified privilege to retract before he files an answer those decisions he does not want to defend. This privilege is exercised by the Secretary in one out of every eight disability cases filed, which accounts for more than forty percent of all remands.

One of the allegedly overburdened circuit judges, Judge Posner of the Seventh Circuit, has added this observation:

I have read many administrative law judges' decisions in social security disability cases, all of which the disappointed applicant has asked the Appeals Council to review (as he had to do, before he could begin judicial review proceedings), but I can remember only one occasion on which the Appeals Council wrote an opinion, even when the administrative law judge's decision raised difficult questions.

Judge Posner has suggested that it would be easier and cheaper for Congress to create at the Appeals Council level a tier of

credible appellate administrative judges who would write opinions in all but frivolous cases.

The burden on the federal courts will not be ameliorated by switching that burden to a new court while keeping the current administrative system essentially intact, with different standards at different levels and often perfunctory review at the highest administrative level. Meaningful administrative reform would certainly lessen the burden on any judicial review system.

#### E. Expediting Judicial Review

It is suggested that a Social Security Court will expedite judicial review of cases. No doubt this, too, is a consummation devoutly to be desired. One must question how this can be possible while providing the touted expert review. As noted by the sponsors of H.R. 400, there are now 531 federal district judges to review Social Security cases. Frequently the initial judicial review is performed by a United States magistrate to whom the district court refers the matter. In some instances, by consent of the parties, the magistrate actually renders the final decision at the district court level. There are now nearly as many United States magistrates as federal district judges, totaling approximately 1,000 federal district judges and magistrates.

Exactly how twenty to thirty-six full-time Social Security Court judges will be able to handle some 55,000 Social Security cases on judicial review more efficiently than the existing bench remains somewhat mysterious. No doubt they will, to some extent, rely upon their law clerks as do the district judges and magistrates. Still the numbers seem overwhelming. One can readily imagine these judges being forced by the sheer number of cases to abdicate their authority and duties to unappointed, unconfirmed "analysts," such as those who now perform a similar function within the Appeals Council. The price of expedition and expertise would surely be a superficial, hit-or-miss judicial review process.

#### F. Appeal to the Federal Circuit

Finally, it is difficult to perceive the benefit of vesting all appeals from the proposed Social Security Court in the United States Court for the Federal Circuit. This specialized appellate court was created out of a merger of the Court of Claims and the Court of Customs and Patent Appeals. Unlike the other circuit courts, its jurisdiction is defined by

subject matter, not geography. Moreover, the workload of the Federal Circuit is considerably heavier than was anticipated when it was created in 1982. Some 2,500 appeals are now docketed annually. Whereas the proposed Social Security Court would hear nothing but Social Security cases, for the Federal Circuit these cases would be an additional burden to the existing caseload. This one circuit court would be expected to do the work now being performed by twelve circuit courts. With its already full docket, it is difficult to perceive how the Federal Circuit can be expected to handle Social Security appeals from all over the United States expeditiously and thoroughly.

Additionally, exclusive jurisdiction in the Federal Circuit based in Washington, D.C. will cause great difficulty or hardship for claimants seeking or required to argue their cases. Frequently, these claimants are indigent, and often are represented by legal services or legal aid attorneys. Absent provision for the Federal Circuit judges to "ride the circuits," claimants will be placed at extreme disadvantage in arguing appeals. This can hardly promote fairness.

The answer to the high number of Social Security cases appealed to the federal courts and the high rates of reversal and remand is for the Social Security Administration to cure itself by examining its own procedures and standards critically, and not assuming blindly that it is initially correct ninety-eight percent of the time, while it is the review system that is erroneous. It is the administrative process, not the judicial review process, that is in need of serious reform. The Social Security Disability Benefits Reform Act was an ambitious first step toward the reform mandated by Congress. Indeed, while SSA may be marching to Thoreau's different drummer, one suspects that it is more akin to our little Johnnie with whom everyone else is out of step.