

The Social Security Administration's Policy of Nonacquiescence

INTRODUCTION

In a recent speech at Tulane University, Attorney General Edwin Meese III stated his position on the precedential effect of United States Supreme Court interpretations of the Constitution. According to Meese, a Supreme Court decision binds "the parties and also the executive branch for whatever enforcement is necessary. But such a decision . . . is [not] binding on all persons and parts of government, henceforth and forever more."¹ The executive and legislative branches, no less than the judicial branch, have the duty to interpret the Constitution and are therefore justified in challenging Supreme Court precedent with which they disagree.² Though the reactions to the Tulane speech varied, many viewed Meese's comments as a public endorsement of lawlessness.³ The Attorney General's statements on the precedential effect of Supreme Court caselaw merely reflect the current administration's views on the validity of judicial review. A case in point is the Social Security Administration's ("SSA") policy of intra-circuit nonacquiescence.

In the early 1980's, amidst the universal call for fiscal austerity, the Secretary of Health and Human Services began accelerating review of the eligibility of recipients of disability benefits⁴ under the Social Security Disability Insurance ("SSDI") program⁵ and the Supplemental Security Income ("SSI") program.⁶ In addition, the SSA tightened eligibility requirements

1. Press & McDaniel, *The Crusades of Ed Meese: Taking on the Supreme Court and the Liberal Past*, NEWSWEEK, Nov. 3, 1986, at 24.

2. *Id.*

3. See Lacayo, *Supreme or Not Supreme: That is the Question, Says the Attorney General*, TIME, Nov. 3, 1986, at 46; Press & McDaniel, *supra* note 1, at 24; N.Y. Times, Oct. 24, 1986, at A17, col. 1.

4. The Social Security Disability Amendments of 1980 mandated that the SSA implement a program effective January 1, 1982 to review periodically the continuing eligibility of disability benefit recipients. In March 1981, the Secretary accelerated review pursuant to the Reagan administration budget initiatives of fiscal year 1982. See *Social Security Disability Reviews; The Human Costs: Hearing Before the Senate Special Comm. on Aging*, 98th Cong., 2d Sess. 74-75 (1984) [hereinafter *Special Committee Hearing*].

5. Social Security Disability Insurance ("SSDI") comes under Title II of the Social Security Act. See 42 U.S.C. §§ 401-33 (1982 & Supp. III 1986); see also 20 C.F.R. §§ 404.1-404.2127 (1985).

6. Supplemental Security Income ("SSI") comes under Title XVI of the Social Security Act. The SSI program is thought of as a federal welfare program because it provides benefits to individuals who have not paid money into social security. Eligibility is based on need and age, blindness or disability. See 42 U.S.C. §§ 1381-83c (1982 & Supp. III 1985); see also 20 C.F.R. §§ 416.101-416.2227 (1985).

and placed the burden of proving continuing eligibility upon the beneficiary, often resulting in the termination of benefits in cases where the beneficiary had not improved mentally or physically.⁷ Many of the terminations were appealed and thus found their way into the federal courts.

The federal judiciary responded to the Secretary's actions by finding them inconsistent with the Social Security Act.⁸ Faced with adverse circuit court decisions undermining what it had perceived as proper implementation of the Social Security Act, the agency ignored those decisions with which it disagreed through its policy of intra-circuit nonacquiescence.⁹

Under a policy of intra-circuit nonacquiescence,¹⁰ administrative agencies refuse to recognize the validity of "the law of the circuit."¹¹ The SSA abided by adverse circuit court decisions in the cases in which they were rendered but refused to recognize the decisions as binding precedents in similar future claims brought within the same circuit.¹² The SSA practiced nonacquiescence even though it never appealed the adverse interpretations at issue.¹³

7. See *Special Committee Hearing, supra* note 4, at 75; H.R. REP. No. 618, 98th Cong., 2d Sess. 10, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3047-48.

8. In *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982) and *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit held that the SSA could not terminate benefits for a lack of disability unless the Secretary had first established medical improvement.

9. The Secretary issued Social Security Rulings ("SSR") directing all agency personnel to disregard the Ninth Circuit's decisions in *Patti*, 669 F.2d 582 (SSR 82-49c) and *Finnegan*, 641 F.2d 1340 (SSR 82-10c).

10. Commentators distinguish between intra-circuit nonacquiescence and inter-circuit nonacquiescence. In the latter, an administrative agency will abide by "the law of the circuit" with which it disagrees but seek to apply its own interpretation in another circuit. Through inter-circuit nonacquiescence, agencies attempt to establish a split in the circuits—creating a situation in which Supreme Court review is more likely. See Note, "Respectful Disagreement": *Nonacquiescence by Federal Administrative Agencies in United States Court of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985).

11. Many different administrative agencies practice nonacquiescence. The National Labor Relations Board ("NLRB") and the Internal Revenue Service ("IRS") have done so on a consistent basis. Commentators have criticized these agencies for the same reasons they criticize the SSA. The NLRB, in particular, has been chastised by members of the judiciary. See *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir.), cert. denied, 449 U.S. 975 (1980); *Allegheny Gen. Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979).

Most commentators, however, treat the brand of nonacquiescence practiced by the SSA as less justifiable. Both the IRS and the NLRB are subject to liberal venue provisions which make it difficult for these agencies to predict which forum will be chosen for litigation. Thus, they do not always know which circuit caselaw to apply. Further, nonacquiescence by either the IRS or the NLRB is more likely to affect individuals who can afford to wait for the vindication of their rights in federal court. For a more thorough discussion, see Note, *supra* note 10. See also Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985).

12. See, e.g., *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983) ("The Secretary acknowledges that he was bound on remand to follow the law of the case doctrine. The Secretary, however, makes clear his belief that the Social Security Administration is not bound by *stare decisis* to follow lower court precedent.").

13. The Secretary's failure to appeal adverse circuit court decisions will be discussed in conjunction with the agency's justification for nonacquiescence. See *infra* notes 69-71 and accompanying text.

The judicial and legislative branches of government soon took notice of the Secretary's use of nonacquiescence. The SSA's calculated disregard for "the law of the circuit" precipitated criticism from federal district and circuit court judges who constantly reminded the Secretary of the well-settled rules of law they enforced in their courtrooms.¹⁴ Congress, also alarmed by the constitutional ramifications and practical consequences of a policy of nonacquiescence,¹⁵ urged the abandonment of such a policy.¹⁶

In response to the growing criticism, the Secretary modified her policy of nonacquiescence; if a claim was appealed to an Administrative Law Judge, "the law of the circuit" was available.¹⁷ Soon thereafter, however, a federal district court, in *Stieberger v. Heckler*,¹⁸ granted a preliminary injunction ordering the SSA to follow circuit court precedent. The court held that the plaintiffs would likely be able to show at trial that the agency's new procedures violated the separation of powers doctrine as well as fifth amendment due process.¹⁹ Members of Congress also voiced their disappointment in the SSA's modified policy.²⁰

Part I of this Note traces the development and modification of nonacquiescence. Part II examines the SSA's defense of nonacquiescence—that the SSA is part of a co-equal branch of government and thus not bound by federal circuit court precedent. Part III argues that intra-circuit nonacquiescence violates the separation of powers doctrine, stare decisis, and due process. Nonacquiescence also undermines the legitimacy of administrative agencies in our constitutional system and calls into question the validity of traditional principles of administrative law. Finally, part IV recommends that Congress assume primary responsibility for controlling agency action by providing specific legislative directives.

14. See, e.g., *Capitano v. Secretary of H.H.S.*, 732 F.2d 1066, 1070 n.9 (2d Cir. 1984); *Association of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1142 n.14 (D.D.C. 1984); *Buckner v. Heckler*, 580 F. Supp. 1536, 1542 (W.D. Mo. 1984); *Polaski v. Heckler*, 585 F. Supp. 997, 1001-02 (D. Minn. 1984); *Lopez v. Heckler*, 572 F. Supp. 26, 29-30 (C.D. Cal. 1983), *stay denied*, 463 U.S. 1326 (Rehnquist, Circuit Justice), *vacation of stay denied*, 464 U.S. 880 (1983); *Valdez v. Schweiker*, 575 F. Supp. 1203, 1204-06 (D. Colo. 1983); *Hillhouse*, 547 F. Supp. at 91-93.

15. See H.R. REP. No. 618, 98th Cong., 2d Sess. 10, 24-26, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3061-63.

16. See H.R. CONF. REP. No. 1039, 98th Cong., 2d Sess. 23, 37-38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095.

17. The modification, which was announced on June 3, 1985, is found in Interim Circular No. 185 of the OHA Handbook, *reprinted in* *Stieberger v. Heckler*, 615 F. Supp. 1315, app. C (S.D.N.Y. 1985), *injunction vacated sub. nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986) [hereinafter Interim Circular].

18. *Id.* at app. A.

19. *Id.* at 1374.

20. See *Implementation of the Social Security Disability Amendments of 1984: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 3, 59 (1985) (statement of Hon. Barney Frank, Rep. from Mass.) [hereinafter *Subcommittee Hearing*].

I. THE DEVELOPMENT AND MODIFICATION OF NONACQUIESCENCE

A. *The Original Policy*

Although conceding that the Supreme Court's interpretations of the Social Security Act are definitive and bind the agency, the SSA's original policy of nonacquiescence provided that the agency was not similarly bound by interpretations of the law found in the unappealed decisions of a district or circuit court.²¹ Occasionally, the SSA formally implemented this policy by issuing a Social Security Ruling ("SSR") that instructed agency employees to disregard a specific circuit court decision. More frequently, the agency simply continued to use its own interpretation and neglected to appeal or follow an adverse circuit court decision.²² In this way, the Secretary argued, the agency could maintain nationally uniform standards.²³

Agency nonacquiescence meant that a claimant could take advantage of "the law of the circuit" only after first exhausting all administrative remedies.²⁴ To illustrate the impact this policy had on claimants seeking SSDI

21. The original policy of nonacquiescence was contained in the OHA Handbook. The OHA Handbook is compiled by the Office of Hearings and Appeals. It contains instructions for ALJ's to follow in deciding Social Security cases. See § 1.161 of the OHA Handbook, reprinted in Stieberger v. Heckler, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), *injunction vacated sub. nom.*, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).

22. See SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG., 1ST SESS., THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 25 (Comm. Print 1983), reprinted in *Social Security Disability Review: The Human Costs: Joint Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means and the Senate Special Comm. on Aging*, 98th Cong., 2d Sess 246 (1984) [hereinafter *Joint Hearing*].

23. See *Social Security Disability Reviews: A Costly Constitutional Crisis: Hearing Before the House Select Comm. on Aging*, 98th Cong., 2d Sess. 103-04 (1984).

[O]ur policy of nonacquiescence is essential to ensure that the agency follows it[s] statutory mandate to administer the Social Security program nationwide in a uniform and consistent manner. In a program of national scope, it would not be equitable to people to subject their claims to differing standards depending on where they reside.

Id.

24. Exhaustion of remedies is a judicially created doctrine which requires that an individual pursue all available administrative remedies before seeking judicial review. 5 MEZINES, STEIN & GRUFF, ADMINISTRATIVE LAW § 49.01 (rev. ed. 1985). The Supreme Court in *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980) (citations omitted) made a clear statement regarding judicial review before administrative remedies are exhausted:

[It] is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. . . . Intervention also leads to piecemeal review which at the least is inefficient and upon the completion of the agency process might prove to have been unnecessary

. . . .

The exhaustion of remedies doctrine is codified in § 405(g) of the Social Security Act. This provision permits judicial review of a "final decision" of the Secretary. 42 U.S.C. § 405(g) (1982). See *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1975); *Weinberger v. Salfi*, 422 U.S. 749, 764-65 (1975).

or SSI benefits,²⁵ consider the following example: Grace is a forty year old woman whose physician has diagnosed her as disabled. Grace lives within the Second Circuit where the Court of Appeals has held that the diagnosis of the treating physician is binding on the fact-finder unless contradicted by substantial evidence. The SSA, however, accords less weight to the opinion of the claimant's doctor.²⁶ Grace's application for disability benefits is first reviewed by a state agency.²⁷ The state agency is charged with determining whether the claimant is disabled, the date the disability began, and the date the disability ended.²⁸ This initial determination, however, is subject to potential "own motion" review by the Secretary.²⁹ Assume the state agency denies Grace benefits in accordance with SSA policy; although contradicting evidence exists showing a lack of disability, it is not substantial. Next, Grace asks the state agency to reconsider her claim *de novo*.³⁰ The result of this reconsideration is also reviewable by the SSA.³¹ Upon receiving an unfavorable decision based on the existence of contradicting evidence, Grace leaves the state agency level.

Grace next requests a hearing *de novo* before an Administrative Law Judge ("ALJ").³² At this hearing the ALJ questions the claimant in order to fully develop the record.³³ The ALJ's decision is also subject to "own motion" review by the SSA's Appeals Council.³⁴ Grace receives another unfavorable decision. She then asks the Appeals Council to review her claim.³⁵ The Appeals Council will either deny Grace's request for review or it will affirm the ALJ's holding. In either case, Grace will have exhausted her administrative remedies.³⁶ After this, she can file suit in a federal district court, which will apply the Second Circuit's "treating physician rule."³⁷ In contrast, absent the policy of nonacquiescence, the state agency would have applied the Second Circuit's "treating physician rule" in its initial deter-

25. Structurally, the administrative review process is the same whether SSDI or SSI disability benefits are sought. In the example that will be given, the claimant is seeking benefits for the first time. However, the same process must be followed by an individual who wants to appeal the termination of his benefits. See *Stieberger*, 615 F. Supp. at 1324.

26. This hypothetical is fashioned after the facts in *Stieberger* where a class action was brought to make the SSA apply the Second Circuit treating physician rule to claimants residing in the Second Circuit. *Id.* at 1321.

27. See 42 U.S.C. § 421(a) (Supp. III 1985).

28. See *id.*; 20 C.F.R. § 404.1503(c) (1986) (SSDI); 20 C.F.R. § 416.903(c) (1986) (SSI).

29. See 42 U.S.C. § 421(c) (1982); 20 C.F.R. § 404.1503(d) (1986) (SSDI); 20 C.F.R. § 416.903(d) (1986) (SSI).

30. See 20 C.F.R. § 404.907 (1986) (SSDI); 20 C.F.R. § 416.1407 (1986) (SSI).

31. See 42 U.S.C. § 421(c) (1982).

32. See 20 C.F.R. § 404.929 (1986) (SSDI); 20 C.F.R. § 416.1429 (1986) (SSI).

33. See 20 C.F.R. § 404.944 (1986) (SSDI); 20 C.F.R. § 416.1444 (1986) (SSI).

34. See 20 C.F.R. § 404.969 (1986) (SSDI); 20 C.F.R. § 404.1469 (1986) (SSI).

35. See 20 C.F.R. § 404.967 (1986) (SSDI); 20 C.F.R. § 416.1467 (1986) (SSI).

36. The Appeal Council can also remand the case to an ALJ. See 20 C.F.R. § 404.977 (1986) (SSDI); 20 C.F.R. § 416.1477 (1986) (SSI).

37. See 42 U.S.C. § 405(g) (1982).

mination of eligibility, and Grace would have received the benefits to which she was entitled.

B. *Criticism of the Original Policy*

Though practiced since 1976, it was not until the 1980's that the SSA's use of nonacquiescence caused a great deal of friction between the federal judiciary and the agency. Because of the SSA's voluntary acceleration of reviews under its program of continuing disability investigations ("CDI")³⁸ and its tightened eligibility rules,³⁹ a burgeoning number of individuals, finding their disability benefits terminated, began making their way through the administrative review process.⁴⁰ Not surprisingly, this resulted in a large increase in the number of cases reaching the federal courts.⁴¹

As the amount of federal court litigation increased, several SSA review policies and procedures came under judicial scrutiny.⁴² Frequently, courts found that the Secretary was not acting in accordance with the Social Security Act in conducting CDIs.⁴³ The Secretary did not appeal these decisions. Instead, the Secretary ignored the decisions and continued to conduct CDIs in the same manner.⁴⁴

As federal judges began to see that the SSA was not implementing judicial interpretations of the Social Security Act, many opinions began to attack the policy of nonacquiescence itself. These opinions stated that the policy violated the separation of powers doctrine, the principle of stare decisis, and the due process clause.⁴⁵ Despite the ever-increasing tension between the federal courts and the SSA, the Secretary continued to practice nonacquiescence.

Congress, however, was disturbed by the escalating hostility between the executive and judicial branches.⁴⁶ In its report on the Social Security Dis-

38. See *supra* note 4.

39. See *supra* note 7 and accompanying text.

40. Between March 1981 and November 1983, the SSA terminated the disability benefits of 470,000 beneficiaries. *Special Committee Hearing, supra* note 4, at 73.

41. In the years between 1955 and 1970, there were a total of 10,000 disability claims appealed to federal district court. In the year 1982 alone, there were 13,000 appeals filed in federal district courts. H.R. REP. No. 618, 98th Cong., 2d Sess. 10, 23 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3060.

42. See *supra* note 8 and accompanying text.

43. *Id.*

44. See *supra* note 9 and accompanying text.

45. See *Lopez v. Heckler*, 713 F.2d 1432, 1441 (9th Cir.), *stay granted*, 463 U.S. 1326 (Rehnquist, Circuit Justice), *vacation of stay denied*, 464 U.S. 880 (1983) (Pregerson, J., concurring) ("The Secretary's nonacquiescence . . . flouts . . . the doctrine of separation of powers embedded in the constitution."); *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983) (court asserts that SSA is bound by stare decisis); *Polaski v. Heckler*, 585 F. Supp. 997, 1002 (D. Minn. 1984) ("the Secretary is not adhering to its constitutional duty to provide due process to individual claimants.").

46. See H.R. REP. No. 618, 98th Cong., 2d Sess. 10, 25, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3062.

ability Benefits Reform Act of 1984, the Committee on Ways and Means criticized nonacquiescence for creating two separate classes of claimants: those who were able to persevere through the administrative review process and those who were not.⁴⁷ In addition, the Committee expressed the concern that "[t]he increasingly adversarial character of the process for becoming eligible for disability benefits, and especially for retaining eligibility, does immeasurable harm to the public's trust in the Social Security program and in government as a whole."⁴⁸ Despite its concern, Congress did not pass legislation in its 1984 amendments prohibiting the agency from practicing nonacquiescence. A House bill would have required the agency to abide by circuit court interpretations unless the adverse decisions were under appeal to the Supreme Court.⁴⁹ The Senate's proposed amendment would have required only that the agency notify Congress and report in the *Federal Register* its intention to acquiesce or not acquiesce in a circuit court's interpretation of the Social Security Act.⁵⁰ Ultimately, the Conference Agreement dropped both proposals. Instead, the conferees urged the SSA to restrict nonacquiescence to those cases where the appeal of an adverse decision to the Supreme Court was likely.⁵¹

C. *The Modification of Nonacquiescence*

On June 3, 1985, the Secretary responded to the growing controversy by announcing a modification of the SSA's policy of nonacquiescence.⁵² The new policy requires the Secretary to consider circuit precedent before reaching a final decision in a particular case. The SSA can deny application of adverse circuit precedent within the agency only if the agency deems those claims to be "appropriate vehicle[s] for relitigating the issue."⁵³ Individuals with such claims will then have to appeal their "test cases" to the federal courts.

The new procedures do not provide for the application of pertinent circuit precedent at all administrative levels. To the contrary, the state agency applies eligibility requirements that are based on the Secretary's interpretations of the Social Security Act and judicial interpretations in which the Secretary acquiesces.⁵⁴ Adverse circuit court precedent is not considered until the claimant appeals his case to an ALJ.⁵⁵

47. *Id.* at 24.

48. *Id.* at 25.

49. See H.R. CONF. REP. No. 1039, 98th Cong., 2d Sess. 23, 37, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095.

50. *Id.*

51. *Id.* at 37-38.

52. See Nat'l L.J., June 17, 1985, at 11, col. 1.

53. Interim Circular, *supra* note 17, at 1405.

54. The state agency level consists of two levels of review: initial determination and reconsideration. See *supra* notes 27-31 and accompanying text.

55. Interim Circular, *supra* note 17, at 1403.

What happens next depends on the results of the ALJ's analysis. If an ALJ determines that the individual seeking benefits is eligible under agency standards, a favorable decision will be issued without consideration of circuit precedent.⁵⁶ But if the ALJ finds that the claimant is ineligible under either standard, the ALJ will issue an unfavorable decision describing the analysis under both agency policy and case law.⁵⁷ Finally, in those circumstances where the ALJ determines eligibility under circuit precedent but not under SSA policy, a "recommended favorable decision" will be issued.⁵⁸

The SSA's Appeals Council will automatically review a recommended favorable decision. If the Appeals Council approves the ALJ's finding of eligibility under circuit precedent, the Council will usually adopt the ALJ's recommended decision.⁵⁹ In certain cases, however, the Council may find that the facts presented provide the appropriate context in which to relitigate adverse circuit case law. When such a case arises, the SSA Special Policy Review Committee reviews the case in conjunction with the Office of the General Counsel and the Department of Justice. An unfavorable decision will be issued if all agree that relitigation is appropriate. The Appeals Council will adopt the recommended favorable decision if the Special Committee determines that relitigation is not appropriate.⁶⁰

Consider the impact of the new procedures in Grace's case:⁶¹ Grace applies for disability benefits at the appropriate state agency but is turned down because of the existence of evidence, though it is not substantial, contradicting her physician's diagnosis of disability. Grace asks the state agency to reconsider her claim *de novo* but the result is the same. Grace will not be granted disability benefits at these first two levels of administrative review because the state agency is not allowed to consider the Second Circuit's "treating physician rule," a precedent with which the Secretary does not agree.

Appeal to an ALJ permits Grace to take advantage of the Second Circuit's "treating physician rule." The ALJ issues a "recommended favorable decision" because Grace is eligible for benefits under circuit precedent but not under SSA policy. The Appeals Council automatically reviews the ALJ's decision. After consultation with the Special Policy Review Committee, the Office of the General Counsel, and the Department of Justice, the Appeals Council adopts the "recommended favorable decision" because Grace's case is not the appropriate context in which to relitigate the validity of the "treating physician rule." Though under the new procedures Grace receives

56. *Id.* at 1404.

57. *Id.*

58. *Id.*

59. *Id.* at 1405.

60. *Id.*

61. See *supra* notes 25-37 and accompanying text.

the benefits to which she is entitled without having to appeal her claim to federal court, this result should have been reached at the state agency level. Furthermore, if Grace's claim had been the "test case" the agency was looking for, she would have been in no better position than she was under the original policy: she would be appealing her case to federal court.

II. THE AGENCY'S POSITION

Although the SSA modified its policy of nonacquiescence on June 3, 1985, the agency did so as a compromise; it did not concede that the former policy was illegal.⁶² The agency continues to maintain that because the Secretary is not a member of the judiciary, but rather part of a co-equal branch of government, the role played by the Secretary in court is that of a litigant, not that of a subordinate. Therefore, the SSA believes that it, unlike lower federal courts, is not bound by the doctrine of *stare decisis*.⁶³

The SSA maintains that, as a litigant, *stare decisis* merely provides it with a prediction of the likely outcome of federal court litigation.⁶⁴ Under the Federal Rules of Civil Procedure and the Code of Professional Responsibility, litigants are permitted to make good faith arguments for courts to extend, modify, or change the existing law.⁶⁵ The agency asserts that nonacquiescence is merely its way of exercising its right to make such arguments.⁶⁶

The SSA is also an agency charged with implementing the Social Security Act on a nation-wide basis. Agency spokespersons assert that the SSA has a special duty to litigate adverse circuit precedent in order to maintain nationally uniform standards.⁶⁷ The SSA contends that its modified policy of nonacquiescence "will reconcile to the extent possible our efforts to have a uniform disability program, uniform standards, and also abide by judicial decisions."⁶⁸

In this context, the new procedures foster an "ongoing litigation management program."⁶⁹ According to the SSA, the cases in which adverse precedent is established often do not have fact patterns which present the

62. Defendants' Objections to Magistrate's Report and Recommendations at 85, n.77, *Steiberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) [hereinafter Defendants' Objections to Report].

63. *Id.* at 75.

64. *Id.* at 76.

65. See FED. R. CIV. P. 11; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980).

66. See Defendants' Objections to Report, *supra* note 62, at 76.

67. See *supra* note 23.

68. Subcommittee Hearing, *supra* note 20, at 26.

69. Interim Circular, *supra* note 17, at 1403.

Secretary with a good chance of succeeding on appeal.⁷⁰ The Secretary, however, must be able to relitigate such adverse decisions in cases where SSA success is likely so that nationally uniform standards will be maintained. Thus, the agency must be permitted to practice nonacquiescence in some form.⁷¹ The Secretary points to *United States v. Mendoza*⁷² as support for this proposition.

In *Mendoza*, the Supreme Court held that the doctrine of non-mutual collateral estoppel did not apply to the government.⁷³ The Supreme Court's holding reflected three concerns. First, the Court wanted the government to be able to litigate issues in multiple forums so that legal doctrine would be thoroughly developed.⁷⁴ Second, the Court wanted the Solicitor General to consider various "prudential factors" in deciding whether to appeal an adverse decision.⁷⁵ Third, the Court recognized the need for new administrations to affect government litigation.⁷⁶ The SSA claims that these three concerns are met under the modified procedures.

In particular, the agency argues that *Mendoza's* solicitude for prosecutorial discretion in agency litigation supports its failure to apply adverse circuit court precedent at the state agency level.⁷⁷ The SSA is not willing to trust state agency officials or even ALJs with the decision of whether a certain

70. Defendants' Objections to Report, *supra* note 62, at 79 n.72. The SSA argues: [T]he Solicitor General frequently decides against appeal or *certiorari* even though the legal conclusions of the court of appeals are believed to be erroneous. Such decisions rest on a host of factors including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government, and a sensitivity to the crowded docket of the Court. . . . Moreover, as with other litigants, practical considerations may effectively preclude review, for example if there is an adequate alternative ground for the decision, if the court's result was correct even if its rationale was not, or if there is not yet a conflict in the circuits.

Id.

71. *Subcommittee Hearing*, *supra* note 20, at 26.

72. 464 U.S. 154 (1984).

73. *Id.* The doctrine of collateral estoppel provides that a court's decision on an issue of law or fact that is necessary to its judgment is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979). When a plaintiff seeks to bar the defendant from relitigating an issue that it has lost in prior litigation, the plaintiff is using collateral estoppel offensively. *Mendoza*, 464 U.S. at 160 n.4. Formerly, courts required that both the plaintiff and the defendant must have been parties to the prior litigation—the mutuality requirement. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971). Recently, the Supreme Court has allowed nonmutual collateral estoppel to be used against a private party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

74. *Mendoza*, 464 U.S. at 161.

75. *Id.* at 162. ("[T]he Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.")

76. *Id.*

77. See Defendants' Objections to Report, *supra* note 62, at 85.

claim is a good test case.⁷⁸ Rather, the Appeals Council and its advisors must be allowed to make this decision after full development of the record.⁷⁹

III. THE VALIDITY OF NONACQUIESCENCE

A. Separation of Powers

A major criticism of the SSA's original policy of nonacquiescence is that it violated the separation of powers doctrine. Courts would often cite *Marbury v. Madison*⁸⁰ for the proposition that it is the role of the judiciary to interpret the law.⁸¹ Consequently, courts viewed the SSA's refusal to consider adverse circuit precedent binding within its administrative structure as a challenge to the authority of the federal judiciary to perform its constitutional function.⁸²

The separation of powers doctrine, however, does not mean that each branch of government always performs its own constitutional function exclusively. Granted, the Constitution authorizes Congress to make law, the courts to interpret law, and the executive to enforce law, but this division of power is not absolute. Indeed, the Constitution itself authorizes certain shared duties. For example: the president can veto legislation,⁸³ the senate can confirm or reject presidential nominations of ambassadors and judges,⁸⁴ and the courts can invalidate congressional and executive acts which are inconsistent with the constitution.⁸⁵

A better way to view the separation of powers doctrine is to understand that it has developed as a way to describe our constitutional government of limited powers.⁸⁶ In this context, the power of judicial review, as articulated by Justice Marshall in *Marbury v. Madison*, is a check that courts can

78. Defendants' Reply to Plaintiffs' Memorandum of Law in Response to Defendants' Objections to the Magistrate's Report and Recommendation at 10, *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) [hereinafter Defendants' Reply to Memo].

79. Interim Circular, *supra* note 17, at 1405.

80. 5 U.S. (1 Cranch) 137 (1803).

81. *See, e.g.*, *Lopez v. Heckler*, 713 F.2d 1432, 1440 (9th Cir.), *stay granted*, 463 U.S. 1326 (Rehnquist, Circuit Justice), *vacation of stay denied*, 464 U.S. 880 (1983) (Pregerson, J., concurring); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983); *Polaski v. Heckler*, 585 F. Supp. 997 (D. Minn. 1984).

82. *See, e.g.*, *Valdez v. Schweiker*, 575 F. Supp. 1203 (D. Colo. 1983).

83. U.S. CONST. art. I, § 7, cl. 2.

84. U.S. CONST. art. II, § 2, cl. 2.

85. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *See Marbury*, 5 U.S. (1 Cranch) at 177-78 (interpreting art. III, § 1).

86. *See Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-79 (1984).

exercise on the legislative and executive branches of government to insure that they do not act outside the limits of their authority.⁸⁷

The application of the separation of powers doctrine in our modern administrative state, however, is complicated by several factors. Administrative agencies, unlike Congress and the executive, are not constitutionally authorized bodies. Furthermore, Congress has delegated to some administrative agencies the three integral governmental functions: the power to make, interpret, and enforce laws.⁸⁸ Finally, traditional principles of administrative law give agencies wide discretion to perform their governmental functions as exemplified by the deferential standards of review courts use when reviewing agency action.⁸⁹

An examination of the traditional justification for the existence and strength of administrative agencies reveals how the separation of powers doctrine applies in the modern administrative state and to the SSA's policy of non-acquiescence. This justification can be divided into two interrelated components: (1) the perceived value of administrative agencies in society, and (2) the existence of control over agency action.

Since their proliferation in the New Deal era, administrative agencies have been characterized as bodies of "expert administrators" ascertaining and promoting an "objective public interest."⁹⁰ This characterization is based

87. See *Marbury*, 5 U.S. (1 Cranch) at 177-78.

88. See Strauss, *supra* note 86, at 578-79.

89. See Federal Administrative Procedure Act, § 706, 5 U.S.C. § 706 (1982). Section 706 provides deferential standards under which courts review agency action when a particular agency's organic statute does not otherwise provide:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id. The Social Security Act provides that "[t]he findings of the Secretary as to any fact, if supported by *substantial evidence*, shall be conclusive." 42 U.S.C. § 405(g) (1982) (emphasis added). See generally R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* ¶ 7.1 (1985).

90. See S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 128 (1985).

on the following assumptions: agencies allow for the application of expertise, they are politically isolated, they recognize the contributions of science, technology, social science and philosophy to solving modern problems, they are practical (as opposed to idealistic), and they can initiate change.⁹¹ Agencies have been allowed to exist, proliferate and exercise a great deal of power on the basis of this characterization.⁹²

In addition, the existence of administrative agencies is defensible because a constitutionally empowered body ultimately controls agency action. Congress can control agency action by limiting the discretion it gives the agency in its organic statute and by passing additional legislation directing the agency to implement or change policies or procedures.⁹³ To a certain extent, the President can control agency action through his appointment and removal power.⁹⁴

The availability of judicial review, however, has been the most frequently used justification for the constitutionality of administrative agencies. Courts

91. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 15-46 (1938).

92. Dean Landis wrote:

It is in the light of these broad considerations that the place of the administrative tribunal must be found: The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.

Id. at 46.

93. Indeed, administrative law, under the nondelegation doctrine, forbids congressional delegation of its legislative power. See K. DAVIS, *1 ADMINISTRATIVE LAW TREATISE* § 3.2 (1978). Congress must provide an "intelligible principle" to which the agency must conform, or the delegation of legislative power is invalid. See *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1927). The Supreme Court, however, has used this doctrine only twice to invalidate congressional delegations of legislative power to administrative agencies. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In all other cases, federal courts have upheld the validity of congressional grants of power even when an "intelligible principle" appeared absent from the agency's statutory grant of authority. See *Amalgamated Meat Workers v. Conally*, 337 F. Supp. 737 (D.D.C. 1971).

Another mechanism used to control agency action is the legislative veto. The legislative veto is a provision inserted in legislation which says that a particular agency action takes effect only if Congress does not take steps to nullify the action within a given period of time. The Supreme Court, however, has found the legislative veto unconstitutional on separation of powers grounds. *INS v. Chadhas*, 462 U.S. 919 (1983). For a discussion of more informal methods of Congressional control over agency action, see S. BREYER & R. STEWART, *supra* note 90, at 107-09.

94. In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court suggested that it was unconstitutional for Congress to restrict the President's power to remove governmental officials. In *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), however, the Court limited the application of *Myers* to the President's power to remove governmental officials who exercise purely executive duties.

examine agency action to ensure that it comports with the Constitution and the agency's organic statute. Even though administrative law requires that courts accord agency action a great deal of deference, "judicial review sets an outer limit beyond which agency discretion may not be exercised."⁹⁵ In other words, judicial review is a "check" to ensure that an agency has not acted outside the limits of its authority.

The separation of powers doctrine is violated when an administrative agency, no less than Congress or the President, refuses to act within the limits of its authority. When a federal circuit court determines that the SSA incorrectly interpreted the Social Security Act, that court has found that the agency has acted outside of its authority. Under the original policy of nonacquiescence, the agency would comply with this adverse decision with respect to the parties before the court but would not apply this unappealed ruling to subsequent claimants.⁹⁶ In effect, the SSA violated the separation of powers doctrine by circumventing the policing action of judicial review.

Under the SSA's new policy of nonacquiescence, most claimants who want to take advantage of circuit precedent that is inconsistent with the agency's interpretation of the Act will not have to appeal their cases to federal court. The SSA now considers the "law of the circuit" before the Secretary renders a final decision.⁹⁷ Even though this consideration does not take place until the ALJ hearing level, the modified policy appears to present a less blatant challenge to judicial authority because adverse circuit court precedent is no longer ignored on a wholesale basis.

The modifications, however, are merely cosmetic changes. The SSA still refuses to acknowledge the binding authority of circuit court precedent over agency interpretations of the Social Security Act.⁹⁸ Permitting ALJs to consider "the law of the circuit" merely foreshadows the likely outcome of a claim that would eventually reach federal court on appeal. The new policy may reduce the amount of time a claimant has to wait for such a result, but it does not eliminate the wait.

Despite the modifications, the new policy of nonacquiescence violates the separation of powers doctrine. By applying a discredited interpretation of the Social Security Act at the state agency level, the SSA is acting outside the scope of its authority.⁹⁹ The fact that the SSA is likely to remedy the use of an incorrect standard at a higher appellate level does not excuse the initial abuse of power.

95. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 89, at ix.

96. *See supra* note 12.

97. *See* Interim Circular, *supra* note 17, at 1403.

98. *See supra* notes 62-66 and accompanying text.

99. Ironically, in modifying the original policy of nonacquiescence, the SSA has violated the Social Security Act's mandate that uniform standards for the determination of disability be established and applied "at all levels of determination, review, and adjudication . . ." 42 U.S.C. § 421(k)(1) (1982 & Supp. III 1985).

Furthermore, the policy of nonacquiescence undermines the legitimacy of the SSA as an administrative agency in our constitutional system. Nonacquiescence prevents the federal courts, constitutionally authorized bodies, from exercising meaningful control over agency action. Granted, Congress can still control agency action through legislation and the President can still exercise his power to remove the Secretary. Considering the reliance that administrative law places on judicial review as the primary method of controlling agency action, however, reliance on congressional and presidential control mechanisms may not be enough to justify the existence and strength of administrative agencies like the SSA.

B. *Stare Decisis*

Another major criticism of the SSA's original policy of nonacquiescence is that it disregards the doctrine of stare decisis.¹⁰⁰ Under this doctrine, a principle of law laid down by a court is binding precedent in the same court or in a court of lower rank in the same jurisdiction unless changes in the social or legal climate render it necessary to reconsider the principle's continuing validity.¹⁰¹ Stare decisis is based on policy considerations such as the need for uniformity of treatment, stability, predictability and convenience.¹⁰² The SSA argues that it is not bound by stare decisis because it is not a subordinate in the federal judicial hierarchy.¹⁰³

Though technically correct, the SSA's position fails to recognize that the same policy considerations underlying the doctrine of stare decisis in a judicial hierarchy argue for administrative agency adherence to judicial precedent.¹⁰⁴ The SSA's original policy of nonacquiescence undermined several policy considerations underlying stare decisis. Forcing claimants to appeal their cases to federal court in order to take advantage of circuit precedent with which the Secretary disagreed led to anomalous results; those who persevered through all the administrative appeals received the benefits to which they were entitled, while those with similar claims who did not or could not make it to federal court received nothing. In addition, requiring claimants to exhaust administrative remedies under the original policy of nonacquiescence

100. See, e.g., *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983).

101. 20 AM. JUR. 2D *Courts* §§ 183-84 (1965).

102. *Id.*

103. 1B J. MOORE, J. LUCAS & T. CURRIER, *MOORE'S FEDERAL PRACTICE* ¶ 0.403 (2d ed. 1984).

104. Administrative agencies do tend to adhere to their own adjudicative precedent. See J. MOORE, J. LUCAS & T. CURRIER, *supra* note 103, at ¶ 0.403 (authors suggest that agencies may nevertheless need more flexibility in their litigation than regular courts because agencies frequently make policy through adjudication). See also Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111 (1959).

was a waste of time and resources for both the claimants and the agency.

Moreover, *stare decisis* is said to carry with it a correlative duty on litigants not to pursue claims that are unwarranted under existing law unless a good faith argument can be made for the reversal, change, or modification of the adverse precedent.¹⁰⁵ Under its original policy of nonacquiescence, the SSA's failure to consider adverse circuit court precedent at all within the agency made every claim a test case. The agency did not make a good faith argument for a reversal, change, or modification of the law; instead, the agency behaved as if the adverse case law did not exist.

The new policy of nonacquiescence differs from its predecessor in that relitigation, though clearly a possibility, is no longer a certainty.¹⁰⁶ The agency asserts that it is making a concentrated effort to relitigate adverse circuit court precedent in only those cases in which the agency feels it has a chance of prevailing.¹⁰⁷ Nevertheless, as noted by the court in *Stieberger v. Heckler*, there is no way to guarantee that the agency will live up to its duty and practice restraint in its decisions to relitigate.¹⁰⁸

The same arguments call for agency adherence to circuit precedent at the state agency level. The disparate treatment of claimants and the waste of time and resources remains under the new procedures. Because the lowest levels of agency review are least likely to set policy, agency flexibility would not be threatened by requiring application of circuit precedent at the state agency level.¹⁰⁹ Further, the Secretary's authority to set aside state agency determinations through "own motion" review protects the SSA's role as a litigator.¹¹⁰

C. *Due Process*

Critics also opposed the original policy of nonacquiescence in the belief that it violated the due process clause of the fifth amendment.¹¹¹ They charged that the policy created two separate classes of claimants: those who had the strength, determination and funds to make it through the administrative review process, and those who did not.¹¹² Nonacquiescence discriminated

105. This correlative duty is codified in FED. R. CIV. P. 11 and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980). See Note, *supra* note 11, at 596. These provisions, however, are also relied upon by the SSA to justify their policy. See *supra* note 65 and accompanying text.

106. See Interim Circular, *supra* note 17, at 1403.

107. *Id.*

108. *Stieberger*, 615 F. Supp. at 1373.

109. See *supra* note 104.

110. See *supra* notes 26-36 and accompanying text.

111. U.S. CONST. amend. V.

112. See, e.g., *Lopez v. Heckler*, 572 F. Supp. 26, 29-30 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *stay granted*, 463 U.S. 1326 (Rehnquist, Circuit Justice), *vacation of stay denied*, 464 U.S. 880 (1983).

against claimants who were so poor, mentally impaired, or physically disabled that they could not persevere through all of the administrative levels to have their claims vindicated in federal court.

The court's preliminary decision in *Stieberger* supports this view with respect to the SSA's modified policy as well.¹¹³ According to the court, the new procedures still create two classes of claimants because the SSA does not apply adverse circuit precedent at the state agency level.¹¹⁴ The only real change that has taken place is that for some claimants—those with fact patterns which do not present a favorable context for relitigation—the finish line is closer. For others, closer does not necessarily mean attainable.

Despite the new procedures' disproportionate impact, it is difficult to imagine a successful due process challenge to nonacquiescence in its modified form. The Supreme Court has not applied heightened scrutiny to classifications based on wealth,¹¹⁵ physical disability, or mental impairment.¹¹⁶ Hence, courts will judge the SSA's policy under the "rational basis" test. To prevail under this test, the SSA need only show that nonacquiescence furthers a legitimate government purpose and that the policy was rationally related to that purpose.¹¹⁷ The purpose of this policy—maintenance of nationally uniform standards—is a legitimate end for the agency to pursue. Further, nonacquiescence is one way in which this end can be achieved. It is therefore unlikely that a court would condemn the policy under the very deferential rational basis test.

A challenge on procedural due process grounds is less problematic. Whenever the government deprives an individual of a "property" or "liberty" interest which is protected by the due process clause of the fifth or fourteenth amendment, procedural safeguards are required.¹¹⁸ In *Mathews v. Eldridge*¹¹⁹ the Supreme Court stated that while "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'"¹²⁰ the procedures required in a particular case would depend upon the balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹²¹

113. *Stieberger*, 615 F. Supp. at 1374.

114. *Id.* at 1370.

115. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

116. See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

117. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

118. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 89, at ¶ 6.3.

119. 424 U.S. 319 (1976).

120. *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

121. *Id.* at 335.

The SSA's policy of nonacquiescence in its modified form must be tested under the *Mathews* balancing test to determine if it violates the dictates of procedural due process.

First, failing to apply adverse circuit precedent at all levels of the administrative review process has a profound effect upon claimants. Requiring that claimants exhaust administrative remedies is an exercise in futility because the agency is not going to apply adverse precedent—at least until the ALJ level is reached.¹²² In the meantime, claimants are forced to endure physical, emotional, and financial hardships, which will discourage individuals with meritorious claims from appealing the agency's denial or termination of their benefits.¹²³

Second, the risk that claimants will be erroneously deprived of benefits under the SSA's policy of nonacquiescence is high. Failure to apply circuit precedent at all levels of the administrative process is an "error inherent in the truthfinding process."¹²⁴ Requiring that the Secretary respect the "law of the circuit" will totally remedy such erroneous deprivations.

Finally, the government's interests are not jeopardized by requiring that the SSA apply circuit precedent at all levels of the administrative process. The agency asserts that nonacquiescence enables it to litigate those cases in which it has a good chance of prevailing. Thus, nonacquiescence promotes the SSA's legitimate interest in maintaining nationally uniform standards under the Social Security Act.¹²⁵ The Secretary, however, can promote this interest just as effectively through the exercise of "own motion" review at the state agency level.¹²⁶ Though the SSA would have to expend additional time, effort and resources to thoroughly screen state agency determinations, the SSA's extensive evaluation of ALJ's "recommended favorable decisions" could be eliminated.¹²⁷

The government also has an interest "in conserving scarce fiscal and administrative resources."¹²⁸ Those claimants who reach the ALJ level and are able to take advantage of circuit precedent, receive retroactive as well as prospective benefits.¹²⁹ Thus, in theory, nonacquiescence does not save agency resources; it merely delays their expenditure. In practice, however, not all claimants appeal the denial or termination of benefits.¹³⁰ Failure to

122. See Interim Circular, *supra* note 17, at 1403.

123. See *infra* notes 147-59 and accompanying text.

124. *Mathews*, 424 U.S. at 345.

125. See *supra* notes 67-71 and accompanying text.

126. See *supra* notes 26-31 and accompanying text.

127. See *supra* notes 58-60 and accompanying text.

128. *Mathews*, 424 U.S. at 348.

129. See 20 C.F.R. § 404.316(a) (1986) ("You are entitled to disability benefits beginning with the first month covered by your application in which you meet all the other requirements for entitlement."). The regulations under Title XVI do not specify when entitlement to SSI benefits begin.

130. See *infra* note 147 and accompanying text.

apply circuit precedent at all administrative levels should not be justified by cost-savings attributable to this phenomenon.

The SSA's policy of nonacquiescence in its modified form thus fails to meet the dictates of procedural due process under the *Mathews* balancing test. On one side of the scale are the claimants' great interests in the receipt of benefits to which they are entitled, the high risk of an erroneous deprivation of benefits under the policy and the assurance of a remedy for such wrongful deprivations if acquiescence in circuit precedent is required. On the other side of the scale are the government's interests in nationally uniform standards under the Social Security Act and in preserving public funds. Although these governmental interests are legitimate, they can easily be promoted in other ways. Under its policy of nonacquiescence, the SSA does not provide a "meaningful opportunity to be heard."

D. *The Significance of Mendoza*

The Secretary relies on the Supreme Court's reasoning in *United States v. Mendoza* to support the policy of intra-circuit nonacquiescence.¹³¹ In *Mendoza*, the plaintiff, a Filipino national seeking naturalization in the United States, argued that the government's administration of the Nationality Act of 1940 during World War II denied him due process of law. Without reaching the merits of the plaintiff's case, the district court granted the petition on the grounds that the government was precluded from relitigating the due process issue because the government had litigated and lost on the same issue in a prior case which it had not appealed.¹³² The court of appeals affirmed.¹³³

The Supreme Court held that the doctrine of nonmutual offensive collateral estoppel does not apply to the government.¹³⁴ The Court recognized that the government's role as a litigant is unique because of the geographic breadth and volume of government litigation.¹³⁵ Further, the government litigates issues that have a substantial impact on the public.¹³⁶ As a result, the government, more so than any other litigant, finds itself in court litigating the same issues against different parties.¹³⁷ The Court concluded that permitting nonmutual offensive collateral estoppel to be used against such a litigious entity as the government is unwise for three reasons.

131. See *supra* notes 72-79 and accompanying text.

132. The prior case was *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

133. *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982).

134. *United States v. Mendoza*, 464 U.S. 154, 163 (1984).

135. *Id.* at 160-61.

136. *Id.* at 161.

137. *Id.*

First, the Court recognized the desirability of the well-developed legal doctrine that results from litigation in multiple forums.¹³⁸ It feared that application of this doctrine would "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."¹³⁹ The Court also feared having to change its policy of waiting until there was a split in the circuits before granting the government's petitions for certiorari.¹⁴⁰

Mandatory intra-circuit acquiescence does not threaten the Court's interest in allowing litigation of issues in multiple forums. Permitting nonmutual collateral estoppel to be used offensively against the government would bind the government in every circuit.¹⁴¹ Under mandatory intra-circuit acquiescence, on the other hand, the SSA would be precluded from relitigating an adverse court of appeals interpretation only within the circuit in which the decision was rendered. The agency would still be free to litigate the issue in another circuit.

The Court's second reason for holding that the doctrine of nonmutual offensive collateral estoppel did not apply to the government was because it wanted to permit the Solicitor General to continue exercising prosecutorial discretion.¹⁴² When the Solicitor General considers whether to appeal an adverse decision, he has to consider factors other than the potential success or failure of the government's case. He also has to take into account "prudential concerns" such as the government's limited resources and the Court's crowded dockets.¹⁴³

Requiring that the SSA abandon its policy of intra-circuit nonacquiescence does not threaten the Solicitor General's prosecutorial discretion. If he decides not to appeal an adverse decision, he is free to litigate the legal issue in another circuit. Indeed, the "prudential concerns" discussed by the Supreme Court in *Mendoza* were not promoted by the SSA's original policy of nonacquiescence because claimants had to appeal to the federal courts in order to have circuit precedent with which the Secretary disagreed applied to their case. The new procedures should eliminate a great deal of the federal court litigation that resulted from the SSA's original policy.

The Court's final reason for its holding in *Mendoza* was its recognition that the manner in which an administration conducts its litigation reflects public policy choices that should not bind successive administrations.¹⁴⁴ For example, the decision not to appeal the case in which the court held that

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 160.

142. *Id.* at 161-62.

143. *Id.* at 162.

144. *Id.* at 162-63.

the government's administration of the Nationality Act of 1940 violated due process was based on the Carter Administration's interest in following "a course of compassion and amnesty."¹⁴⁵ The Court reasoned that application of the doctrine of nonmutual offensive collateral estoppel would bind the current administration, which in reality was not party to the prior litigation, to the prior administration's policy choices.¹⁴⁶

Mandatory intra-circuit acquiescence does not bind successive administrations to the policy choices made by their predecessors. The SSA can litigate unappealed adverse circuit precedent in another circuit if a new administration wishes to pursue different policies. In the event that every circuit has decided the issue in question against the agency and that none of these decisions have been appealed, the Secretary can ask Congress to legislate the particular issue into the Social Security Act.

Thus, the factors that led the Court in *Mendoza* to decide that nonmutual offensive collateral estoppel does not apply to the government would not be threatened by requiring the SSA to acquiesce in adverse circuit court decisions which the agency does not intend to appeal. *Mendoza* is not good precedent for the SSA's policy of nonacquiescence because mandatory intra-circuit acquiescence is significantly different from nonmutual offensive collateral estoppel against the government. Under the former, the SSA would be precluded from relitigating an adverse circuit court decision only within the circuit in which the decision was made, while the latter would bind the agency in every circuit.

E. Public Policy Concerns

Critics of nonacquiescence, in both its original and modified forms, argue that the practical effects this policy has on claimants is a sufficient reason to require the Secretary to apply adverse circuit precedent at all levels of the administrative process. For a variety of reasons, such as lack of funds, ill-health, trust in the system, or even ignorance, fewer and fewer people appeal unfavorable decisions at each higher level of the administrative review process.¹⁴⁷ From a practical standpoint, nonacquiescence exploits this behavior.

Even for those claimants who make it to the ALJ hearing level, the strain of pursuing futile procedures has a negative effect on their mental and physical condition.¹⁴⁸ While the SSA does permit a claimant whose benefits

145. *Id.*

146. *Id.*

147. Approximately two-thirds of those individuals who were denied disability benefits at the initial state agency level failed to reach the ALJ hearing level. See *Stieberger*, 615 F. Supp. at 1371.

148. *Id.* at 1342.

have been terminated to continue receiving payments while seeking appellate review,¹⁴⁹ there is no such provision for first-time claimants. Even a first-time claimant receiving a recommended favorable decision from an ALJ may still have to wait for the Appeals Council to review the decision before receiving benefits.¹⁵⁰

The policy of nonacquiescence also undermines the public's confidence in the SSA.¹⁵¹ The agency should be a place where eligible individuals can go to receive their benefits in accordance with the Social Security Act. When the SSA refuses to apply circuit precedent which would allow claimants to receive the benefits to which they are entitled at the state agency level, it frustrates claimants who end up losing faith in the agency's willingness to help them. The agency loses its aura of being a body of "expert administrators" ascertaining and promoting an "objective public interest."¹⁵²

Furthermore, critics correctly view the SSA's policy of nonacquiescence as lawlessness.¹⁵³ The existence and power of administrative agencies is defensible because a constitutionally authorized body exercises ultimate control over agency action. Judicial review of the SSA's policies and procedures is the primary control mechanism used to ensure that the agency does not act outside of its authority.¹⁵⁴ The agency's legitimacy is threatened when it circumvents this control through its policy of nonacquiescence. It is questionable whether society as a whole can afford to permit the SSA, an agency whose actions affect so many citizens, to continue acting outside the scope of its authority in this manner.

IV. POSSIBLE SOLUTIONS

The best solution to the problems created by nonacquiescence would be for the SSA voluntarily to abandon this policy and apply circuit court precedent at all administrative levels. Ideally, the Secretary would acknowledge that nonacquiescence was not legitimate, constitutionally or practically. Then the agency could promise to relitigate only adverse circuit court precedent in other circuits. The SSA's modified policy is a step in the right direction, but it does not go far enough. As Attorney General Meese's recent statements on the precedential effect of Supreme Court caselaw indicate, the friction between the executive and judicial branches of government has not

149. See 42 U.S.C. § 423(g) (Supp. III 1985).

150. See *Stieberger*, 615 F. Supp. at 1373; see also *Subcommittee Hearing*, *supra* note 20, at 173 (statement of Eileen P. Sweeney, National Senior Citizens Law Center).

151. See *Subcommittee Hearing*, *supra* note 20, at 160 (statement of Arthur S. Flemming, Co-Chairman of Save Our Security Coalition).

152. See *supra* note 90 and accompanying text.

153. See *Subcommittee Hearing*, *supra* note 20, at 59-60 (statement of Hon. Barney Frank, Rep. from Mass.).

154. See *supra* note 95 and accompanying text.

lessened.¹⁵⁵ It is therefore unlikely that the SSA will voluntarily abandon all remnants of this policy. Further, the damage caused by this policy is significant enough to counsel a more interventionist solution.

A. Judicial Solutions

Until now, the federal courts have been left to deal with the SSA's policy of nonacquiescence. The courts have often responded by certifying large class actions against the Secretary.¹⁵⁶ Because the agency will follow an adverse circuit court decision in regards to parties before the court,¹⁵⁷ such class actions have the virtue of spreading a favorable decision over more claimants. Courts have also been willing to waive the requirement that claimants exhaust their administrative remedies before seeking review in federal court.¹⁵⁸ Thus, the class action is able to represent even more claimants.

The courts, however, do not have the option of waiving the requirement that claimants present their claims to the Secretary prior to seeking review in federal court.¹⁵⁹ This nonwaivable presentment requirement precludes the courts from institutionalizing a judicial interpretation of the Social Security Act to benefit all future claimants within a particular circuit. Thus, even large class actions are piecemeal attempts to deal with the SSA's nonacquiescence in particular circuit court interpretations of the law.

In addition, courts have been reluctant to fashion remedies which have "the potential for bringing the Judicial Branch into protracted involvement with the Executive Branch in the administration of a complex regulatory scheme affecting hundreds of thousands of persons."¹⁶⁰ For example, in

155. See *supra* notes 1-3 and accompanying text.

156. See, e.g., *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), *injunction vacated sub nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

157. See *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983).

158. Under § 405(g) of the Social Security Act, an individual can seek review of a final decision of the Secretary in federal district court. 42 U.S.C. § 405(g) (1982). The "final decision" requirement has two parts: (1) a nonwaivable requirement that the claim for disability benefits has been presented to the Secretary, and (2) a waivable requirement that the claimant has exhausted his administrative remedies. See *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976).

A court will waive the exhaustion requirement in the "appropriate" circumstances: "where plaintiffs' legal claims are collateral to the demand for benefits, where exhaustion would be futile, or where the harm suffered pending exhaustion would be irreparable." *Stieberger*, 615 F. Supp. at 1329. See also *Bowen v. City of New York*, 106 S. Ct. 2022, 2031-32 (1986). Cf. *Heckler v. Lopez*, 463 U.S. 1326, 1335 (9th Cir.) (Rehnquist, Circuit Justice) (citations omitted), *vacation of stay denied*, 464 U.S. 879 (1983) ("Although there are other federal-court opinions which have accepted that argument, there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement.")

159. See *supra* note 158.

160. *Stieberger v. Bowen*, 801 F.2d 29, 33-34 (2d Cir. 1986).

Stieberger, the district court's preliminary injunction contained the following provisions: (1) it enjoined the Secretary and all his personnel and agents from denying or terminating benefits under policies that are inconsistent with Second Circuit precedent; (2) it ordered the Secretary to rescind all policies concerning nonacquiescence, in a particular decision or in general, with respect to New York residents; and (3) it required that the Secretary distribute a copy of all adverse Second Circuit decisions to all his personnel and agents who adjudicate disability claims with instructions that the decision is to be followed.¹⁶¹

The Secretary appealed the preliminary injunction to the United States Court of Appeals for the Second Circuit, which subsequently vacated the injunction in *Stieberger v. Bowen*.¹⁶² The court's major concern was that the district court's preliminary injunction subjected agency adjudicators to potential contempt proceedings for violating the injunction when the denial or termination of disability benefits was caused by misapplying, not disregarding, the circuit precedent.¹⁶³

In addition, the court concluded that the preliminary injunction granted in *Stieberger* was no longer necessary in light of the permanent injunction granted by the Second Circuit in *Schisler v. Heckler*.¹⁶⁴ That injunction directed the Secretary to order the SSA to announce in "appropriate publications" that the "treating physician rule" was to be applied at all administrative levels.¹⁶⁵ The court reasoned that proceeding with the *Schisler* injunction "will minimize intrusion into the administrative process and at the same time accord the Secretary the opportunity to demonstrate his good-faith compliance with the law of this Circuit and his readiness to take appropriate action to see that law implemented throughout the administrative process that he supervises."¹⁶⁶ Unfortunately, relying on the Secretary's "good-faith" may be an exercise in futility.

B. Congressional Solutions

Another way to deal with the SSA's refusal to apply adverse circuit precedent is congressional amendment of the Social Security Act to disallow this practice. This is an appropriate remedy because it is the lack of clarity in the Act which leads to differing interpretations in the first place. If Congress is not going to pass statutes that are subject to precise interpretation, it can at least specify which, agency or court, will have the final

161. *Stieberger*, 615 F. Supp. at app. A.

162. 801 F.2d 29.

163. *Id.* at 35.

164. 787 F.2d 76 (2d Cir. 1986).

165. *Id.* at 84.

166. *Stieberger*, 801 F.2d at 38.

word. Regardless of the propriety or desirability of such congressional action, the political reality is that Congress is not likely to amend the Act to proscribe SSA nonacquiescence in circuit precedent. This is illustrated by Congress' failure to pass the Senate and House bills in 1984.¹⁶⁷

Maybe the best solution to the SSA's policy of nonacquiescence is to require Congress to take responsibility for determining SSA policies by giving the agency specific legislative directives. This solution would shift primary control of the agency's action from the courts to Congress. Of course, courts would still exercise judicial review, but the clearer statutory language would reduce the likelihood that the Secretary and a court would disagree. This solution also takes into account that the SSA is not a body of "expert administrators" which ascertains and implements an "objective public interest."¹⁶⁸ Because Congress is a constitutionally authorized body, as well as democratically elected, the agency's legitimacy would remain intact. Though resistant to politically unpopular acts, Congress has demonstrated its ability to assume responsibility for controlling agency action in its passage of the Disability Benefits Reform Act of 1984.¹⁶⁹

CONCLUSION

The SSA's modification of its policy of intra-circuit nonacquiescence has not answered the concerns which motivated criticism of the original policy. The new procedures violate the separation of powers doctrine, the stare decisis doctrine and due process. They also produce undesirable practical consequences which the government and public can ill-afford to tolerate. A solution which requires the SSA to adhere to adverse circuit precedent must be found. Preferably, the SSA should renounce nonacquiescence voluntarily. Realistically, Congress should either amend the Social Security Act to require SSA compliance with adverse circuit court precedent or give the agency specific legislative directives to follow.

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167. See *supra* notes 49-51 and accompanying text.

168. See *supra* note 90 and accompanying text.

169. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).