MENDING THE SAFETY NET'S SAFETY NET: THE FEDERAL COURTS STUDY COMMITTEE'S PROPOSALS FOR REFORMING THE SOCIAL SECURITY DISABILITY BENEFITS REVIEW PROCESS

THOMAS BARTLETT WILINSKY*

Introduction 1080
I. The Need for Reform 1082
A. Seeking a Better System 1083
1. The Purpose of a Social Security Administration 1083
2. Evaluating Safety Nets: Finding Sources of Criteria 1083
B. The Current System of Benefits Administration 1084
1. Eligibility for Benefits 1084
2. The Claims Process 1086
C. Problems with the Current System 1087
1. The Burden on the Federal Courts 1087
2. Nonacquiescence, Politics, and Controlling the System .. 1090
II. The Federal Courts Study Committee's Proposals for Reform ... 1093
A. The Federal Courts Study Committee 1093
B. The Committee's Recommendations 1094
1. Congressional Action to Prohibit Nonacquiescence 1094
2. The Majority Proposal for Disability Claims 1095
3. The Dissent's Proposal for Disability Claims 1097
III. Evaluating the Proposals for Reform 1099
A. Reform at the Agency Level 1099
1. The Constitutionality of the Committee's Proposals 1099
2. The Better Review Forum 1101
3. Summary: The Better Proposal versus the Current System 1106
B. Reform at the Level of Judicial Review 1107
1. The Constitutionality of the Committee's Proposals 1108
2. Article I versus Article III Review 1110
3. Specialist versus Generalist Review 1112
4. District Court versus Court of Appeals Review 1115
a. District Courts versus Courts of Appeals 1116
b. Single- versus Two-Tiered review 1117
5. Judicial Review and Nonacquiescence 1119

* B.A. Connecticut College, 1986; M.A. New York University, 1988; J.D. New York University, 1991.

6. Summary 1120
IV. The Better Procedural Safety Net 1121

INTRODUCTION

Social security was designed to function as a societal safety net, ensuring basic economic provisions for those in need. The benefits review process is thus the safety net's safety net. The benefits review system is designed to ensure that the truly disabled are not denied the benefits to which they are entitled. However, this secondary safety net is presently torn. Litigation of social security disability benefits cases comprises a significant portion of the federal courts' dockets. Changes in the policies of the Social Security Administration [hereinafter SSA], both substantive and procedural, have drawn the courts into the thicket of interpreting the law surrounding disability benefits, and ordering the SSA to follow these interpretations, only to see these orders flouted. Within the SSA itself, the complicated benefits review process is subject to political control and conflicting views of the law.

This Note was inspired by the author's own experience representing a social security disability claimant.[1] The claimant became disabled in 1976 and received disability benefits for seven years. In 1983, the claimant's benefits were terminated, not because his condition improved, but because the system changed its policy. Since 1983, the claimant has repeatedly sought reinstatement of his benefits. During this time, the federal courts issued numerous decisions interpreting the governing legislation which were ignored by the SSA. Congress also acted to amend the Social Security Act so as to afford claimants a presumption of continuing disability.[2] Yet this claimant never benefited from such a presumption.

The claimant was denied full reinstatement on three separate occasions after hearings before Social Security Administrative Law Judges [hereinafter ALJs]. In 1989, some benefits were restored, but, due to a mistake on the part of the ALJ, the claimant received neither backpayment for benefits wrongly denied during the prior six year period, nor the full reinstatement of benefits to which he was entitled.

At the time of this author's involvement in the case, the claimant faced a fourth adversarial hearing before an ALJ, on the issues of full reinstatement and backpayment of benefits. By this time, the case had been heard by at least three different ALJs. The appellate body of the SSA had considered the case four times since the initial termination of benefits, and had again remanded it for reconsideration.

The case was remanded to the same ALJ who had wrongfully denied the claimant full reinstatement of his benefits at a prior hearing. At this most

1. The claimant's name will not be revealed in order to protect his privacy.

2. The Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified at 42 U.S.C. §§ 405, 408, 416, 421-23, 907, 1303, 1305, 1382(c), 1382(d), 1382(h), 1383, 1383a, 1383b (1988)).

recent hearing, the ALJ threatened to dismiss without cause and wait for another remand, a move designed to further punish the claimant. Though the claimant's benefits were restored, backpayment to the date of his wrongful termination was denied. His case continues.

A government founded on the rule of law should not allow a single citizen to suffer what this claimant suffered. Nor should a government deriving its sovereignty from its citizens use their tax money to pay for such flagrantly wasteful acts as the repeated, wrongful denials of benefits to deserving individuals. Such behavior is particularly egregious where both Congress and the federal courts have ordered change.

Yet, this claimant's plight is by no means unique. According to the SSA's own estimate, this claimant was one of more than 200,000 disabled people whose benefits were wrongfully terminated.[3] Many claimants do not achieve an appropriate result until they reach the federal courts.[4] Most claimants, however, never manage to reach the federal level, since only approximately seventeen percent of disability claimants have the ability to press their claims this far.[5] The safety net's safety net has clearly failed.

As the number of claimants increases with the rising age of the population, the importance of an adequate benefits administration system grows. Coincidentally, with the federal government facing unprecedented fiscal constraint, the expense of agency administration and article III judicial review has prompted proposals from the Federal Courts Study Committee to repair the secondary safety net. This Note considers these proposals.

In an initial effort to demonstrate the need for reform, the discussion begins with an overview of the function of social security and the tools for evaluating its efficacy. The determination of eligibility for social security disability benefits, a complicated process, is described in order to shed light on the task that must be performed by an adequate review system. Problems with the current system are highlighted, since they inform an evaluation of proposed solutions.

A discussion of the Federal Courts Study Committee and its recommendations follows. The proposals of both the Committee's majority and dissent are described and analyzed in detail. This analysis involves consideration of proposed changes at two levels: first, change within the SSA and, second, change of the federal judicial review mechanisms which operate outside of the SSA.

Both the majority and the dissent of the Federal Courts Study Committee Report suggest change within the SSA. Evaluation at this first level requires

3. Schweiker v. Chilicky, 487 U.S. 412, 416 (1988).

4. In 1984, the federal courts reversed or remanded over 80% of the benefits cases in which the SSA had denied benefits. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1371 (S.D.N.Y. 1985), *vacated sub nom.*, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).

5. *Id.*

consideration of the goals of an agency review system, and the probability of the success of each proposed system.

An evaluation at the second level involves examination of the proposals to reform federal judicial review of Social Security claims. A determination as to which system provides a better institutional review mechanism outside of the SSA relies on the answers to several related questions. Under which article of the Constitution should the primary review body be located? Should this body be a specialized court or is a generalist perspective more valuable? When judicial review is sought, should it begin in the trial courts or should it go immediately to the appellate level? Is federal judicial review adequate if there is only one level of scrutiny, or must there be two?

Finally, conclusions are drawn. Since three systems of review are involved, the current system and the two systems proposed by the Federal Courts Study Committee, the conclusions are twofold. First, the majority's proposed system envisions a weaker secondary safety net than the present system. The majority's proposed system eliminates a layer of review, and substitutes a less independent tribunal for the district court. Were the majority proposal the only alternative, the current system would better remain unchanged. The dissent's proposal describes a system superior to that now in place. Rather than eliminating the advantages of the current system, it builds on them, improving the review bodies and eliminating redundancy where possible. The dissent proposes a secondary safety net which better protects those falling into it.

I.
THE NEED FOR REFORM

Calls for reforming the Social Security benefits process are abundant.[6] Much criticism spans two areas: review at the agency level and the system of federal court supervision of the process.[7] Before addressing either of these structural aspects of the benefits review process, an overview of the purpose and substantive provisions of the relevant law is merited. Knowledge of the steps taken in order to obtain Social Security disability benefits is crucial to an understanding of the importance of appeals in such an intricate system.

6. *See, e.g.*, Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 HAMLINE L. REV. 1 (1984); Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989); Rubin, *Government Nonacquiescence Case in Point: Social Security Litigation*, 15 SOC. SEC. REP. SER. 768 (1987); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986); Shoenberger, *State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration*, 1987 A.C.U.S. 579.

7. *See* Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1821-22 nn. 16-17 (1989).

A. Seeking a Better System

1. The Purpose of a Social Security Administration

The SSA is an administrative agency of the federal government. An administrative agency, located under the executive branch, is a body charged with executing the day-to-day details of legislation. The task entails promulgation of rules and application of these rules to individual situations.[8]

The SSA follows this general mode of operation. With the Social Security Act of 1935, Congress charged the newly created SSA with administration of a program designed to support those unable to support themselves.[9] Although the original act provided no relief for the disabled, the SSA itself expressed concern about this class of people during the 1940s.[10] By the 1950s, Congress had amended the Social Security Act to provide for the disabled.[11] Under this legislative directive, the SSA performs two tasks. First, it makes general social security policy. Second, it processes individual applications for, and terminations of, social security benefits.[12] This latter, procedural aspect of the SSA's tasks are at issue in this Note.

Like many administrative agencies, the SSA provides claimants whose benefits applications are denied, as well as those whose benefits payments are terminated, with a procedure for review of such decisions. This benefits review system is intended to assure that the SSA meets its goal of supporting the disabled.

2. Evaluating Safety Nets: Finding Sources of Criteria

Evaluating proposed reforms of the Social Security benefits review system presents a number of questions. What are the constitutional constraints on an agency's ability to administer benefits? How can review bodies located within the agency function to provide adequate review? What are the appropriate criteria to determine the adequacy of review? Beyond the agency, what does the Constitution require in terms of participation and supervision of the SSA by the federal courts? Constitutional requirements aside, how much federal judicial review is appropriate and what form should it take? Unfortunately, there are no easy answers, nor are there ready sources to which to turn.

The text of the Constitution provides little guidance with regard to administrative agencies. Establishment of agencies such as the SSA is considered a power granted to Congress under article I, section 8, and the President is empowered by article II, section 3, to execute federal laws. Beyond these general grants of power, federal administrative function is subject to the constraints of the Bill of Rights, in particular, the due process clause of the fifth

8. W. FOX, UNDERSTANDING ADMINISTRATIVE LAW 1 (1986).

9. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935).

10. S. REP. NO. 408, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, 1277, 1290.

11. *Id.*

12. W. FOX, *supra* note 8, at 1.

amendment.[13] Most of the administrative procedure required by the Constitution is defined by Supreme Court cases decided during this century which define the requirements of due process.[14]

The function of review systems within agencies is difficult to assess. Different administrative agencies have different procedures for review, and evaluating their respective functional successes requires analogizing among the agencies. Analogy is no easy task, since administrative agencies have disparate functions. But because this Note involves discussion of proposals by a committee, and because those proposals are modeled on other agencies, comparison of different agencies' review systems is elucidating. However, given that no two agencies are alike, evaluation of agency review methods requires application of general principles of agency review. Such principles are found in treatises on administrative law, law review articles, and court cases. These sources provide criteria by which evaluation of the efficacy of the agencies' self-corrective mechanisms is possible.

Evaluating judicial review involves a similar process of examination, comparison, and application of theory. Where the Supreme Court has ruled, a foundation exists on which to base the validity of the judicial review provided. As is frequently the case, however, the constitutional minimum may not guarantee a system which adequately provides the intended beneficiaries of the SSA with the benefits to which they are statutorily entitled. In other words, minimum constitutional standards may not require the agency to perform its function properly. For more comprehensive standards, comparison of existing administrative systems is required, as well as the conjectural application of competing models to the system in question.

B. The Current System of Benefits Administration

The Social Security disability insurance benefits and supplemental security income programs serve as a safety net to provide income for citizens who are unable to work because of medical disabilities.[15] As such, the safety net is intended to ease the hardships of disabled workers by providing some form of subsistence during the period of disability.

1. Eligibility for Benefits

Social Security disability benefits are administered under two programs. One is the Supplemental Security Income program [hereinafter SSI], a need-based welfare program.[16] The second, the Old Age Survivors and Disability

13. U.S. CONST. amend V ("No person . . . [shall] be deprived of life, liberty, or property, without due process of law. . . .").

14. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970) discussed *infra* notes 110-18 and accompanying text.

15. 42 U.S.C. §§ 423(a)(1)(D), 1381-1385 (1988).

16. Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465-1475 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383c (1988) (Title XVI of the Social Security Act)).

Insurance program [hereinafter OASDI], insures workers through payroll taxes.[17] SSI and OASDI regulations can be grouped together for discussion since they generally parallel one another.[18]

An obvious goal of the SSA is to limit benefits to the truly disabled. The key question in determining whether an individual deserves benefits is whether the claimant's disability falls within the meaning of the relevant statutory provisions. The inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" constitutes disability under SSI and OASDI.[19] The claimant must be so severely disabled "that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[20] Thus the claimant must establish that she is not engaging in substantial gainful activity,[21] and that her impairment meets the statutory severity requirement.[22] The claimant is also required to show either that her incapacity meets or exceeds a listing of impairments contained in the Social Security regulations,[23] or that she is unable to perform her prior occupation.[24]

Once the claimant has made the required showings, the burden shifts to the SSA to prove that work is available which the claimant is capable of performing. This burden involves either comparing the claimant's ability to a complex set of objective criteria, commonly called the "Grids,"[25] or making an individualized vocational determination. If the SSA cannot prove that there is work in the national economy which the claimant can perform, then the claimant is eligible for benefits.

Evaluation of eligibility therefore involves complex questions of fact and law. Both the claimant and the SSA must attempt to convince the trier of fact of the physical and/or mental ability of the claimant. Thus, technical exper-

17. *Id.*

18. FEDERAL COURTS STUDY COMMITTEE AND SUBCOMMITTEE REPORTS: WORKING PAPERS AND SUBCOMMITTEE REPORTS, July 1, 1990, 287 n.4 (1990) [hereinafter WORKING PAPERS].

19. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

20. *Id.* §§ 423(d)(2)(A), 1382c(a)(3)(B).

21. 20 C.F.R. §§ 404.1572, 416.972 (1991).

22. *Id.* §§ 404.1521, 416.921 (SSI and OASDI require the inability to perform basic work activities); *id.* §§ 404.1509, 416.909 (both programs also require a 12-month duration of impairment).

23. *See id.* pt. 404, subpt. P, app. 1.

24. *Id.* §§ 404.1545, 416.945. The SSA determines a claimant's residual functioning capacity based on the physical and mental ability to perform past relevant work, involving evaluation of factors such as whether the claimant can walk, sit, bend, lift, and adjust psychologically to work. The determination currently gauges the claimant's ability to perform sedentary, light, medium, heavy, or very heavy work. *See id.* §§ 404.1567, 416.967.

25. *See id.* pt. 404, subpt. P, app. 2; *cf.* Heckler v. Campbell, 461 U.S. 458 (1983) (upholding the use of Grids).

tise may be necessary, in addition to familiarity with the complex regulations governing disability. Furthermore, since pain is an important factor in considering disability, many determinations of eligibility for benefits will turn on the claimant's credibility as well as the testimony of treating physicians.[26]

2. The Claims Process

A secondary procedural safety net is necessary to assure that all deserving claimants are given the opportunity to correct the claims process when it goes awry.

When disability claims are sent to regional SSA offices they are forwarded to federally funded state offices of disability determination for review. The state offices determine eligibility for benefits under SSA regulations.[27] This determination involves development of a medical file, comprised of data submitted by the claimant and solicited by the state office. Additionally, the state office may require a claimant to submit to an examination by a consulting physician employed by the Disability Determination Service.[28] A disability examiner, with the help of a medical advisor, then makes the determination of disability.[29]

If the Disability Determination Service denies the claimant's eligibility, she is entitled to seek federal administrative review by the SSA, a two-tiered process. First, claimants appear before an ALJ at an informal hearing.[30] This proceeding is a de novo hearing of the disability claim[31] based on the record submitted to the state office, with new evidence accepted.[32] The hearing is supposed to be non-adversarial, with the ALJ assisting the claimant's presentation of her case.[33] The ALJ determines the facts and applies the law at the hearing stage of the benefits process.

Above the ALJs sits the Appeals Council, a twenty-member SSA body which reviews applications by disappointed claimants[34] as well as by its own motions.[35] The Appeals Council reviews cases for abuse of discretion, errors

26. To establish disability, the claimant's statements as to pain must be supported by objective evidence of a medical impairment that could reasonably be expected to produce pain. Although this requirement, originally imposed by statute, has since lapsed, it remains SSA policy under Social Security Ruling 82-58 (1982) (Titles II and XVI of Evaluation of Symptoms).

27. State offices also perform on-going disability reviews, determining whether claimants receiving benefits are still eligible. In addition, state offices may reconsider applications from disappointed claimants. *See* 20 C.F.R. §§ 404.913, 416.1413-416.1413a.

28. *Id.* §§ 404.1512-404.1518, 416.912-416.918.

29. *Id.* §§ 404.915, 404.1615(c).

30. *See id.* §§ 404.929, 416.1429.

31. 42 U.S.C. §§ 405(b)(1), 1383(c)(1) (1988).

32. *See* 20 C.F.R. §§ 404.944, 404.950, 416.1444, 416.1450.

33. *See generally* 2 H. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES, §§ 573-75 (1983 & Supp. 1989). The Administrative Procedure Act protects the ALJ's independence. 5 U.S.C. §§ 554(d), 3105, 5362, 7521 (1988).

34. 20 C.F.R. §§ 404.967-404.981, 416.1467-416.1481.

35. Prior to 1975, the Appeals Council reviewed "virtually all ALJ decisions for 'gross error.'" WORKING PAPERS, *supra* note 18, at 296 n.37. The Council later abandoned the practice of reviewing its own motions, but the "Bellmon Amendment" reinstituted the controversial

of law, decisions not supported by substantial evidence, or important issues of law or policy.[36] Functioning as an appellate tribunal for ALJ decisions, the Council also has broad power both to independently weigh the evidence and to consider new evidence. A decision from an ALJ is considered final if the Appeals Council refuses to consider it. Otherwise, an Appeals Council affirmation renders the decision final. The situation differs, however, when a case is remanded by a federal court. There, the decision of the ALJ is final unless either the Appeals Council takes jurisdiction sua sponte or the claimant appeals to the Council.[37]

Upon obtaining a final decision from the SSA, either after the Appeals Council has considered or has refused to consider her case, a disappointed claimant may seek relief in federal district court.[38] In the district court, a claimant is afforded de novo review based on the administrative record. The judge determines whether the SSA had substantial evidence for the decision, and whether the decision was made according to correct legal standards. Subsequent to a district court decision, de novo review as of right lies in the appropriate federal circuit court of appeals. Finally, the Supreme Court may certify appeals. Figure 1 summarizes the current appeals process.

C. Problems with the Current System

Although a full critique of the current system of Social Security benefits administration is beyond the scope of this Note, it is necessary to examine the current system's problems in order to evaluate the proposed changes. The current system serves as a benchmark. If a new system would be worse it should not be implemented. However, since it is possible that the proposed changes could improve the current system, its problems merit discussion.

The present system of Social Security benefits administration is problematic in at least two ways. First, the redundance of the secondary safety net slows the benefits process. This is due to the tremendous burden the process of judicial review imposes on the federal judiciary. Second, the system is subject to considerable political control. As demonstrated by recent history, the conflicting agendas of the SSA and the courts have resulted in nonacquiescence by the agency. When the SSA flouts the federal courts' interpretation of the Social Security Act, it engages in nonacquiescence. Such disagreement over meaning and implementation of the law ultimately results in considerable frustration and expense to the claimant as well as the taxpayer.

1. The Burden on the Federal Courts

Social security cases comprise a large portion of the federal courts' dock-

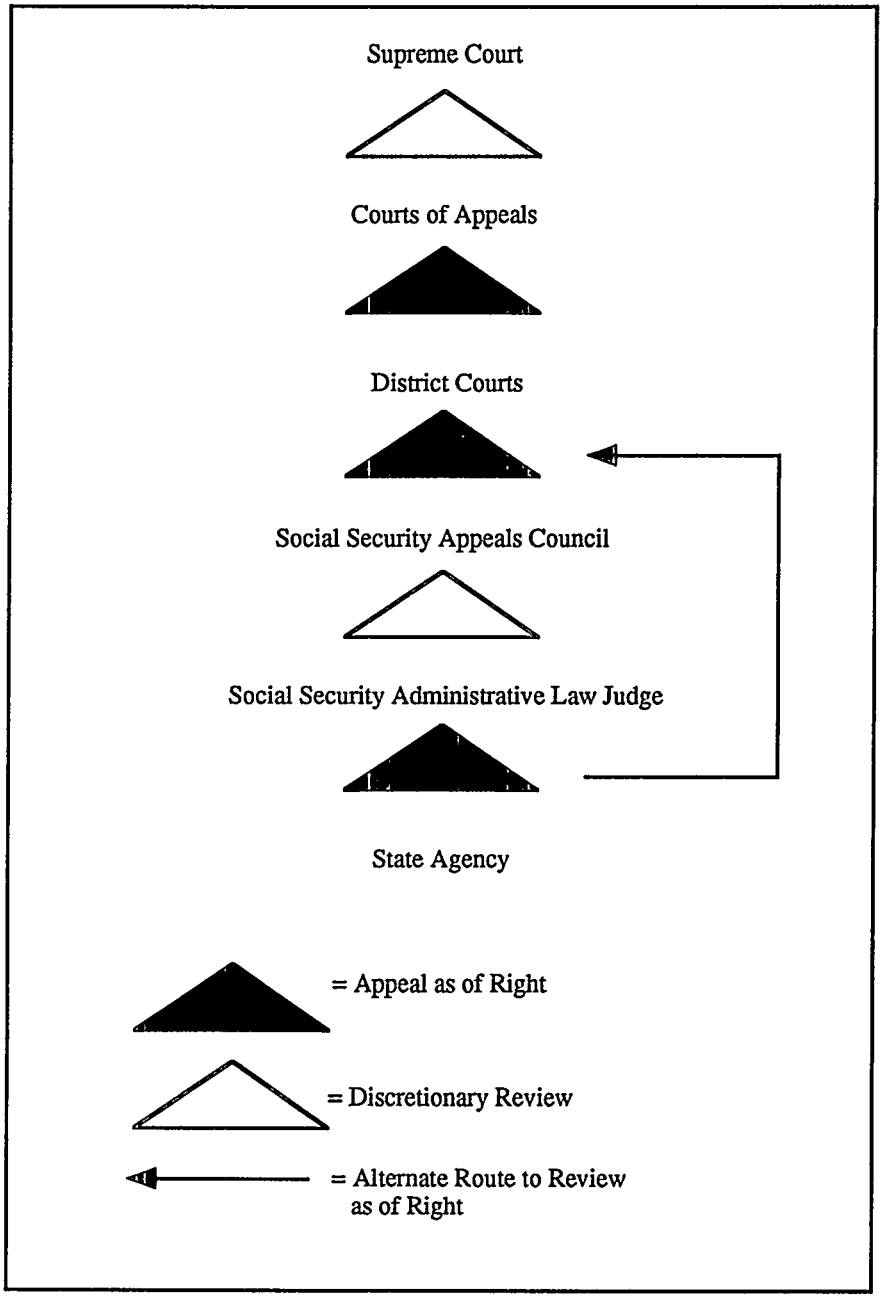
practice of sua sponte review. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441, 446 (1980) (codified as amended at 42 U.S.C. § 421 (1988)).

36. *See* 20 C.F.R. §§ 404.970(a), 416.1470(a).

37. *See id.* §§ 404.984, 416.1484.

38. *See id.* §§ 404.981, 416.1481.

Figure 1
Current Structure for Review
of Social Security Disability Claims



ets. Appeals from denials of social security disability claims constituted 7.8% of the civil cases filed in the district courts in 1983, 11% in 1984, 6.9% in 1985, 5.3% in 1986, 5.3% in 1987, and 6.0% in 1988.[39] The number of Social Security cases reviewed by the district courts went from 9,850 in 1978 to 15,412 in 1988, with as many as 29,985 cases filed in 1984.[40] The circuit courts' dockets reflect a similar burden. Social Security cases ranged from three to four and one-half percent of the total cases filed each year between 1983 and 1988.[41] In absolute terms, the number of Social Security cases heard by the courts of appeals grew from 585 in 1978 to 992 in 1988.[42]

Beyond the numbers, Social Security cases are notable for the reactions they elicit from the judges involved. "Judges apparently find these cases burdensome, but feel that their efforts contribute little to improving administration in this area."[43] In some districts, federal magistrate-judges complain that Social Security cases outnumber "*all* of [their] other duties combined."[44]

In addition, Social Security cases cause inter-circuit conflicts in the federal courts. Such conflicts occur when one circuit interprets a law differently from one or more other circuits. The only final solution to such conflict is resolution by the Supreme Court. However, not all of these cases will reach the Court.[45] Examples of unresolved circuit conflicts as of October 1989 include: payment of benefits to legal widows as opposed to non-legal widows;[46] whether a tribunal, on remand, may determine the amount of the attorney fees for the court and administrative services;[47] the scope and procedure of the

39. WORKING PAPERS, *supra* note 18, at 285 (citing 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, table C-2; 1987 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, table C-2).

40. *Id.* at 303 (citing ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, table C-2, for the years 1977-1988). On average, nearly 15,000 Social Security cases flooded the district courts each year during this period, with an increase of approximately 56% from the number of cases reviewed in 1978 to the number reviewed in 1988.

41. *Id.* at 285 (citing 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, table B1-A; 1987 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, table B1-A).

42. *Id.* at 303. These numbers reflect a growth rate of approximately 70%, higher than that of the district courts.

43. *Id.* at 286.

44. Letter from the Honorable Edwin E. Naythons, United States Magistrate, to the Honorable Joseph F. Weis, Jr., Chairman, Federal Courts Study Committee (Feb. 21, 1989) (in WORKING PAPERS, *supra* note 18).

45. Letter from Mr. A. George Lowe, Office of the General Counsel, Department of Health & Human Services, to Mr. Dennis Hauptley, Federal Courts Study Committee (October 31, 1989) (in WORKING PAPERS, *supra* note 18).

46. Garcia v. Secretary of Health and Human Services, 760 F.2d 4 (1st Cir. 1985); White v. Schweiker, 709 F.2d 247 (3d Cir. 1983); Martin v. Harris, 653 F.2d 428 (10th Cir. 1981); Davis v. Califano, 603 F.2d 618 (7th Cir. 1979).

47. Rodriguez v. Bowen, 865 F.2d 739 (6th Cir. 1989) (en banc); Wells v. Bowen, 855 F.2d 37 (2d Cir. 1988); Coup v. Heckler, 834 F.2d 313 (3d Cir. 1987); Webb v. Richardson, 472 F.2d 529 (6th Cir. 1972).

Appeals Council;[48] class certification issues;[49] and formulation of legal standards for assessing a claimant's subjective allegations of pain.[50] Rather than being exhaustive, the issues listed above are merely examples of inter-circuit conflicts involving the SSA.[51]

2. *Nonacquiescence, Politics, and Controlling the System*

No less important than the sheer numbers of Social Security cases in the federal courts and the problem of unresolved inter-circuit conflicts, is the well-documented issue of agency nonacquiescence in judicial decisions. Nonacquiescence is a product of conflicting forces which tear the safety net.[52] The SSA is not the only administrative agency engaging in nonacquiescence.[53] However, the enormous influx of benefits cases in the early 1980's attests to the fact that the SSA's nonacquiescence typifies the problems inherent in judicial supervision of congressional enactments which are relegated to administrative agencies loosely organized under the executive.[54]

" 'Nonacquiescence' denotes the deliberate refusal of an administrative agency, exercising adjudicatory authority, to follow relevant judicial precedent

48. Gronda v. Secretary of Health and Human Services, 856 F.2d 36, 37 (6th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); Bauzo v. Bowen, 803 F.2d 917 (7th Cir. 1986); Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986); Powell v. Heckler, 789 F.2d 176 (3d Cir. 1986); Deters v. Secretary of Health, Education and Welfare, 789 F.2d 1181, 1185 (5th Cir. 1986); Parker v. Bowen, 788 F.2d 1512, 1514 (11th Cir. 1986) (en banc); Kellough v. Heckler, 785 F.2d 1147, 1149 (4th Cir. 1986); Razey v. Heckler, 785 F.2d 1426, 1429 (9th Cir.), *modified*, 794 F.2d 1348 (9th Cir. 1986); Lopez-Cardona v. Secretary of Health and Human Services, 747 F.2d 1081, 1083 (1st Cir. 1984); Baker v. Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984).

49. Lindquist v. Bowen, 813 F.2d 884 (8th Cir. 1987), *aff'g* 633 F. Supp. 846 (W.D. Mo. 1986) (certification of a nationwide class allowed though the D.C. Circuit had ruled otherwise in Burns v. United States R.R. Retirement Board, 701 F.2d 189 (D.C. Cir. 1983)).

50. Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986); Polaski v. Heckler, 739 F.2d 1320 (order), *supplemented*, 751 F.2d 943 (8th Cir. 1984), *vacated* 476 U.S. 1167 (1986), *adhered to on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S. 827 (1987); Zblewski v. Schweiker, 732 F.2d 75, 79 (7th Cir. 1984).

51. Letter from Mr. A. George Lowe, Office of the General Counsel, Department of Health & Human Services, to Mr. Dennis Hauptley, Federal Courts Study Committee (October 31, 1989) (in WORKING PAPERS, *supra* note 18).

52. *See, e.g.*, Diller & Morawetz, *Comment: Intracircuit Nonacquicscence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Kubitschek, *supra* note 6; Rubin, *supra* note 6; Schwartz, *supra* note 7.

53. *See, e.g.*, Weis, *Agency Non-aquiescence — Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845, 846-48 (1987) (documenting the National Labor Relations Board's disregard for judges' rulings); Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986) (documenting nonacquiescence practices of the National Labor Relations Board the Occupational Health and Safety Review Commission, and Internal Revenue Service practices).

54. Estreicher & Revesz, *supra* note 52; Maranville, *supra* note 53, at 473 ("SSA has drawn wider attention [than NLRB nonacquiescence]"); Williams, *The Social Security Administration's Policy of Non-Acquiescence*, 12 N. KY. L. REV. 253 (1985); Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111 (1985).

in deciding another matter presenting the same question of law."[55] An agency becomes a mini-government of its own when it takes on the legislative task of rulemaking, the adjudicative task of decisionmaking and law application, and the executive task of paying benefits. When such an agency runs amok, it is difficult for the judiciary to control it, particularly if the executive branch is complicit in the nonacquiescence. Such disregard for the rule of law may take many forms, "run[ning] the gamut from self-conscious, public assertions that the agency refuses to be bound by particular judicial precedent to omission of relevant judicial precedent from agency opinions."[56]

"Formal" nonacquiescence involves the issuance of a public statement explaining the agency's intent to disregard a court's decision on a matter of law.[57] "Informal" nonacquiescence involves silent disregard for the ruling law or for factual distinctions which allow the law to be circumnavigated or repeatedly contested through litigation.[58] The SSA has historically practiced both formal and informal nonacquiescence, most prominently in the early 1980's. The SSA's formal nonacquiescence is accomplished through its publication of quarterly Social Security rulings which dictate action in violation of specific federal court decisions.[59]

The process by which a new law leads to greater litigation is straightforward. Congress passes the law. The SSA, in its implementation, takes an anti-claimant stance. Considerable numbers of applications for benefits are denied, many are challenged in federal courts, and the agency's interpretation is rebuffed. If the agency acquiesces, it then implements the courts' decisions in its future reviews. However, should it choose to disregard such decisions, claimant after claimant, having lost at the agency level of review, will proceed to challenge the individual denial in the more favorable environment of the federal courts.[60]

Such has been the case with Continuing Disability Reviews [hereinafter CDRs]. In 1980, Congress amended the Social Security Act to require periodic review of benefits recipients for continuing eligibility.[61] However, because Congress did not specify a procedure for conducting the CDRs, the new responsibility "gave rise to disputes concerning the procedures and burdens of proof to be used in assessing continued eligibility."[62] One of the most troublesome issues is whether the claimant must make a fresh showing of continuing disability to retain her benefits or whether, in order to achieve termination, the government must show either that there has been medical improvement or

55. Schwartz, *supra* note 7, at 1816.
56. Maranville, *supra* note 53, at 476.
57. *Id.* at 476-77.
58. *Id.* at 480-81.
59. *Id.* at 477.
60. WORKING PAPERS, *supra* note 18, at 301-02.
61. The Social Security Amendments of 1980, Pub. L. No. 96-265, § 311, 94 Stat. 441, 460 (1980) (codified as amended at 42 U.S.C. § 421(i) (1988)).
62. Schwartz, *supra* note 7, at 1817 n.3.

that the severity of her impairment has lessened to the point of benefits reduction. The agency's assertions that the claimant bears the burden of making a de novo showing of disability have resulted in a number of lawsuits,[63] and, ultimately, congressional action.[64]

The SSA also engages in informal nonacquiescence. For the last fifteen years, the SSA has routinely advised ALJs to disregard federal court decisions where they conflict with agency interpretations.[65] Such informal disregard for the rule of law may be more pernicious than formal disavowal, since it is significantly more difficult to identify and more expensive to eradicate.[66] It is tougher to identify because no formal, overt, systemwide edict is issued. Instead, claimants are frustrated on a case-by-case basis, and must individually challenge the decisions. The particularized nature of the corrective process means that many claimants who lack the resources for legal challenge will fall through the net. Informal nonacquiescence costs more in terms of the judicial resources expended to compel the SSA to obey the law in any individual case.

SSA nonacquiescence, the subject of abundant commentary,[67] is problematic for several reasons. First, it caused the explosive growth of Social Security cases before the federal courts.[68] Second, nonacquiescence flouts the rule of law, explicitly undermining the federal courts' ability to make final determinations on matters of law. Since *Marbury v. Madison*,[69] federal courts have derived their power from the functional expectation that a judge is the arbiter of a case, with the correlative ability to render final decisions on points of law which will have precedential value in future cases.[70] If a federal agency, acting under the direction of the executive branch, can disregard or facilely circumnavigate judges' determinations of law, then the entire system of separate powers is destabilized. "That an agency, which acts as judge, jury, and prose-

63. *See, e.g.*, Kuhner v. Heckler, 717 F.2d 813, 815 (3d Cir. 1983) (class action brought by former recipients of disability benefits challenging termination procedures), *vacated*, 469 U.S. 977 (1984); Holden v. Heckler, 584 F. Supp. 463, 466 (N.D. Ohio 1984) (class action raising statutory and constitutional challenges to policies and procedures involved in terminating benefits); Lopez v. Heckler, 572 F. Supp. 26, 27 (C.D. Cal. 1983) (class action challenging agency procedures for terminating disability benefits), *rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated*, 469 U.S. 1082 (1984).

64. *See, e.g.*, Pub. L. No. 97-455, 96 Stat. 2498 (1982); The Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984) (affording claimants a presumption of continuing disability to prevent benefits from being terminated absent findings of medical improvement, improved ability to work through technological advances in treatment, or mistake in the original determination of disability).

65. Maranville, *supra* note 53, at 481 n.23 (citing Office of Hearings and Appeals Handbook §§ 1-161 (1981)); W. FOX, *supra* note 8, at 189-90; J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 239-50 (2d ed. 1985).

66. Maranville, *supra* note 54, at 480-81.

67. *See, e.g.*, Schwartz, *supra* note 7, at 1821 n.15 (citing 10 cases in which the federal courts condemned nonacquiescence by the SSA); *id.* at 1822 n.17 (citing 13 articles criticizing SSA nonacquiescence).

68. WORKING PAPERS, *supra* note 18, at 302.

69. 5 U.S. (1 Cranch) 137 (1803).

70. Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987).

cutor in proceedings before it, should assert the right to disregard the law expounded by an article III court is repugnant to our system of government."[71]

Finally, nonacquiescence results in considerable expense to the litigants, those falling through the torn procedural safety net. It is ironic that a benefits program enacted to help the weak and impoverished should devolve to the point where it punishes intended beneficiaries seeking to vindicate their rights in court. Nonetheless, this is precisely what happens when, despite prior unfavorable rulings, the SSA chooses to continue litigating individual cases. The result is an "inexcusable expense to litigants,"[72] more than 200,000 of whom were wrongly deprived of their benefits during the early 1980's.[73]

More ironically, with a benefits system designed to help the poor, the SSA, through nonacquiescence, punishes the most indigent claimants most severely. Only an estimated seventeen percent of all claimants have the requisite wealth and knowledge of the system to pursue their claims in the federal courts.[74] Since these victims of nonacquiescence almost always win in federal court when they are able to pursue their claims, the SSA's nonacquiescence ends up helping the less needy while victimizing those most deserving of aide.[75]

The irony is only compounded by an accounting of the social costs, since the taxpayer bears both the SSA's litigation expenses and the costs of appeals. When a court decides a point of law and the SSA continues to contest it in individual cases, the courts are forced to individually reaffirm each time. The result is an overburdened judiciary, a more difficult route to a just decision for each claimant, and a higher bill than necessary for the taxpayer.

II.
THE FEDERAL COURTS STUDY COMMITTEE'S PROPOSALS FOR REFORM

Responding to the growth and changing nature of litigation, the Federal Courts Study Committee was created to improve the federal judicial system.

A. The Federal Courts Study Committee

Seeking to address numerous difficulties facing the judiciary, Congress commissioned the fifteen-member Federal Courts Study Committee [hereinaf-

71. Weis, *supra* note 53, at 852.

72. *Id.*

73. WORKING PAPERS, *supra* note 18, at 310 n.70 (citing Schweiker v. Chilicky, 487 U.S. 412, 416 (1988) (SSA "itself apparantly reported that benefits for over 200,000 recipients were wrongfully terminated")).

74. Neuborne, *supra* note 70, at 996 (citing Stieberger v. Heckler, 615 F. Supp. 1315, 1371 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bower, 801 F.2d 29 (2d Cir. 1986)); Social Security Admin., OPERATIONAL REPORT OF OFFICE OF HEARINGS AND APPEALS 30-31 (Sept. 30, 1984).

75. Neuborne, *supra* note 70, at 996-97.

ter the Committee] to provide a comprehensive plan for reform.[76] The Committee released its report detailing "over a hundred recommendations" on April 2, 1990.[77] The Committee's work resulted in two publications, the Report of the Federal Courts Study Committee[78] and the two-volume Working Papers and Subcommittee Reports.[79] Both works contain sections proposing to restructure the Social Security disability process.[80]

The Committee's criticisms of the SSA process are twofold. First, it found the process "vulnerable to unhealthy political control."[81] Second, it criticized the appeal procedure as "cumbersome and duplicative."[82] Although the Committee's proposal to forbid nonacquiescence was unanimous, the proposed reform of the appeals process resulted in a dissenting proposal.[83] Recently, several of the Committee's "noncontroversial recommendations" were implemented, while others await consideration, debate, and possible enactment.[84]

B. The Committee's Recommendations

1. Congressional Action to Prohibit Nonacquiescence

The Committee unanimously recommended that Congress amend the Social Security Act to forbid nonacquiescence.[85] The proposal would "require the Secretary of Health and Human Services [hereinafter the Secretary], in all administrative proceedings, to abide by the holdings of the court of appeals in

76. H.R. REP. NO. 5381, 101st Cong., 2d Sess. 16 (1990) (Federal Courts Study Committee Implementation Act of 1990). The Committee included five federal judges, Judge Joseph Weis, Jr., chair, Judge Jose Cabranes, Judge Levin Campbell, Judge Judith Keep, and Judge Richard Posner, as well as a state supreme court justice, Justice Keith Callow of Washington, an assistant attorney general, Edward Dennis, a former solicitor general, Rex Lee, two private practitioners, Diana Gribbon Motz and Morris Harrell, the general counsel of a state public advocacy program, Vince Aprile II, and four members of congress, Senators Howell Heflin and Charles Grassley, and Representatives Robert Kastenmeier and Carlos Moorhead.

77. *Id.*

78. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter COMMITTEE REPORT].

79. WORKING PAPERS, *supra* note 18.

80. COMMITTEE REPORT, *supra* note 78, at 55-60 (1990) (§ A, Administrative Law Judiciary-Disability Claims); WORKING PAPERS, *supra* note 18, at 285-353. Both the Committee Report and the Working Papers are necessarily vague in their proposals. The Committee Report describes the majority and dissenting proposals to reform the SSA in a scant five pages. Although the Working Papers report is much longer, it concentrates on the current system and its problems before justifying the majority's proposal. Thus it neither describes in detail the majority's proposal nor mentions the dissent.

81. COMMITTEE REPORT, *supra* note 78, at 55.

82. *Id.*

83. *Id.* at 58-59 (dissenting statement by Judge Weis, Committee Chairman, in which Messrs. Dennis and Harrell join).

84. H.R. REP. NO. 5381, 101st Cong., 2d Sess. 15 (1990) (Federal Courts Study Committee Implementation Act of 1990) (examples of changes implemented include the alteration of United States Magistrates' titles to United States Magistrate Judges and increased fees for witnesses and jurors).

85. COMMITTEE REPORT, *supra* note 78, at 59-60.

the circuit in which a claim for benefits under the [Social Security] Act is filed."[86] Under this proposal, the SSA would then be bound in a manner similar to the Internal Revenue Service [hereinafter IRS].[87] Although the IRS's bondage to the laws of the circuit has been without "apparent adverse effect,"[88] the IRS Commissioner claims a "right of non-acquiescence."[89] Thus congressional prohibition of nonacquiescence may not, in itself, close the rent in the safety net. Like the IRS Commissioner, the Secretary might claim a right to nonacquiesce. Furthermore, informal nonacquiescence may persist without cure. If the SSA is willing to disobey the federal judiciary, what is to prevent it from disobeying the federal legislature?

2. The Majority Proposal for Disability Claims

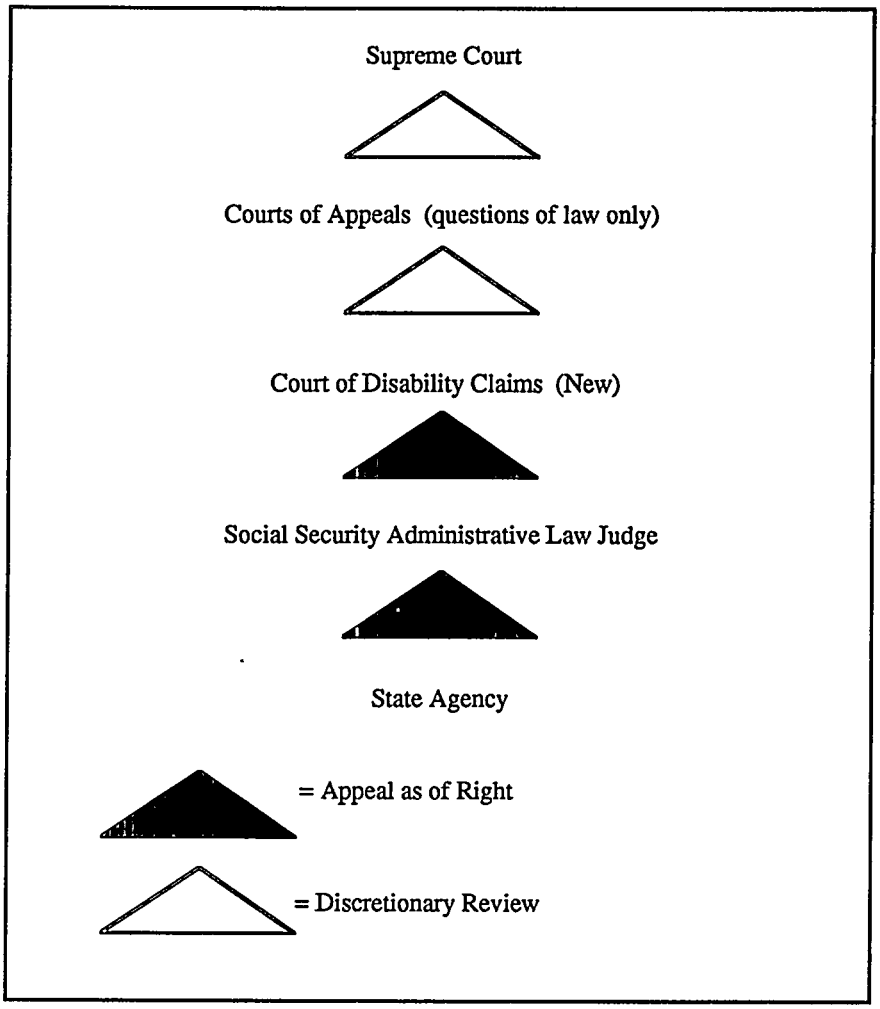
The majority proposes a three-part reform of the benefits administration process which would provide fewer levels of appeal for claimants and would concentrate this review in a new body rather than splitting it between the agency and the federal courts. First, the ALJs would be given "sufficient institutional independence to avoid the reality or appearance of an administrative judiciary under the political control of the Social Security Administration."[90] Second, instead of the Appeals Council, an article I Court of Disability Claims, modeled on the new Veterans Court of Appeals, would hear appeals from disappointed claimants as of right.[91] Third, the proposal would replace the current system of appeals as of right to the federal district courts with limited review of constitutional claims and questions of law by the circuit courts of appeals.[92] Figure 2 depicts the majority proposal.

The majority proposal reflects the Committee's focus on the factual record, which serves as the basis for most individual appeals. Recognizing that issues of fact are at the center of most Social Security benefits disputes, the majority seeks to concentrate adjudicative resources at the administrative level.[93] By restructuring the ALJ hearings and more formally institutionalizing appeals, the majority clearly hopes to reduce the number of appeals to the federal courts.

Such a containment policy is manifest in the limitation of article III judicial review to constitutional claims and questions of law. Unlike the review guaranteed under the present system, "[d]ecisions about the sufficiency of evidence require no review beyond the Court of Disability Claims, and hence are not questions of law under this recommendation. [The Committee] therefore

86. *Id.*
87. *Id.* at 60.
88. *Id.*
89. *Id.*
90. *Id.* at 56.
91. *Id.* Federal Courts are article III bodies; that is, they exercise the judicial power of the United States under article III of the constitution. In contrast, article I courts are empowered by the Congress.
92. *Id.*
93. *Id.*

Figure 2
Majority's Proposed Structure for Review
of Social Security Disability Claims



envision[s] relatively few appeals to the courts of appeals."[94] This vision, however, is pure conjecture. It is simply impossible to judge the effectiveness of a new Article I Court in an agency of such broad scope as the SSA. Indeed, even the model institution, the Veterans Court of Appeals,[95] is too new for meaningful evaluation. Review by the courts of appeals is only appropriate where few cases will be appealed to the federal courts.[96]

94. *Id.*

95. For a fuller discussion of the Veterans Court of Appeals, see *infra* notes 124-32 and accompanying text.

96. *See infra* notes 197-237 and accompanying text.

The majority's proposal is a view from the top. With its condensation of review into three distinct levels, each with basically single-tier review, the majority is clearly geared toward reducing the systemic cost of benefits administration from the current multi-tiered review process. This approach hurts claimants, since fewer occasions for review are offered.

3. *The Dissent's Proposal for Disability Claims*

In his dissenting statement, joined by Messrs. Dennis and Harrell, Judge Weis opposes the majority's suggestion to create an article I Court of Disability Claims, and instead proposes a specialized Social Security Benefits Review Board.[97] Judge Weis also opposes restricting article III judicial review to questions of law, preferring to retain full review on the administrative record in the district courts.[98] The dissent's proposal is depicted in Figure 3.

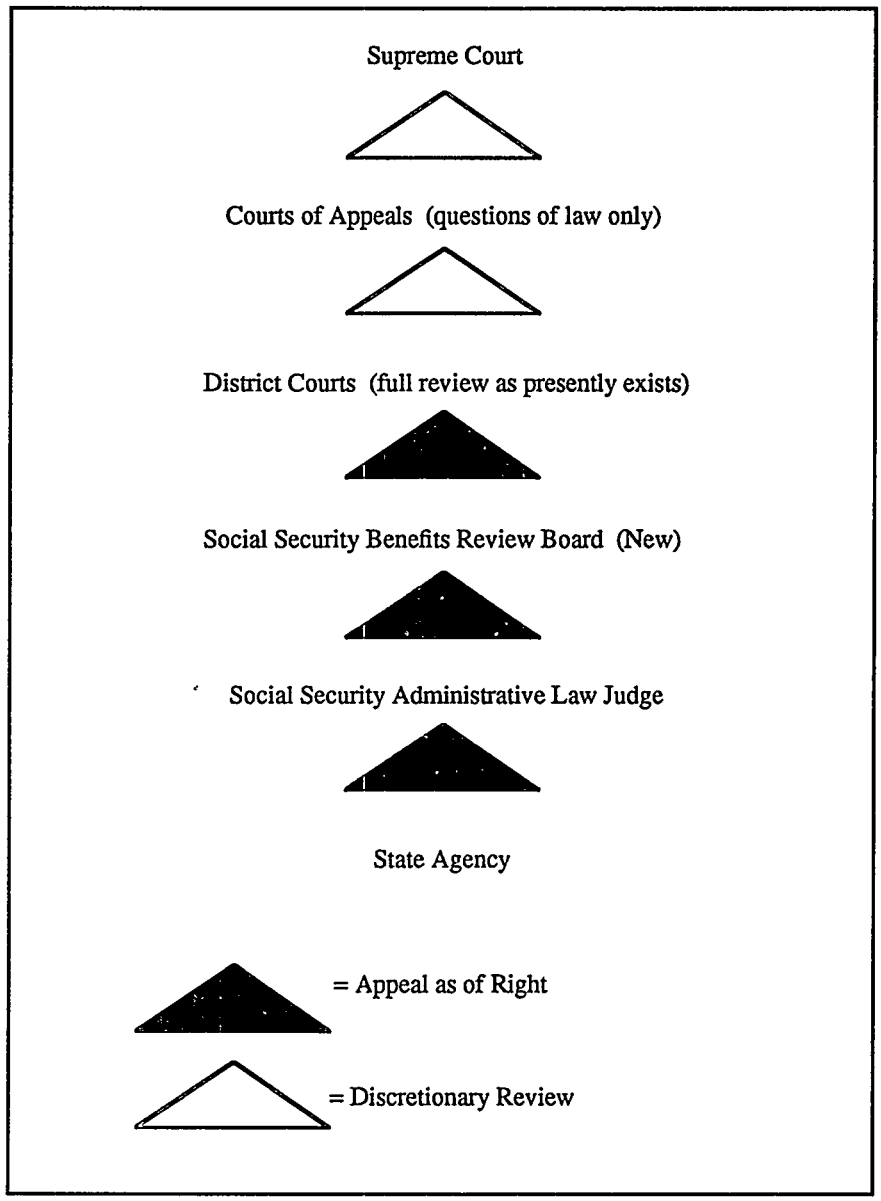
Like the majority, Judge Weis rejects the current Appeals Council, with its discretionary review power, calling instead for a specialized body based on "the administrative entity that reviews findings by ALJs in black lung as well as Harbor and Longshore Workers cases,"[99] which would hear appeals by right of the claimants. The dissent favors such a review board for several reasons. First, "[t]he proposal does not contravene the general policy against creating specialized courts, particularly ones with a very narrow focus."[100] Second, "[e]stablishing a system for administrative appellate review would not increase the number of courts."[101] Third, "[r]eview by a Benefits Review Board could be expected to be less formal and less expensive than traditional court procedures."[102] Fourth, "[t]he Benefits Review Board model has been thoroughly tested."[103] Finally, "[t]he existence of a Benefits Review Board would offer a career track to ALJs to make their positions more attractive."[104]

Judge Weis flatly opposes limiting article III judicial review to questions of law before the courts of appeals, stating that:

> [a]ny proposal for Article III court review must recognize the critical problem of overwhelming caseloads in the courts of appeals. The district courts are also struggling with heavy dockets, but the total number of district judges far exceeds the number of three-judge panels that could be constituted in the appellate courts. Thus, directing appeals to district judges would result in a far lighter burden per judge than providing for initial review in the courts of appeals. . . . .[105]

97. WORKING PAPERS, *supra* note 18, at 58.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 58-59.

Figure 3
Dissent's Proposed Structure for Review
of Social Security Disability Claims



Because Judge Weis favors greater review of disability claims by article III tribunals, the federal courts would hear substantially more claims under his proposal than under those of the majority.

Like the majority, the dissent recognizes that issues of fact are a "critical element" in determining eligibility for Social Security disability benefits.[106] Accordingly, Judge Weis would afford claimants the right to a de novo hearing on the administrative record in the district court.[107] "Thus [the dissent's] proposal would give claimants two opportunities for review on substantiality of the evidence — first in the Benefits Review Board setting, and then in the district court."[108]

This redundant review reflects the dissent's claimant-oriented view of the system. Rather than merely concentrating on the systemic costs of benefits administration, the dissent preserves several layers of review in order to implement a procedural safety net designed for the system's beneficiaries.

III.
EVALUATING THE PROPOSALS FOR REFORM

To adequately examine the Committee's proposals and their probable success, discussion must focus on reform at the agency and judicial review levels. This examination will consider efficiency and the probable costs of the system's administration to both the government and claimants. Consideration of the practicability of the proposed structures is also important. Will they provide a workable method of review or will they instead act to prevent appeals by claimants who have been wrongfully denied benefits? Will they fail to filter out unwarranted claims?

The following analysis will cover the constitutionality of each proposal, as well as the probability that they will provide an adequate secondary safety net. Article I and article III scrutiny, specialized and general tribunals, single- and two-tier scrutiny, and review by district courts and courts of appeals will be compared.

A. Reform at the Agency Level

1. The Constitutionality of the Committee's Proposals

The Constitution requires that a safety net underlie benefits administration, but it does not require that the net be elaborate. Given the Supreme Court's recent administrative jurisprudence, it is highly likely that both the majority and dissent proposals for reforming the SSA would survive constitutional scrutiny. Recent Supreme Court decisions demonstrate a growing deference to administrative adjudication with only minor article III intervention. Though the right to benefits is considered protected by the due process clause

106. *Id.* at 59.
107. *Id.*
108. *Id.*

of the fifth amendment,[109] due process would very likely be satisfied by either proposals' provisions for hearing and appeal.

In *Goldberg v. Kelly*,[110] the Supreme Court held that due process requires a welfare recipient to be afforded "an evidentiary hearing prior to termination [of benefits],"[111] in this case Aid to Families with Dependent Children. Though Justice Brennan, writing for the majority, noted that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them,"[112] he declared that welfare is "not a mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' "[113] The majority proceeded to describe in detail the type of pre-termination hearing required.

The Court elaborated the requirements of due process in *Mathews v. Eldridge*,[114] in which it discussed the constitutionality of Social Security disability benefits terminations. The Court allowed the termination of Social Security benefits after notice and an opportunity for the claimant to reply in writing.[115] Basically, the *Mathews* Court held, 6-2, that although due process concerns were triggered, they did not rise to the level found in *Goldberg*.[116] Instead of specifying a procedure for review, as was done in *Goldberg*, the Court developed a three-part test for considering due process challenges to agency procedures. The *Mathews* test considers: (1) the private interest affected; (2) the risk of error inherent in the existing procedures; and (3) the government's interest in maintaining the existing procedures.[117] This last factor involves consideration of the fiscal and administrative burdens of changing the procedures.[118]

The Committee's proposals certainly meet the due process requirements of *Mathews*. Neither the majority nor the dissent would in any way reduce the scrutiny given by the agency. Rather, both would enhance this scrutiny. In fact, there is unanimous agreement that the independence of ALJs should be increased either by "creating an independent agency in the executive branch to employ all administrative law judges in the federal government"[119] or by "develop[ing] further safeguards within the agency itself, to insulate the administrative law judges' decisions from the influence of agency superiors."[120]

---

109. U.S. CONST. amend. V ("No person . . . [shall] be deprived of life, liberty, or property, without due process of law. . . .").

110. 397 U.S. 254 (1970).

111. *Id.* at 255.

112. *Id.* at 262.

113. *Id.* at 265 (quoting U.S. CONST. preamble).

114. 424 U.S. 319 (1976).

115. *Id.* at 349.

116. It has been suggested, however, that the majority was actually seeking to overrule *Goldberg*. *See* W. FOX, *supra* note 8, at 96.

117. 424 U.S. at 321.

118. *Id.* at 348.

119. COMMITTEE REPORT, *supra* note 78, at 56.

120. *Id.*

In addition, both proposals provide further review of the ALJs' decisions, thus providing a safeguard against unconstitutional property deprivations. After a denial of benefits, claimants under either proposed system may appeal as of right to intermediate bodies and ultimately, to federal courts.[121] Thus, the constitutionality of the committee's recommendations is not at issue.

Finally, the constitutionality of the Benefits Review Board in the context of Longshoreman's benefits has been considered and approved by the D.C. Circuit in *Kalaris v. Donovan*.[122] Therefore, the constitutionality of the dissent's proposal is virtually assured.

2. *The Better Review Forum*

The majority and dissent propose the creation of different bodies to review decisions by the ALJs.[123] A general analysis of agency review systems reveals the superiority of the dissent's proposal for a quasi-independent board over the majority's proposed article I Court of Disability Claims.

The majority seeks to create a new, specialized article I court[124] modeled on the recently created Court of Veterans Appeals.

> The Court of Veterans Appeals has exclusive jurisdiction to review decisions of the top administrative tribunal of the Department of Veterans' Affairs, the Board of Veterans Appeals. Only the claimant may seek review of a decision of the Board, and the court is empowered to affirm, modify, reverse, or remand a decision of the Board as appropriate. The legislation creating the court provides for a limited review of the court's judgments by the United States Court of Appeals for the Federal Circuit. Although the court's caseload can only be estimated at this juncture, the court is expected to receive up to 3,600 cases each year. The cases likely will cover all types of veterans' benefits, such as loan eligibility and educational benefits, but the major issues will concern disability benefits.[125]

Presumably, since the majority does not provide for an intermediate board, the proposed Court of Disability Claims would directly review ALJ decisions. Thus, a layer of review would be eliminated from the current SSA system, with the Court of Disability Claims encompassing the roles of both the Appeals Council and the District Court. Not surprisingly, then, "the final level of administrative review takes on added significance. [The majority] recommendation . . . envisions an independent Court of Disability Appeals that is larger than either the current Appeals Council or the Court of Veterans

121. *See supra* notes 90-108 and accompanying text.

122. 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

123. *See supra* notes 90-108 and accompanying text.

124. *See supra* note 91 and accompanying text.

125. Letter from Esther C. Grant, Secretary to Judge Jonathan R. Steinberg, United States Court of Veterans Appeals to Jane Thieberger, Assistant Dean for Career Planning and Placement, New York University School of Law (October 9, 1990) (on file with author).

Appeals."[126]

The greater size and scope of the Court of Disability Claims would stem from the greater caseload, more elaborate procedures, and geographical diversity of the claimants. "[I]t will be necessary to distribute panels geographically to hear appeals from ALJ decisions within various regions. Geographic distribution is especially important in this context: no class of claimants is likely to find the time, expense, and difficulty of travel more burdensome."[127]

While conceding that article III status would assure the independence and enhance the stature of the Court of Disability Claims, the majority prefers an article I Court.[128] The majority adds to the considerations of geographical distribution the "already overburdened appointments process" of the article III judiciary[129] and Congress' greater flexibility in controlling the size of an article I court.[130]

The dissent seeks to substitute a Benefits Review Board for the Appeals Council. This Board would be based on the body reviewing claims under the Longshoreman's Act.[131] Unlike the article I Court of Veterans Appeals, the Benefits Review Board "is an independent quasi-judicial body, with exclusive jurisdiction to consider and decide appeals raising substantial questions of law and fact, taken by any party from decisions and orders relating to claims arising under the [Black Lung] Act."[132] Its independence is assured: "[t]he Secretary of Labor has no authority to oversee the [Benefits Review] Board's decision-making process, nor is it empowered to review decisions and orders rendered by the Board, although the Board relies very much on the Department of Labor for its effective day-to-day operations."[133] As to its power and scope of review,

> [t]he [Benefits Review] Board has authority to adjudicate "private rights" in resolving entitlement issues, to interpret the Act and its implementing regulations, and to resolve issues concerning the validity of regulations promulgated by the Secretary of Labor. The Board does not have the power to subpoena witnesses or to punish for contempt, and the Board must resort to an appropriate district court to have its orders enforced. . . . In resolving a case on appeal, the Board may affirm, reverse, remand, vacate, modify, dismiss, or perform a combination of these dispositions.[134]

---

126. WORKING PAPERS, *supra* note 18, at 341 (citations omitted).

127. *Id.* at 342.

128. *Id.* at 343. For a full discussion of the differences between article I and article III tribunals, see *infra* notes 173-182 and accompanying text.

129. WORKING PAPERS, *supra* note 18, at 343.

130. For a fuller comparison of article I and article III courts, see *infra* notes 175-184 and accompanying text.

131. *See supra* notes 99-104 and accompanying text.

132. Ramsey & Habermann, *The Federal Black Lung Program — The View from the Top*, 87 W. VA. L. REV. 575, 590 (1985) (citation omitted).

133. *Id.* at 591 (citations omitted).

134. *Id.* at 591-93 (citations omitted).

Decisions of the Board are "appealable to the appropriate United States Court of Appeals."[135]

The Benefits Review Board may not be entirely independent, however, because the D.C. Circuit has held that members of the existing Benefits Review Board are removable at the discretion of the Secretary of Labor.[136] If the SSA Benefits Review Board duplicates the institution created under the Longshoreman's Act, the members will not be fully independent of the Secretary of Health and Human Services.[137]

Evaluation of review systems begins with an overview of four basic goals: accuracy, efficiency, acceptability, and consistency.[138]

> The accuracy goal reflects the need to ascertain the truth. The goal of efficiency encompasses a desire to minimize not only the monetary costs to the parties and to the public, but also the costs of the waiting time and the decisionmakers' time. The acceptability goal recognizes the importance of having a procedure that the litigants and the general public perceive as fair.[139]

Consistency "overlaps partly, but not entirely, with the other three."[140] Since inconsistent decisions result in a public uncertain as to how to plan for the future, consistency may be subsumed "within the general rubric of acceptability [to the public]."[141] However, since "[a] benefit of consistency is conservation of judicial and administrative resources,"[142] consistency also falls under the rubric of efficiency. The independent importance of consistency, however, distinguishes it. "Consistency assures equal treatment of similarly situated litigants."[143]

At least three of these four factors favor the dissent's proposal over that of the majority. In terms of accuracy, the more redundant the review given, the greater the likelihood of obtaining a true picture of the facts. Since the majority proposes collapsing administrative appellate and district court review into one stage, it eliminates the beneficial redundancy of the current system.

---

135. *Id.* at 593 (citation omitted).

136. Kalaris v. Donovan, 697 F.2d 376, 393 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

137. Congress may stipulate otherwise, however. In *Kalaris*, the court noted that Congress considered appointment of Board members for fixed terms with protection against removal, "but did not adopt the fixed term proposal." *Id.* at 390.

138. *See* Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986).

139. *Id.* (citations omitted); *see also* Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1, 14-15 (1986) (citation omitted) ("[E]fficiency simply means that, other things being equal, the process should cost as little as possible and involve as little delay as possible. . . . [A]ccuracy . . . requires the end product of agency decisionmaking to be faithful to the statutory mandate at issue. . . . [A]cceptability . . . places value on the degree to which parties in a proceeding perceive the process to be fair.").

140. Legomsky, *supra* note 138, at 1313.

141. *Id.*

142. *Id.*

143. *Id.* at 1314.

In contrast, by substituting the Benefits Review Board for the Appeals Council, the dissent's proposal would result in a greater likelihood of accurate results.

Efficiency also favors the dissent. Since both proposals call for oral argument with counsel provided at the appeals stage, something which rarely occurs during current Appeals Council review, costs will increase beyond the status quo. Yet, although both proposals are more expensive than the current system, it is cheaper to establish an informal board such as the Benefits Review Board than to create a new article I court with formal procedures. In addition, the likelihood of more accurate determinations within the agency means fewer occasions for review by either an article III court or the specialized article I court, which lowers the overall cost of the system. Efficiency is greater when there are two layers of agency review than when ALJ decisions are immediately appealed to an extra-agency court.

The goal of acceptability is also more likely to be met by the dissent's proposal. First, the extra layer of review prior to appearance in court is easier on the claimants, who, in the Court of Disability Claims, would face a more daunting, procedurally formal process. Second, claimants, as well as the general public, would favor a system which promotes the aforementioned goals, accuracy and minimal expense. Increased accuracy and minimized costs are much more likely where adequate appellate review takes place within the agency, thereby reducing the caseload of the federal courts.[144]

Finally, the combination of the Benefits Review Board and de novo review on the administrative record, as of right, by the district courts provides more assurance of a just result than review by a specialized article I court carrying the badge of the Social Security Administration. Given the response to the Reagan Administration's policy of nonacquiescence, namely "harsh criticism from many members of Congress, Federal judges and governors,"[145] it seems to be generally acknowledged that specialized courts may be coopted by the political branches for effectuating policy. Granted the existence of such a perception, it makes little sense to concentrate the resources required for appellate review in a specialized article I court when additional article III judicial review will be needed to legitimize the system's fairness. The Benefits Review Board provides a less expensive and less restrictive alternative.[146]

It is unclear which proposal better serves the goal of consistency. Consistency will remain a hobgoblin for the SSA regardless of the choice of review

144. However, "[t]he best indication [of acceptability] may be the frequency with which review is sought by those with an opportunity to demand it." Cass, *supra* note 139, at 16. If this is true, any judgment of the proposed systems is pure conjecture. Professor Cass suggests that high rates of review may indicate high measures of acceptability. *Id.* This view would indicate that the current system is highly acceptable, a proposition contradicted by recent history.

145. Pear, *Culling of U.S. Disability Rolls is Under Way*, N.Y. Times, May 14, 1986, at A24, col. 1.

146. *See infra* notes 173-81 and accompanying text.

systems. In the 1980s, the SSA used consistency as a justification for nonacquiescence, citing the need to apply uniform standards throughout the country as a means to avoid unfavorable decisions in certain circuits. For example, the Acting Commissioner testified before Congress in 1984 that:

> nonacquiescence is essential to ensure that the agency follow its statutory mandate to administer the Social Security program 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.[147]

Technically, the current system, as well as either of the proposed systems, should promote consistent rules within the agency.

The article I court system might appear better equipped to provide consistency than the other two systems. If the court is truly independent of political control, and if the quality of the decisions is of an acceptable caliber, then it is unlikely that reversals by the circuit courts of appeals and splits among these circuits would create disuniformity. The majority clearly envisions an improvement:

> By mixing independent and political review in an alternating fashion, the current disability claims system produces conflicts between ALJs and SSA, ALJs and the federal courts, and SSA and the federal courts. The centralized heirarchy [sic] created by our proposal should be more effective at resolving such disputes than the current system. Moreover, this dispute-solving capability can be enhanced by legislation specifying the relative authority of SSA and the Court of Disability Appeals regarding such matters as statutory construction and interpretation of Social Security rules [and] regulations.[148]

Unfortunately, this contribution to consistency may rest on illusory grounds. First, it is unclear how the majority's proposed system would be more centralized than either the current system or the dissent's proposed system. All three have single, superior bodies reviewing the ALJs, although, admittedly, the majority's high body is a court. Nonetheless, if the Court of Disability Claims is as independent as the majority would hope, then no single adjudicatory authority administering unified decisions remains within the SSA. The reconciliation of various ALJ decisions is currently performed by the Appeals Council. Under the majority's proposal, the SSA would produce disparate decisions by the ALJs, with the separate Court of Disability Claims correcting them individually.[149]

---

147. *Social Security Disability Insurance Program: Hearing Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 105-06 (statement of Commissioner Martha A. McSteen), *quoted in* Estreicher & Revesz, *supra* note 52, at 695.

148. WORKING PAPERS, *supra* note 18, at 345-46.

149. The SSA itself might prefer a system in which it is allowed to reconcile such disparity prior to external judicial intervention.

Second, since all three systems, proposed and current, ultimately assign decision making authority to the federal courts, none of them assures consistency barring appeal to the Supreme Court. Instead, the law is interpreted differently in the geographic regions correspondent to the federal circuits.

Third, the SSA's preoccupation with consistency is suspect. Its equitable justification for nonacquiescence itself manifests only a pretense of achieving consistency, since vertical equity is obliterated.

> Because one set of rules obtains in the agency and another in the court of appeals that will review the case, nonacquiescence creates distinctions between claimants who are able to appeal to the circuit courts and who will ultimately prevail against the agency, and those who are unable to appeal and will therefore be denied benefits.[150]

How then can the SSA claim to flout the law of the circuit in the name of fairness?

One final word on reform of the claims process at the agency level is merited. Neither the majority, nor the dissenting proposal provides any structural guarantee that nonacquiescence will be avoided. If the ALJs are persuaded to actively deny claimants' benefits or terminate recipients,[151] nonacquiescence will still occur. No amount of review will save those claimants who are unable to appeal to the federal courts, due to either limited resources, or sheer exhaustion from fighting a hostile system. A truly intransigent SSA bent on such a policy will not be stopped, either by an independent Article I court or by a reviewing board. Although its decision making process is untouchable by the Secretary, the similarity of the dissent's Benefits Review Board's to the Appeals Council and its placement within the agency raise the specter of its being subject to political pressure, as does the susceptibility of its members to removal at the Secretary's discretion. Essentially, neither system prevents a politically induced breakdown in law from damaging the system's integrity. Although the safety net's safety net may be patched, neither proposal renders it tear proof.

3. *Summary: The Better Proposal versus the Current System*

Table 1 summarizes the comparison between the majority's proposal for a Court of Disability Claims and the dissent's proposal for a Benefits Review Board. The goals of accuracy, efficiency, acceptability, and consistency favor the dissent's proposal, which preserves review within the agency and externally, in an independent forum. The Court of Disability Claims is a widely cast safety net because it subsumes the duties of the Appeals Council and the

150. Estreicher & Revesz, *supra* note 52, at 695 (citing H.R. REP. No. 618, 98th Cong., 2d Sess. at 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3061).

151. Recall that this persuasion could come either informally, through coercion applied by the Secretary, or formally, through restrictive regulations promulgated either by the Secretary or by an Appeals Council reconstituted as an advisory board. *See supra* notes 52-75 and accompanying text.

federal district court. However, the majority uses a net with a loose weave, since there is no redundant article III review. The dissent's net, less widely cast, but with the narrowed weave of district court de novo review, is superior.

TABLE 1:
COMPARING PROPOSALS FOR AGENCY REVIEW

Court of Disability Claims	Benefits Review Board
Advantages:	Advantages:
1. May be geographically diverse.	1. Preservation of administrative review assures accuracy.
2. More streamlined appointments process	2. Less formal procedure results in reduced costs to litigants.
3. Congress has greater flexibility.	3. Less expensive to maintain.
4. Provides for uniformity of law.	4. Provides for a uniform statement of the law at the agency level.
5. Elimination of a layer of review saves money.	
Disadvantages:	Disadvantages:
1. Cost benefits may be slight.	1. May be subject to some political control.
2. May be subject to political influence.	2. Consistency still subject to the laws of the circuit.
3. Elimination of a layer of review may hinder accuracy, acceptability.	3. Provides no absolute guarantee against SSA nonacquiescence.
4. Consistency still subject to the laws of the circuit.	
5. Provides no absolute guarantee against SSA nonacquiescene.	

The majority's proposal, with its emphasis on systematic efficiency, is harder on claimants, with its reduced accuracy, and its single, and potentially less independent court. It is less effective than the current system in perpetuating the goals of the SSA.[152] In contrast, the dissent's preservation of review at the agency level, with review as of right to the Benefits Review Board, retains the current system's two-tiered review at the agency level, while improving the agency's reviewing institution.

B. Reform at the Level of Judicial Review

A complete comparison of the two proposals requires a second look at the majority's proposal for an article I Court of Disability Claims. This new court subsumes the current system's body for administrative review, the Appeals Council, and the current system's primary independent reviewer, the district court. The article I court examines the case, is supposed to be independent, and is reviewable by a court of appeals. Thus, after initial constitutional scrutiny, this discussion will focus on the primary reviewer in both proposals, confronting the issues of article I versus article III review and specialized versus generalized adjudication. Next, comparisons of district court and court of appeals scrutiny, and single- and two-tier review are necessary to determine the sufficiency of article III review in each proposal. Then, overall conclusions may be drawn regarding the differing procedural safety nets.

152. *See supra* notes 8-12 and accompanying text.

1. The Constitutionality of the Committee's Proposals

As with the proposed reforms at the agency level, it is highly likely that both the majority's and the dissent's proposal for reforming judicial review of the benefits process would survive constitutional scrutiny. The dissent's proposal essentially retains the current system's supervision by the federal courts. Although it limits the jurisdiction of the courts of appeals to questions of law and constitutional claims, the availability of full district court review on the administrative record preserves the system's constitutionality. In fact, as the majority notes in its constitutional analysis, discretionary review by a court of appeals should suffice.[153]

Though it restricts the federal courts' participation in the administration of government benefits, the majority's proposal would also survive constitutional scrutiny. As noted by the Committee,[154] *Commodities Futures Trading Commission v. Schor*[155] governs the constitutionality of the majority's proposed congressional delegation of adjudicative power to an article I Court of Disability Appeals. In *Schor*, the Court determined that the delegation to the Commodities Futures Trading Commission [hereinafter the Commission] of the power to adjudicate common law counterclaims filed in administrative proceedings was constitutional.[156] Writing for the majority, Justice O'Connor found three factors determinative of the constitutionality of such delegation:

> [First,] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercised the range of powers normally vested only in Article III courts, [second,] the origins and importance of the right to be adjudicated, and [third,] the concerns that drove Congress to depart from the requirements of Article III.[157]

The Committee correctly concludes that its proposal satisfies these requirements.[158]

In examining the extent to which the essential attributes of Article III judicial power had been retained by the federal courts, the *Schor* Court looked to the scope of jurisdiction exercised by the Commission, the power of the Commission to enforce its orders, and the scope of the reviewing courts' power.[159] Although the Court of Disability Claims and the Commission both deal with a " 'particularized area of law,' "[160] the ability of the proposed Arti-

153. *See supra* note 109 and accompanying text.
154. WORKING PAPERS, *supra* note 18, at 337-40.
155. 478 U.S. 833 (1986).
156. *Id.* at 855-56.
157. *Id.* at 851.
158. *See* WORKING PAPERS, *supra* note 18, at 337-40.
159. *Id.* at 338.
160. 478 U.S. at 852 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

cle I disability claims court to enforce its decisions without an Article III court order is a major distinction between the two. The Committee brushes this aside, however, saying, "it is difficult to see much importance in this fact; aggrieved individuals may seek review in the courts of appeals, and in other cases the agency simply terminates benefits without need for any further assistance from the courts."[161] Although this gap may be constitutionally insignificant, it forces the courts of appeals to shoulder the burden of initial Article III review, and the limits of such courts' dockets may forestall effective appellate intervention. Furthermore, the ability of the agency to "simply terminate benefits without . . . assistance from the courts" accounts for the problems associated with nonacquiescence.

The majority shows more concern with the highly circumscribed role of Article III review that is proposed. Unlike *Schor*, in which the reviewing court could examine the Commission's factual determinations under a "weight of the evidence" standard,[162] the majority proposes to limit such review to questions of law and constitutional claims. In support of the constitutionality of its proposal, the majority cites *Thomas v. Union Carbide Agricultural Products Co.*,[163] where the Court upheld Congress' delegation of judicial power to an arbitrator subject only to review for "fraud, misrepresentation, or other misconduct."[164] Since this arrangement is more restrictive than the majority's proposal, the limitation on review of the facts is not per se unconstitutional.[165]

With regard to the right being adjudicated, the fact that it is a public right suggests that delegation to an Article I forum is constitutionally permissible. A public right involves an entitlement granted by the legislative or executive branch whose resolution can be conclusively decided without judicial intervention.[166] Social Security is a public right since it is granted by Congress, and congressional action governs its administration. A private right involves liability among individuals.[167] Even the liberal wing of the Court, though it dissented in *Schor*, has acknowledged that the core of Article III power is the private dispute.[168] "[S]ince [an SSA adjudication] involves a claim by an individual against the government arising from a public regulatory scheme, and the Court has recognized that Congress has broad power to structure the adjudication of such rights,"[169] Congress may validly delegate adjudicatory authority to a non-Article III body.

The majority finds no problems with regard to the third factor in *Schor*,

161. WORKING PAPERS, *supra* note 18, at 338.

162. *See* 478 U.S. at 853.

163. 473 U.S. 568 (1985).

164. *Id.* at 573-74 (quoting section 3(c)(i)(D)(ii) of the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136a(d)(1)(C)(ii)).

165. *See* WORKING PAPERS, *supra* note 18, at 339.

166. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982).

167. *Id.* at 69-70.

168. *Id.* at 70.

169. WORKING PAPERS, *supra* note 18, at 339.

namely congressional motivation for the delegation of adjudicatory power. The Committee cites two policy reasons for such delegation: "concern that disability cases would overload the judicial system and the need to *strengthen* the disability determination process by making administrative review more independent."[170] Although the current Court would probably be inclined to agree, given its approval of congressional initiatives which trim the dockets of the federal courts,[171] the countervailing policy concern of assuring that a neutral body would have adequate opportunity to prevent the type of runaway agency actions seen in the 1980s remains unaddressed.[172]

2. Article I versus Article III Review

The most important characteristic of an Article III judge is her independence, guaranteed by life tenure and an irreducible salary.[173] Such independence assures that these judges are free to oppose the political branches whenever actions are taken against or outside of the law. In contrast, Article I judges generally sit for a fixed period of time, with salaries subject to change during their tenure.[174] The majority notes the importance of independence to its proposal: "Once Article III judicial review is limited, independent administrative review becomes imperative, not only to ensure fairness for individual claimants, but also to make limited judicial review workable."[175]

Considering an Article I court in an analogous context, the Immigration and Naturalization Service [hereinafter INS], Professor Legomsky has noted three advantages: maximal congressional flexibility, congressional ability to limit salaries in times of budgetary austerity, and the ability of "an article I tribunal [to] smooth the transition to a specialized court by making politically more feasible the initial appointments of those present immigration judges and [Board of Immigration Appeals] members who do not meet the standards for article III judges."[176] Professor Legomsky's analysis applies to the SSA because both the SSA and the INS are federal administrative agencies charged with processing a high number of claims involving federally granted public rights.

However, each of the above advantages can also be regarded as a disadvantage. The flexibility inherent in a congressionally mandated adjudicatory

170. *Id.* at 340 (emphasis in original).

171. For example, in Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), the Court upheld a Congressional scheme delegating the ability to hear state law claims to an agency.

172. *See supra* notes 39-60 and accompanying text.

173. U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.").

174. For example, judges on the article I Court of Veterans Appeals sit for 15-year terms. *See* Letter from Esther C. Grant, *supra* note 125 (discussing the United States Court of Veterans Appeals).

175. WORKING PAPERS, *supra* note 18, at 342.

176. Legomsky, *supra* note 138, at 1396.

authority is inherently destructive of independence. "At some point in the process there must be judges who are free of, and who are perceived to be free of, the temptation to succumb to political or economic pressure."[177] Further, the quality of the tribunal will determine the quality of the decisions rendered. If the Court of Disability Claims is to succeed in relieving the inefficiencies of the current process, the judges seated on it must be of the highest caliber. "The lesser prestige and the lesser security of an article I judgeship would hamper achievement of that goal."[178] Finally, if the article I status of the Court of Disability Claims would allow membership of those who would not be qualified to sit as article III judges, then it cannot be said to enhance the present system.

The majority bases its reasons for proposing an article I court more on negative statements about the prospects for innovating an article III tribunal than on positive comments about article I review. Indeed, the committee concedes that "Article III status would enhance the independence and stature of the Court of Disability Appeals and obviate any concerns over the constitutionality of limiting review by the courts of appeals."[179]

Aside from the aforementioned flexibility attribute, the majority would apparently prefer article I status to protect the "way Article III status is perceived" and to avoid burdening "an already overburdened appointments process."[180] The first objection reflects a general fear on the part of the government that expansion of the article III judiciary will result in a perceived dilution in the quality of those on the bench,[181] a charge which is speculative at best. The second objection may reflect the difficulty of making judicial appointments during periods when the two political branches are dominated by different parties.

If the majority proposal is adopted, the Court of Disability Claims will result in a system that is more expensive to taxpayers than either the current system or the one proposed by the dissent. This conclusion is based on the fact that salaries paid to the judges of the Court of Veterans Appeals are equal to those paid to article III judges.[182] Assuming that an article I judge under the majority proposal would spend the same amount of time on each case as a district court judge, there would be no immediate savings incurred by placing the appellate body under article I. In contrast, the current system filters out a number of cases at the Appeals Council level, and the dissent proposes the implementation of an improved intra-agency review mechanism which is still

177. *Id.*

178. *Id.*

179. WORKING PAPERS, *supra* note 18, at 343.

180. *Id.*

181. *Id.* at 94-102 (noting various concerns with regard to increasing the size of the judiciary, such as strains on the appointments process, a decline in prestige, a fear of increased bureaucracy, a potential for additional uncertainty in the law due to more opinions expressing different views, and a decline in familiarity and collegiality among the judges).

182. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365, 373 (1989).

cheaper than an article III hearing. With concentrated review at the article I stage, the majority proposal exposes a greater number of cases to more expensive review than either the current system or the dissent proposal.

With no absolute or compelling advantages, there is no reason why an article I court should hear all appeals of ALJ decisions. The flexibility noted by the majority is problematic since it undermines independence. The minor advantage of expedited appointment, provided there is a divided government, is ancillary. Since a layer of review is being eliminated from the current system, and since the first layer of independent judicial review takes on added importance because later review is limited to questions of law and constitutional claims, the advantages of article I adjudication do not substantially outweigh the disadvantages of review by an article III court. Thus, the majority's proposal is no better than the present system. In fact, with respect to independence and cost, it is worse.

3. Specialist versus Generalist Review

In addition to the issue of article I versus article III review, the Committee's two proposals force a comparison of specialist versus generalist review. The majority proposes to vest primary review in a single, specialist court which is devoted to disability claims. The dissent seeks to retain the involvement of the generalist federal district courts after less formal review within the agency. Establishing a specialized court sacrifices a generalist perspective for a policy favoring better understanding of the subject matter. Specialized tribunals also promise greater efficiency than adjudication in generalized forums, and uniformity of decisions. Therefore, the procedural safety net might be more sensitive to those whom it is supposed to save.

"Perhaps the dominant rationale for creation of specialized administrative courts has been the notion that review of highly technical administrative decisions requires a better grasp of the subject matter than can be expected from a generalist judge."[183] A court that deals with one specific area of law is bound to understand the intricacies of that area better than a general trial court. Because Social Security Benefits law is complicated and intricate, a specialized tribunal might deliver a higher quality of adjudication.[184] First, the courts would be made up of judges already experienced in such law. Second, the courts' resources would be devoted to the practice and study of such law. Third, as cases progress through the courts, the judges' expertise would continue to grow and develop.

However, what is advantageous in terms of specialized knowledge may become disadvantageous when a more generalized perspective is lost. "A legal generalist brings to the bench a greater ability to analogize to other areas of the law, to find solutions in those areas, and to approach specific problems

183. Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 67 (1975).

184. *See supra* notes 15-26 and accompanying text.

with fewer preconceptions."[185] Such insight is relevant in Social Security benefits cases, where the law is intricate, but where external, common law solutions may be required to work through changes in legislation. One example of this is the Second Circuit's innovation of the treating phsician rule, a response to the SSA's tendency to ignore physician's reports in CDRs.[186] The Second Circuit curtailed this practice by instituting strict guidelines not present in the text of the statute. A specialized tribunal might be more likely to adhere to the minimal text of the statute, as did the Appeals Counsel in such cases, rather than elaborating the law as did the Second Circuit.

Of course, generalist review does not preclude the use of specialists.[187]

> Perhaps the most valuable property of specialized expertise is its capacity to be transmitted. Expert witnesses in judicial trials assist lay jurors in performing their fact-finding mission. Expert witnesses testify before legislative committees to help lawmakers discharge their policy making functions. Expert consultants make recommendations to governmental agencies and commissions.[188]

Therefore, a specialized tribunal is not necessary to make use of expert knowledge in cases involving disability benefits review. In fact, under the dissent's proposed structure, the Benefits Review Board would provide the generalist district court with a specialized perspective. "By drafting carefully reasoned opinions, [expert administrative tribunals] can communicate to the reviewing court any special insights that will aid the resolution of an individual case. Generalist review can thus be seen as an instrument for combining the joint thinking of generalists and specialists."[189]

Efficiency is another factor which, upon examination, disfavors specialized forums. It might seem that a review system which substitutes a single, specialized forum for an administrative review body and a dispersed federal court review process would decrease the costs associated with duplicative review involving article III courts. This assumption is questionable due to the increased pressure placed upon a court which must act as the chief administrative review mechanism as well as a filter for article III review.

As previously stated, it is imperative that the Court of Disability Claims perform the dual role adequately, since it will replace two tiers of review in the current system. It must interpret the Social Security law and apply it to the facts of individual cases in such a way that most of these cases are not later appealed. For such judgments to stand without appeal, the court must have

185. Legomsky, *supra* note 138, at 1389 (citation omitted).

186. *See* Note, *The Treating Physician Rule: Morgan Presumption in Social Security Disability Insurance and Supplemental Security Income Cases*, 17 N.Y.U. REV. L. & SOC. CHANGE 303 (1990).

187. Legomsky, *supra* note 138, at 1390 ("Generalist review [does not] waste the knowledge of the specialist.").

188. *Id.*

189. *Id.*

high caliber judges, appear independent, and be able to meet the geographically diverse needs of the claimants, which are currently being met by the district courts. All of these are expensive propositions.

As already noted, the Court of Veterans Appeals, the majority proposal's model, pays its members salaries equal to those of the generalist article III judges. If Congress pays less to judges on the Court of Disability Claims, it will risk reducing the quality of applicants. Obtaining high caliber judges means offering a salary approaching that of article III judges. In the analogous immigration context, the problem is described as follows:

> If the new judges are paid appreciably less than the article III judges they replace, judges of article III caliber will be difficult to attract. In an area in which important individual interests are at stake, serious questions as to both the actual and the perceived quality of justice would arise. Conversely, if the salary levels of the new judges approach those of their article III counterparts, the costs of the new system would be astronomical.[190]

Welfare benefits are individual interests as "important" as the rights to citizenship and residency, since they provide subsistence for millions of elderly and/or disabled Americans. Accordingly, Professor Legomsky's call for a high quality judiciary, despite its attendant high cost, applies to the SSA.

Independence, a need that has already been discussed,[191] is another expensive trait. For a court to be independent, the salary must be high enough to guarantee against outside influence such as graft. Salaries must also be protected from reduction so as to protect judges from congressional pressures. It is in this way that the Constitution provides independence to the article III judiciary. Accordingly, the Court of Disability Claims' judges may have to be paid at a level commensurate with their article III counterparts. If this is so, it is unlikely that the creation of a Court of Disability Claims will result in substantial savings.

The majority acknowledges that the Court of Disability Claims will also have to meet the geographically diverse needs of claimants nationwide. "Geographic distribution is especially important in this context: no class of claimants is likely to find the time, expense and difficulty of travel more burdensome."[192] Geographic dispersion means that the Court of Disability Claims will have to be considerably larger than its model, the seven-member Court of Veterans Appeals.[193] Given the considerable expense of establishing and staffing a nationwide court system, the savings of the specialized court appear marginal.

Specialized tribunals are usually billed as solutions to the problems of

190. *Id.* at 1391 (citation omitted).

191. *See supra* notes 173-74 and accompanying text.

192. WORKING PAPERS, *supra* note 18, at 342.

193. *See* Letter from Esther C. Grant, *supra* note 125 ("[t]he court is authorized to have at least three and not more than seven judges").

nationwide disuniformity and the correspondent uncertainty in administrative law. "The most significant advantage of centralized appellate adjudication is uniformity."[194] Indeed, uniformity has been cited by the SSA as a goal.[195] But, as the majority explicitly recognizes,[196] the aforementioned size and geographical dispersion of the Court of Disability Claims is likely to result in disuniformity. Although the entire committee proposes legislation to mandate agency obedience to circuit court decisions, inter-circuit conflicts are bound to continue under either proposal, except where the Supreme Court intervenes. Therefore, article I review is not superior to article III review in this context.

4. District Court versus Court of Appeals Review

Having discussed the differences between review within the agency and review in an article I forum, and the differences between generalized article III review and specialized article I review, this Note will now examine the differences between article III review in the district courts and in the courts of appeals.

In a study commissioned jointly by the Administrative Conference of the United States and the Commission on Revision of the Federal Court Appellate System, reprinted in the *Columbia Law Review*, Professors Currie and Goodman discuss the optimal forum for reviewing administrative action.[197] Their analysis contrasts single- and two-tier systems of review. A single-tier system may require review by district courts or courts of appeals. Two-tier systems may comprise either mandatory or discretionary review at the second level.[198] The current system of benefits review is a mandatory, two-tier review scheme wherein claimants may appeal adverse decisions as of right from the district courts to the courts of appeals.[199] The majority proposes a single-tier review scheme where questions of law may be reviewed as of right by the courts of appeals.[200] The dissent proposes two-tier review with de novo review as of right to the district courts and discretionary review by the courts of appeals of questions of law.[201] Professors Currie and Goodman, though generally favoring direct review to courts of appeals, would favor the dissent's proposal in the SSA context.[202] This Note will first compare the district courts and the courts

194. Legomsky, *supra* note 138, at 1392 (citing SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 246 (1981); *see also* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 183 (1973); Levinson, *A Specialized Court for Immigration Hearing and Appeals*, 56 NOTRE DAME L. REV. 644, 653 (1981); Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 971-73 (1971).

195. *See supra* note 147 and accompanying text.

196. WORKING PAPERS, *supra* note 18, at 342 (noting "The geographic division of the Court may . . . result in inconsistencies between regions.").

197. Currie & Goodman, *supra* note 183.

198. *Id.* at 7-23.

199. *See supra* note 38, accompanying text, and Figure 1.

200. *See supra* note 92, accompanying text, and Figure 2.

201. *See supra* notes 97-108, accompanying text, and Figure 3.

202. Currie & Goodman, *supra* note 183, at 23-27.

of appeals, and then single- and two-tier review.

a. District Courts versus Courts of Appeals

There are four advantages to review of agency action by district courts instead of courts of appeals: (1) geographic dispersion, which is more convenient and less expensive for claimants;[203] (2) more efficient use of judicial resources;[204] (3) "the greater flexibility with which [the district courts] can be expanded to meet rising caseload demands;"[205] and (4) the superior ability of the district courts to take new evidence at the time of review.[206] In contrast, "the great advantages of review in the courts of appeals [are] its capacity, or perceived capacity, for superior decisionmaking and its ability to develop and maintain a uniform and coherent case law for a large geographical area."[207]

A convenient forum is important to assure that the expense of litigation remains within the reach of claimants seeking review.[208] Since district courts sit in many more cities than do courts of appeals, they provide greater access for the litigant of modest means.

District courts also provide a more economical allocation of judicial resources than do courts of appeals. Review in the district courts reduces from three to one the number of judges required per case. It is simply wasteful to use a three-judge panel to consider a case when a district court can handle it using a single judge.[209] However, since the tribunals conduct different kinds of hearings, this does not mean that district court review will result in a two-thirds savings over court of appeals review. First, the courts of appeals decide cases on the record, without a full hearing. Also, courts of appeals, hearing cases as a three-judge panel, can process individual cases more quickly than can single district court judges.

"A third advantage of the district court over the circuit court, going to both efficiency and to quality, is the greater flexibility with which it can be expanded to meet rising caseload demands."[210] This type of flexibility was also sought by the majority in its proposal to establish the article I Court of Disability Claims.[211] Whereas the district courts are permitted to take differ-

203. *Id.* at 7-8.
204. *Id.* at 9.
205. *Id.*
206. *Id.* at 10-11.
207. *Id.* at 12.
208. *Id.* at 7-8.
209. *Id.* at 9.
210. *Id.*
211. In noting the advantages of article I courts over article III courts, the majority wrote:
[A]s we have seen, the Social Security caseload is quite sensitive to changes in policy, and the number of claims is likely to vary widely from year to year. While Congress has flexibility to change Article III courts by not filling vacancies or by reassigning judges to different courts, it has considerably less flexibility than with an Article I court. If the patterns of the past hold true, there may be large shifts in the caseload both up and down over relatively short periods of time, and the additional flexibility Article I status would give to Congress may prove useful.

ent positions within and among the circuits, the courts of appeals "strive not only to resolve conflicts of decision within and between districts but also to maintain harmony among their own decisions through en banc procedures that become both costly and awkward when too many judges are involved."[212]

Fourth, district courts are superior to courts of appeals when it comes to taking evidence to supplement administrative records.[213] For example, medical evidence may sometimes be submitted in social security cases to supplement the administrative record.[214] The courts of appeals, however, have a "qualitative superiority" which is attributable to three characteristics.[215] First, the multi-member composition of the courts of appeals "tends to counteract bias, subjectivity and incompetence."[216] Second, the appellate bench is considered to be of a higher caliber than the trial bench.[217] Third, the judicial experience of an appellate judge better qualifies her to review agency action.[218]

In the case of Social Security benefits administration, the success of direct review by the courts of appeals would depend on the success of the Court of Disability Claims. As noted, the courts of appeals are more expensive, less geographically diverse, and ill-equipped to handle introduction of evidence; they will become backlogged unless the Court of Disability Claims provides a review mechanism ensuring that appeals are few. Otherwise, the more numerous, single-judge district courts constitute a better choice.

Professors Currie and Goodman reject direct review by the courts of appeals, citing fear of overwhelmed dockets as a justification.[219] Although writing in 1975, before the explosion in Social Security benefits litigation which occurred in the 1980s,[220] Professors Currie and Goodman accurately predicted the increase, concluding that "it would be manifest folly to institute direct circuit court review."[221]

b. Single-tiered versus Two-tiered Review

The majority proposal allows only one appeal to the federal courts. In contrast, the dissent retains two-tiered review. Clearly, the majority hopes to eliminate what it considers "cumbersome and duplicative" review by the courts,[222] while the dissent seeks to retain the active supervision of the SSA by

---

WORKING PAPERS, *supra* note 18, at 344.

212. Currie & Goodman, *supra* note 183, at 10.

213. *Id.*

214. *See, e.g.*, Zielinski v. Califano, 580 F.2d 103 (3d Cir. 1978); Terio v. Weinberger, 410 F. Supp. 209 (W.D.N.Y. 1976).

215. Currie & Goodman, *supra* note 183, at 12-13.

216. *Id.* at 12.

217. *Id.*

218. *Id.* at 13.

219. *Id.* at 25.

220. *See supra* notes 39-42 and accompanying text.

221. Currie & Goodman, *supra* note 183, at 25.

222. COMMITTEE REPORT, *supra* note 78, at 55.

the article III judiciary. Professors Currie and Goodman generally prefer single-tier review with direct appeals to the courts of appeals, given its potential for reduced expense and immediate involvement of a superior tribunal. However, in the case of Social Security benefits, they approve of a system similar to the dissent's proposal.[223]

Two-tier review has four advantages overall. First, if the cases pass through a district court first, a record has been created and the job of the appellate court is limited to review of the issues.[224] Under either the majority or minority proposals, this advantage is minimal since an administrative record has already been created, either by the Court of Disability Claims or the Benefits Review Board, prior to review by a court of appeals. Second, district courts are cheaper and more geographically diverse than courts of appeals.[225] This factor is particularly significant when litigants cannot afford to appeal to a circuit court, as is likely in the context of Social Security claims. Further, district court litigation is cheaper to the claimant only where the government chooses not to appeal a case to the court of appeals. Third, district court review would eliminate the factfinding problems inherent in circuit court review.[226] Finally, "the only really important justification for two-tier review is the possibility that a great many cases will not be appealed beyond the district court and the appellate courts will be relieved of a significant part of their workload."[227] It is this last advantage which tips the balance for Social Security cases.

Discretionary rather than mandatory two-tier review of Social Security claims ensures that the appeal rate will be kept low enough to minimize the burden to the courts of appeals. There would, however, be the additional step of deciding when and where to grant review. Furthermore, "the appeals court would be removed as a forum for the correction of error and bias," and the litigants would face the prospect of "added cost and delay."[228] Accordingly, Professors Currie and Goodman, generally disfavor two-tier review and approve of direct appeal to the courts of appeals.

Agency action may be suitable for discretionary two-tier review provided it meets two conditions. First, if the number of appeals is large even after one layer of judicial review, allowing the district court to screen the cases would result in considerable savings.[229] This would only be fair to the claimants if the second requirement is met. The second requirement is that the proportion of appeals involving legal issues be small relative to the number of appeals involving questions of fact.[230]

223. Currie & Goodman, *supra* note 183, at 25-27.
224. *Id.* at 17.
225. *Id.*
226. *Id.* at 17-18.
227. *Id.* at 18.
228. *Id.* at 21.
229. *Id.* at 22.
230. *Id.*

Social security cases meet these two conditions. When the SSA is not involved in nonacquiescence, statistics show that appeals are lower, and frequently involve minor issues of fact.[231] When the SSA practices informal nonacquiescence, the action of the district courts to decide for the claimants may be sufficient to settle the cases. And, when the SSA is actively engaged in formal nonacquiescence, the courts of appeals may step in and order adherence to the law.

Professors Currie and Goodman would support the dissent in its conclusion that discretionary two-tiered review is appropriate for Social Security benefits cases. First, given their accurate projections with regard to the explosive growth in appeals, direct review by the circuit courts is impracticable.[232] Second, "a high proportion of all Social Security cases involve purely evidentiary issues,"[233] meaning that the district courts would, indeed, filter out most cases. Though they question the effect of discretion,[234] Professors Currie and Goodman find, based on the statistical evidence available to them, that district court review is searching enough to provide litigants with an adequate opportunity for justice. "These figures suggest that district court review, on the whole, is searching and sympathetic, and that placing appellate review on a discretionary basis would not leave claimants' rights inadequately protected."[235] Their claims are supported by the nonacquiescence experiences, in which district court review frequently resulted in reversals of the SSA.[236] Accordingly, "while denial of access to a court of appeals is not a step to be taken without compelling justification in the interest of a sound and effective judicial system, the proper circumstances for such a move may well be present, or imminent in the social security area."[237]

5. *Judicial Review and Nonacquiescence*

A final criterion for evaluating proposed reforms of the Social Security Benefits Review process is their potential to minimize nonacquiescence. It is probably impossible to eliminate nonacquiescence altogether in a system with so many players and so many layers of review. Its elimination is particularly difficult in the case of an administrative agency which tends to occupy an interstice between the executive and legislative branches of the government.

Recent history has shown that the federal court is the claimant's last resort, for only there will the law be interpreted fairly.[238] In this respect, judicial review faces a paradox: as more article III courts review SSA decisions, the SSA faces more situations in which it might choose not to acquiesce; con-

231. *Id.* at 23.
232. *Id.* at 25.
233. *Id.* at 26.
234. *Id.*
235. *Id.* at 27 (referring to appeal and reversal rates in the period from 1968-1973).
236. *See* Neuborne, *supra* note 70, at 996.
237. Currie & Goodman, *supra* note 183, at 27.
238. *See supra* notes 52-75 and accompanying text.

versely, article III courts have been the last resort of frustrated claimants seeking relief from nonacquiescence. Accordingly, the superior system would allow claimants to avail themselves of the courts without producing so many decisions that the SSA would find nonacquiescence an attractive response.

The dissent's proposal better satisfies the goal of minimizing nonacquiescence while providing a forum for relief. The majority proposal's failure to guarantee a right of review to an article III forum might foreclose the availability of truly independent review to all claimants. Furthermore, the Court of Disability Claims may issue decisions triggering nonacquiescence, yet be unable to order the SSA to comply with the same force as the judicial branch. In contrast, the dissent's proposal will decrease article III involvement, given the limitations on courts of appeals review, while assuring the availability of article III review de novo on the administrative record at the district court level. The dissent casts a procedural safety net which better protects against nonacquiescence.

6. Summary

Tables 2-4 summarize the comparison between the majority's proposal for Article I review followed by appeals of constitutional claims and questions of law to the courts of appeals and the dissent's proposals for maintaining de novo review by the district courts followed by discretionary review in the courts of appeals.

Table 2 compares article I and article III courts, where the respective advantages are potentially lower costs versus constitutionally guaranteed independence. The savings are speculative, given the enormous burden article I courts would have to shoulder, and the advantage of independence is vital, given the system's vulnerability to political control. In this respect, the dissent's proposal is superior.

TABLE 2:
COMPARING PROPOSALS FOR PRIMARY REVIEW TRIBUNALS: ARTICLE I VERSUS ARTICLE III

Article I Court of Disability Claims	Article III District Court
Advantages:	Advantages:
1. Congressional flexibility to expand/contract in accordance with caseload.	1. Independence from political control is assured.
2. Congressional ability to limit salaries in austere times.	2. High caliber judiciary is assured.
3. Smoother appointment process	
4. May be less expensive than expansion of Article III judiciary.	
Disadvantages:	Disadvantages:
1. Cannot be truly independent while subject to congressional control.	1. May be more expensive than an Article I court.
2. Cannot expect significant savings on salaries without compromising the caliber of the bench	2. Less congressional flexibility.

Table 3 summarizes the advantages of specialized and generalized tribunals. In this area of law, where efficiency is critical and issues of fact frequently predominate, specialization may be merited. However, a generalist perspective does not mean that expertise can play no role. The dissent's proposed structure contains a specialized forum, namely the Benefits Review Board, which both acts as a filter and prepares a record for review, utilizing its own expertise. Further, the possible increase in efficiency is not worth the certain expense of creating a new, geographically diverse, specialized adjudicatory authority.

Table 4 compares the differing proposals for article III review. The specious advantage of single-tier review of questions of law to the courts of appeals is the projected decrease in SSA litigation before the federal courts. But, if history is any guide, the burden will not diminish significantly, nor is it likely to do so permanently. The advantages of two-tier review, with discretionary review by the courts of appeals, combine a limited caseload on the more expensive courts of appeals, with the availability of a less expensive, more geographically dispersed forum for all claimants. Again, the dissent's proposal is more appropriate.

The four goals of agency review, namely accuracy, efficiency, acceptability, and consistency,[239] generally favor the dissent's proposal. Additional review of the entire record enhances accuracy. The action of the district court to filter out cases from the courts of appeals promotes efficiency. The continued involvement of a judiciary perceived as being independent and of high caliber favors acceptability. Finally, the availability of discretionary review by the highest courts assures consistency within the circuit without overwhelming these courts' dockets.

IV.
THE BETTER PROCEDURAL SAFETY NET

On balance, the dissent's proposal for reforming the Social Security Benefits Review process better meets the Committee's criticisms of the system's vulnerability to political control and the duplicative nature of the current review process. While the majority would reduce the layers of review afforded claimants, and stem the burgeoning caseload of the federal courts, it appears to be willing to do so without definite savings and at the expense of truly independent review. The dissent's proposal more closely parallels the current system, but its chief changes, the establishment of a more independent, comprehensive agency review board than that now in place, and the limitation on court of appeals review, would streamline the current system without compromising the federal courts' ability to fight nonacquiescence.

239. *See supra* notes 138-144 and accompanying text.

TABLE 3:
COMPARING PROPOSALS FOR PRIMARY REVIEW TRIBUNALS: SPECIALIZED VERSUS GENERALIST

Specialized Court of Disability Claims	Generalist District Court
Advantages:	Advantages:
1. Better grasp of intricacies of the subject matter	1. Generalist perspective with expertise imported for approriate cases.
2. More efficient at processing a single type of case.	2. Efficiency enhanced by an administrative record prepared by the Benefits Review Board.
3. May be less expensive than expanding generalist judiciary.	3. Salaries may not be higher than a comparably qualified Article I judiciary.
	4. Geographically dispersed judiciary already in place.
Disadvantages:	Disadvantages:
1. Less ability to apply common law solutions.	1. Expertise may be imported, not inherent.
2. Added pressure of being the primary reviewing body may decrease efficiency.	2. Burdened docket.
3. The expert judges may be as expensive as are Article III judges.	3. Expensive to appoint, impossible to contract.
4. Requirement of geographic dispersion means expensive establishment of a new judiciary.	

TABLE 4:
COMPARING PROPOSALS FOR ARTICLE III REVIEW

Single-Tier Courts of Appeals Review	Two-Tier District Court Review with Discretionary Review by the Courts of Appeals
Advantages:	Advantages:
1. Less expensive than two tiers.	1. Lower court creates record for review.
2. Superior decisionmaking ability.	2. District Courts are more convenient and cheaper to litigants.
3. Forestalls intra-circuit conflict.	3. Eliminates issues of fact for the Courts of Appeals.
	4. Limits cases heard by Courts of Appeals.
	5. May be more accurate.
Disadvantages:	Disadvantages:
1. Each hearing is more expensive.	1. Additional step required to decide whether to continue appeals process.
2. Courts of Appeals may be overwhelmed by agency caseload.	2. Courts of Appeals removed as forums for correction of error.
	3. Added cost and delay.

Given the disadvantages of less independent review and the lack of considerable savings, there is little reason to move from the current system to that proposed by the majority. What is sacrificed in reducing layers of review is not balanced by any corresponding gain. The dissent's proposal, on the other hand, presents an improvement. First, it establishes a new forum for more independent agency review, the Benefits Review Board. Second, it preserves meaningful, independent judicial review while reducing the burdens on the federal court system. If the safety net's safety net is to be mended, the dissent offers the stronger thread.