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An Argument Against Administrative Acquiescence

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AN ARGUMENT AGAINST ADMINISTRATIVE ACQUIESCENCE

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"They have made their decision, now let them enforce it."[1]
– President Andrew Jackson

ABSTRACT

Administrative Law is different. It is a code based system, normally without any role for legal precedent as found in the common law. As such, when the decisions of an administrative agency are reviewed by a court, friction can result if the court creates a legal precedent which the agency does not follow, as it is not part of the agency's rules or regulations. This result is called non-acquiescence, where the administrative agency ignores the precedential value of a court's ruling. This Article suggests that, based on the Social Security Act and the decisions of the Supreme Court of the United States, there are very few instances in which the Social Security Administration should alter its rules or regulations to accommodate a circuit court ruling. Following a brief introduction, Part II of this Article describes the standard adjudication of a Social Security Disability Case to provide an example of administrative workings. Next, Part III further articulates the problems created by non-acquiescence. Finally, Parts IV and V discuss the impact of non-acquiescence from a policy and legal perspective.

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1. President Jackson's alleged response to Supreme Court's decision in Worcester v. Georgia, 31 U.S. 515 (1832). *See generally* Tim Alan Garrison, Worcester v. Georgia (1832), THE NEW GA. ENCYCLOPEDIA (Apr. 27, 2004), http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2720; Acquiescence, WEBSTER'S ONLINE DICTIONARY, http://www.websters-online-dictionary.org/definitions/Acquiescence (last visited Mar. 17, 2012).

I. INTRODUCTION

In September 1831, Samuel A. Worcester was convicted of violating a Georgia statute that made it illegal for a white person to reside on Cherokee lands without a state issued license.[2] A missionary from Vermont living among the Cherokee, Worcester appealed his conviction all the way to the Supreme Court of the United States, arguing that Georgia's law was both unconstitutional and contrary to federal law.[3] The Supreme Court struck

2. *Worcester*, 31 U.S. at 531-32.
3. *Id.* at 534-35.

down the Georgia statute as unconstitutional.[4] Because the United States was not a party to the suit, the Supreme Court did not order the federal government to enforce the decision.[5] President Jackson – disagreeing with the decision in his ever-so-subtle manner – purportedly suggested that Chief Justice Marshall and the rest of the justices could enforce their decision themselves.[6]

One hundred and eighty years later, some federal agencies continue to ignore the precedent set by federal circuit courts of appeals [hereafter circuit courts], in effect, invoking the sentiment attributed to President Jackson. A variety of federal agencies, such as the National Labor Relations Board (NLRB), Internal Revenue Service (IRS), and Social Security Administration (SSA), issue decisions which are sometimes appealed to the circuit courts.[7] There are times when the circuit courts determine how an agency's regulations should be construed, which these agencies then choose to ignore in later opinions.[8] This active refusal to follow the precedential value of a circuit court decision is termed non-acquiescence.[9] For decades, commentators and various courts have condemned these agencies for failing to modify their administrative regulations by acquiescing to circuit court precedent.[10] The worst offender in this regard has been the SSA and its disability adjudication programs.[11]

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4. *Id.* at 561.

5. *Id.* at 562-63.

6. THE NEW GA. ENCYCLOPEDIA, *supra* note 1.

7. *See* 42 U.S.C. § 405(g) (2006) (granting authority for some administrative decisions to be appealed).

8. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989); *see* Joshua I. Schwartz, *Nonacquiescence*, Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815, 1816 (1989).

9. Robert J. Axelrod, *Social Security: The Politics of Nonacquiescence: The Legacy of* Stieberger v. Sullivan, 60 BROOK. L. REV. 765, 770-71 (1994) ("Non[-]acquiescence is the policy of refusing to follow the decision of a United States court of appeals except for the specific case decided by that court."); Estreicher & Revesz, *supra* note 8, at 681 (defining non-acquiescence as "[t]he selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals . . . ."); Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399, 401 (1989) ("[N]on[-]acquiescence is a comprehensive policy and practice of refusing to abide by judicial precedent."); Schwartz, *supra* note 8, at 1816 (Non[-]acquiescence is "the deliberate refusal of an administrative agency, exercising adjudicatory authority, to follow relevant judicial precedent in deciding another matter presenting the same question of law.").

10. Estreicher & Revesz, *supra* note 8, at 681; *see* Kubitschek, *supra* note 9, at 400; Schwartz, *supra* note 8, at 1821.

11. Estreicher & Revesz, *supra* note 8, at 692. *See generally* Kubitschek, *supra* note 9 (discussing SSA's failure to follow circuit courts' precedent regarding the eligibility of injured and ill individuals for disability and supplemental income benefits); Ann Ruben, Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOK. L. REV. 89, 98-103 (1986) (noting the Secretary of Health and Human Services (Secretary) refusal to

This Article, however, does not condemn every instance of the SSA's decision to not follow the precedents set by a circuit court. Instead, this Article argues the SSA should adopt a circuit court's interpretations of the Agency's rules or regulations only in an extremely narrow set of circumstances. Otherwise, the SSA – while bound by any federal court's decision in the particular case that the court heard – is under no obligation to follow any precedent set by the ruling unless issued by the Supreme Court of the United States.[12] Even more fundamentally, this Article argues that due to the unique nature of the SSA's adjudicatory scheme, the role of federal district and circuit courts need to be strictly confined to the role set forth by Congress and the Supreme Court when considering the SSA's disability decisions.

To accomplish these two goals, Part II of this Article describes the process by which a Social Security disability case progresses through the SSA's administrative adjudicatory system to the federal courts. Furthermore, Part III describes the concept of acquiescence and the SSA's current policy regarding when it will, and will not, follow the precedent set by a federal circuit court. In Part IV, the Article then examines the controversy surrounding the concept of non-acquiescence and the harm that supposedly results. Part V discusses the manner in which federal circuit courts are supposed to review federal administrative agency cases pursuant to the Supreme Court. And finally, because of the fundamental differences of the SSA's adjudicatory scheme, Part VI discusses how the federal courts' role needs to be restricted when considering the Agency's disability decisions.

II. THE ADJUDICATION OF SOCIAL SECURITY DISABILITY CASES AND APPLICATION OF ACQUIESCENCE RULINGS

Utilizing an example of a current administrative law issue that addresses acquiescence issues with federal and circuit courts can aid in understanding acquiescence. One must first understand the process of initiating and appealing a social security disability claim. Second, one should examine the acquiescence rulings currently impacting the Agency and its findings.

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follow the circuit courts' medical improvement test, which prevents the Secretary from "terminating benefits without any showing of medical improvement").

12. Axelrod, *supra* note 9, at 770-71; Kubitschek, *supra* note 9, at 401.

A. NAVIGATING THE CURRENT SOCIAL SECURITY FRAMEWORK

The current Social Security disability framework consists of initial and reconsideration determinations made at the state level. Next is the opportunity to request a de novo hearing before an administrative law judge at the federal level. The federal decision is reviewable upon appeal by the SSA's Appeals Council and then subsequently by the federal courts.

1. *State Determinations*

In 2010, a record breaking 3,161,314 applications for disability benefits were filed with the SSA.[13] This was more than a 230 percent increase over the number of applications filed only ten years before.[14] The population of the United States only increased by nine percent during these same ten years.[15] Further, no evidence exists indicating the number of disabilities in the United States increased at all during these same ten years, let alone grew by two hundred and thirty percent. The increase in Social Security disability applications could be a result of either (1) a bad economy with record unemployment[16] or (2) individuals' desire to receive a lifetime's worth of government disability benefits, rightfully or wrongly.[17] Governed by Title II and Title XVI of the Social Security Act, the Agency has a four

13. U.S. SOC. SEC. ADMIN., No. 31-231, SUMMARY OF PERFORMANCE AND FINANCIAL INFORMATION FOR FISCAL YEAR 2010, 3 (2011) [hereinafter U.S. SOC. SEC. ADMIN, SUMMARY OF PERFORMANCE].

14. U.S. SOC. SEC. ADMIN., No. 13-11827, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 142 (2011) [hereinafter U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT] (reporting 1,364,323 disability applications were filed in the year 2000).

15. The population of the United States in the year 2000 was 281,421,906. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PHC-3, UNITED STATES SUMMARY: 2000: POPULATION AND HOUSING AND UNIT COUNTS II-4 tbl.A (2004). As of 2010, the population of the United States was 308,745,538. U.S. CENSUS BUREAU, POPULATION AND HOUSING OCCUPANCY STATUS: 2010, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_NSRD_GCTPL2.US01PR&prodType=table.

16. *The SSA's New Methods for Improving Disability Claim Backlog*, VOCUS/PRWEB (Feb. 2, 2011), http://www.prweb.com/releases/2011/2/prweb8104909 htm; Lisa Rein, *Claims for Social Security Benefits on the Rise*, WASH. POST (Mar. 28, 2011), http://www.washingtonpost.com/politics/claims_for_social_security_benefits_on_the_rise/2011/03/28/AFTPNgrB_story.html?wprss=rss_politics.

17. Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J., Mar. 22, 2011, at A1; *Disability Payments: The Elephant in the Waiting-Room*, ECONOMIST (Mar. 10, 2011), http://www.economist.com/node/18332928?story_id=18332928. Because the ultimate question in a Social Security disability decision is whether or not a disability prevents an individual from working, an individual's inability to work because of the bad economy would be irrelevant to this determination. *See* 42 U.S.C. § 423(d)(1)(A), (d)(2)(A) (2006).

tier administrative adjudication scheme, using the same rules at each level.[18]

The first tier of SSA's adjudicatory scheme is an initial decision made by the claimant's local Disability Determination Service operated by their state government.[19] Of the new disability applications, approximately thirty-seven percent were approved at the initial level.[20] Many of the remaining claims were appealed to the reconsideration level, which is also conducted by the state Disability Determination Service.[21] Of these disability claims, an additional fourteen percent were approved.[22] Combined, almost half of all applications were paid through the first two levels of administrative review at the state level.[23]

2. *Federal Determinations*

In 2010, 720,161 claimants, whose claims had been denied at the initial and reconsideration levels, appealed their decisions to an administrative law judge at the federal level.[24] Each of these claims had already been denied twice by the state level SSA Disability Determination Services using the exact same rules and regulations that the administrative law judges must follow.[25] While hearings before administrative law judges are de novo, one would expect that many of these cases would be denied benefits based on the two previous denials, unless there is new evidence or a change in the claimant's age that would trigger a regulatory requirement to award benefits

18. *See generally* Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J. L. & PUB. POL'Y 614, 618-20 (2011) [hereinafter Swank, *Welfare and Shadow Economy*].

19. *See, e.g.*, 20 C.F.R. §§ 404.1615, 416.1015 (2012).

20. *See* Stephen Ohlemacher, *Social Security Disability System Bogged Down with Requests*, ONEIDA DAILY DISPATCH (May 9, 2010), http:/www.oneidadispatch.com/articles/2010/05/09/news/doc4be763e82502259319203.prt.

21. U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT, *supra* note 14, at 146-47 tbl.61; 20 C.F.R. §§ 404.907, 416.1407 (2012).

22. *See* Ohlemacher, *supra* note 20.

23. *Id*.; *see also* Russell Grantham, *Some Gains Made on Social Security Backlog*, ATLANTA JOURNAL-CONSTITUTION (Nov. 1, 2010), http://www.ajc.com/business/some-gains-made-on-709806 html.

24. U.S. SOC. SEC. ADMIN., SUMMARY OF PERFORMANCE, *supra* note 13, at 3.

25. Grantham, *supra* note 23. The Social Security Administration did experiment in ten states having only a single review, and no reconsideration step at the state-level. This experiment was a failure. U.S. GEN. ACCT. OFFICE, NO. 02-322, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES, SOCIAL SECURITY DISABILITY, DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 3 (2002), *available at* http://www.gao.gov/new.items/d02322.pdf.

as of a subsequent date.[26] This is not the case. In 2009, the SSA's administrative law judges awarded benefits, on average, to sixty-three percent of twice denied cases.[27] An explanation for this high approval rate is that the hearing before the administrative law judge is the first occasion where the claimant appears in person before an adjudicator. However, if the decision is based on the longitudinal medical evidence as required by the regulations, the individual's presence at a hearing should do nothing to change the results of their clinical examinations or diagnostic testing.[28] In fiscal year 2010, approximately 128,703 of the remaining 266,460 denied claimants – forty-eight percent – requested review of the administrative law judge's decision by the SSA's Appeals Council.[29] If there is no appeal of the administrative law judge's decision, it becomes the final decision of the Agency.[30] If the decision is appealed, the ruling of the Appeals Council becomes the final decision of the SSA.[31]

3. *Appealing the Decision in Federal Court*

If the claimant disagrees with this final decision issued by the Appeals Council, he or she may appeal it to the federal district court in which the claimant resides.[32] The SSA is not allowed to appeal its own decisions to the district court.[33] Rarely, however, does a case make it to federal district court. In fiscal year 2010, there were only 12,257 cases filed by claimants in federal district court,[34] less than one-half of one percent of all disability applications filed in 2009.[35] While over twelve thousand cases may seem like a large number, 99.62% of all disability applications the Agency receives are not appealed to the federal district court. The district court may affirm, reverse, or modify the Agency's final decision with or without

26. *See generally* Drew A. Swank, *The Social Security Administration's Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 507 (2012) [hereinafter Swank, *Attorney Misconduct*].

27. Ohlemacher, *supra* note 20.

28. *See, e.g.*, 20 C.F.R. §§ 404.1508, 416.908 (2012); *Disability Evaluation Under Social Security, Part II – Evidentiary Requirements*, U.S. SOC. SEC. ADMIN., www.ssa.gov/disability/professionals/bluebook/evidentiary.htm (last updated Feb. 09, 2011).

29. *General Appeals Council Statistics*, U.S. SOC. SEC. ADMIN., www.ba.ssa.gov/appeals/ac_statistics html (last updated Feb. 09, 2011) [hereinafter U.S. SOC. SEC. ADMIN., *Appeal Statistics*].

30. 20 C.F.R. §§ 404.955, 416.1455.

31. *Id.* §§ 404.981, 416.1481.

32. 42 U.S.C. § 405(g) (2006).

33. Kubitschek, *supra* note 9, at 426.

34. *Civil Action Process*, U.S. SOC. SEC. ADMIN., www.ssa.gov/appeals/court_process html (last updated Feb. 09, 2011).

35. U.S. SOC. SEC. ADMIN., *Appeal Statistics*, *supra* note 29.

remanding the matter back to the Agency.[36] Findings of fact by the Agency are to be reviewed by the federal district court under a "substantial evidence" test.[37] As to issues of law, the federal district court's review is limited by the Social Security Act to issues of whether the Agency's adjudication of the claimant's application for disability benefits conformed to the Agency's regulations and their underlying construction.[38]

Unlike the first four appeals, both the SSA and the claimant may appeal a district court decision to the circuit court.[39] Both the Agency and claimant may likewise petition the Supreme Court to review a circuit court decision.[40] The decisions of any federal court – whether district, circuit, or Supreme – is binding with regard to that particular claimant.[41] Any ruling and accompanying precedent made by the Supreme Court is always binding on the SSA.[42]

But what about the rulings made by the federal circuit court? The SSA's approach to circuit court decisions is set forth in 20 C.F.R. §§ 404.985 and 416.1485.[43] These regulations state that the SSA will apply a circuit court decision *that the Agency determines conflicts* with its own interpretation of either a provision of the Social Security Act or the Agency's regulations at all applicable levels of the administrative review process within a particular circuit, unless the government seeks further judicial review or relitigates the issue in question.[44] To apply a circuit court's holding, the Agency will issue a Social Security Acquiescence Ruling.[45] The Acquiescence Ruling will explain the court's decision and how it will be applied in the administrative scheme.[46] The Acquiescence Ruling will be effective upon publication in the Federal Register and remain in effect until rescinded.[47] As with all Social Security regulations, only the

36. 42 U.S.C. § 405(g); Estreicher & Revesz, *supra* note 8, at 693.

37. 42 U.S.C. § 405(g); Estreicher & Revesz, *supra* note 8, at 693. Substantial evidence is defined as more than a scintilla, but less than preponderance. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 217 (1938).

38. *See* 42 U.S.C. § 405(g).

39. *Id.*; Estreicher & Revesz, *supra* note 8, at 693.

40. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

41. *See* Axelrod, *supra* note 9, at 770-71; Kubitschek, *supra* note 9, at 403; Schwartz, *supra* note 8, at 1816.

42. Kubitschek, *supra* note 9, at 403.

43. For an in-depth history of the Social Security Administration's policies regarding non-acquiescence, *see* Estreicher & Revesz, *supra* note 8, at 692-717; Kubitschek, *supra* note 9, 401-08; Axelrod, *supra* note 9, at 770-81. *See generally* Ruben, *supra* note 11; Schwartz, *supra* note 8.

44. 20 C.F.R. §§ 404.985(a), 416.1485(a) (2012).

45. *Id*. §§ 404.985(b), 416.1485(b).

46. *Id*.

47. *Id*.

Commissioner[48] may determine which circuit court cases will, and will not, be the subject of an Acquiescence Ruling.[49] If the Commissioner does not issue an Acquiescence Ruling, the SSA limits the decision of a circuit court to the specific case it decides and will not apply any precedent from that case in the four levels of the administrative review process.[50]

There are currently forty-three active Acquiescence Rulings for the eleven federal circuits.[51] The numbers per circuit range from one for the First, Seventh, and Tenth Circuits[52] to ten for the Ninth Circuit.[53] One of the cases that generated an Acquiescence Ruling is from the 1960s; two are from the 1970s, nineteen are from the 1980s, sixteen are from the 1990s, and five have arisen since the year 2000.[54] The Agency can rescind an Acquiescence Ruling under certain circumstances, such as when the Supreme Court or the circuit court overrules or otherwise limits the precedential value of a decision, a new law is passed, or the Agency changes its regulations and *the Agency* determines that there is no longer a conflict between the court's ruling and the Agency's regulations.[55] To date, there have been thirty-six Acquiescence Rulings that were subsequently rescinded.[56]

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48. *See* 42 U.S.C. § 902(A) (2006) (explaining the appointment, role, and powers of the Commissioner of Social Security).

49. *See, e.g.*, *id.* §§ 405(a); 1383(d)(1).

> The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Id. § 405(a); *see also* 20 C.F.R. §§ 404.985, 416.1485.

50. *See* Kubitschek, *supra* note 9, at 401-02.

51. *Acquiescence Rulings Table of Contents*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/OP_Home/rulings/ar-toc html (last visited Apr. 17, 2012) [hereinafter U.S. SOC. SEC. ADMIN., *Acquiescence Rulings*].

52. *Acquiescence Rulings First Circuit Court Table of Contents*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/OP_Home/rulings/ar/01/AR01toc html (last visited Apr. 17, 2012) [hereinafter U.S. SOC. SEC. ADMIN., *First Circuit Acquiescence Rulings*]; *Acquiescence Rulings Seventh Circuit Court Table of Contents*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/OP_Home/rulings/ar/07/AR07toc html (last visited Apr. 17, 2012) [hereinafter U.S. SOC. SEC. ADMIN., *Seventh Acquiescence Rulings*]; *Acquiescence Rulings Tenth Circuit Court Table of Contents*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/OP_Home/rulings/ar/10/AR10toc html (last visited Apr. 17, 2012) [hereinafter U.S. SOC. SEC. ADMIN., *Tenth Circuit Acquiescence Rulings*].

53. *Acquiescence Rulings Ninth Circuit Court Table of Contents*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/OP_Home/rulings/ar/09/AR09toc html (last visited Apr. 17, 2012) [hereinafter U.S. SOC. SEC. ADMIN., *Ninth Circuit Acquiescence Rulings*].

54. U.S. SOC. SEC. ADMIN., *Acquiescence Rulings*, *supra* note 51.

55. 20 C.F.R. §§ 404.985(e), 416.1485(e) (2012).

56. U.S. SOC. SEC. ADMIN., *Acquiescence Rulings*, *supra* note 51.

Inevitably, a claimant's representative will argue in a Social Security disability hearing that the administrative law judge or Appeals Council must follow a federal district or circuit court precedent that is not the subject of an Acquiescence Ruling. A Social Security administrative law judge's authority is delegated to him or her by the Commissioner of Social Security.[57] The administrative law judge is not an Article III judge,[58] and he or she has no independent authority.[59] The Commissioner cannot delegate to an administrative law judge a power that the Commissioner does not possess.[60] An administrative law judge, whose only authority flows from the Commissioner, can neither override the Commissioner's decision to follow or not follow a circuit court decision. Unless there is an Acquiescence Ruling issued by the Commissioner, the administrative law judge or Appeals Council must ignore a federal district or circuit court precedent.[61] In theory, the representatives who appear before administrative law judges in disability hearings are supposed to be competent and comply with the Agency's rules and regulations – including knowing the regulations regarding Acquiescence Rulings.[62] Likewise, an attorney is ethically prohibited from falsely representing controlling law.[63] An attorney representative who argues a Social Security administrative law judge must follow federal district or circuit court precedents, which the Commissioner chose not to make the subject of an Acquiescence Ruling, may fail to competently understand what authority is binding, behave unethically, or both.[64]

57. 42 U.S.C. § 405(l) (2006).

58. U.S. CONST. art. III.

59. *See* Edward F. Lussier, *The Role of the Article I "Trial Judge,"* 6 W. NEW ENG. L. REV. 775, 776 (1984).

60. *See* JOHN LOCKE, SECOND TREATY ON GOVERNMENT, ch. XI (1690) (stating that "for no body can transfer to another more power than he has in himself . . . ").

61. 20 C.F.R. §§ 404.985(e), 416.1485(e) (2012). *But see* Estreicher & Revesz, *supra* note 8, at 689 (stating that Social Security staff may be instructed to ignore a federal circuit court decision, be given no guidance at all and therefore make their own determination, or merely be ignorant of the decision).

62. *See* Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 239-40 (2012) [hereinafter Swank, *Non-Attorney and Unauthorized Practice*].

63. *See, e.g.*, MODEL CODE OF PROF'L CONDUCT R. 3.3(a)(1) (2011). "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." *Id.* cmt. 4.

64. Swank, *Non-Attorney and Unauthorized Practice*, *supra* note 62, at 228 (discussing how non-attorneys are not bound by state bar rules of professional ethics).

B. THE DILEMMA POSED BY SOCIAL SECURITY NON-ACQUIESCENCE

It is this framework of how the SSA adjudicates its disability claims and selectively chooses which federal circuit case precedent to follow that has created the controversy surrounding non-acquiescence. Selective non-acquiescence has created the situation in which there are circuit court cases that the SSA follows and others that it does not. While it is routinely condemned, the legality of non-acquiescence has not been determined.[65] Some commentators have concluded non-acquiescence is unconstitutional based on the doctrines of the separation of powers, due process, and equal protection.[66] While criticized by some courts and legal scholars, non-acquiescence has been seemingly tolerated by Congress and the Supreme Court in that neither has directly addressed the issue.[67] Regardless of its legality, many individuals and organizations have been extremely critical of non-acquiescence, believing that in no circumstances should a federal agency be allowed to disregard the rulings of a federal court in that circuit.[68]

III. THE ALLEGED HARM OF SOCIAL SECURITY NON-ACQUIESCENCE

But what is the damage caused by Social Security non-acquiescence? Critics argue there are a variety of interrelated types of harm posed by the Agency ignoring circuit court precedent. These harms include: harm to the individual claimant, to the federal court system, to a society that is supposed to be governed by the rule of law, and even to the integrity of the Social Security disability program itself.

A. IMPACT ON THE INDIVIDUAL CLAIMANT

With regard to the individual claimant, when the SSA does not adopt every legal precedent set by a federal circuit court reviewing its decisions, two distinct bodies of law are created – the Agency's administrative adjudication system and that of federal courts. Claimants who under the Agency's rules and regulations properly fail to qualify for disability benefits, but are persistent in appealing all four levels of the Agency's

65. Schwartz, *supra* note 8, at 1823.

66. Estreicher & Revesz, *supra* note 8, at 718-19, *see also* Ruben, *supra* note 11, at 109; Schwartz, *supra* note 8, at 1827.

67. Estreicher & Revesz, *supra* note 8, at 681; *see also* Kubitschek, *supra* note 9, at 407; Schwartz, *supra* note 8, at 1821-23.

68. Axelrod, *supra* note 9, at 771 n.30; *see also The Federal Agency Compliance Act: Hearing Before the Sub. Comm. House Comm. on the Judiciary*, 106th Cong. 66 (1999).

administrative adjudication system, may prevail under the different "rules" of the federal courts as determined by legal precedent.[69] Critics maintain many of the claimants who appeal to federal court are successful once their claims are evaluated under the court's legal precedents – although no statistics or success rate has been given to substantiate this claim.[70] The critics further argue "[m]any poor, disabled individuals have lost claims – and consequently much needed social security disability benefits – which they would have won if they had appealed to the courts."[71]

Instead of making claimants appeal to the federal court, critics argue if only the SSA would acquiesce to the various federal circuit court decisions, then hundreds of thousands more deserving claimants would be paid their disability payments.[72] By ignoring legal precedent through non-acquiescence, the SSA is "a heartless and indifferent bureaucratic monster destroying the lives of disabled citizens and creating years of agony and anxiety . . . ."[73] Critics further argue that the Agency rarely appeals circuit court decisions with which it disagrees to the Supreme Court, so as to not have a binding unfavorable precedent issued against.[74] Merely ignoring the circuit court decision, these same critics assert, is much easier and safer from the Agency perspective so as to deny more claimants their properly deserved disability benefits.[75] Such an approach hurts future claimants, because they cannot benefit from favorable court precedent, if the Agency will not follow it.[76]

There is more at stake for the claimants, however, than money alone. Not only does the Agency deny these claimants their disability benefits, but it allegedly forces them to forego necessary medical treatment, which they cannot afford to do.[77] It is further argued that even if the claimants persevere through the SSA adjudication process, finally receiving their overdue benefits hardly compensates them for the trauma they suffered at the hands of the SSA.[78]

69. *See* Kubitschek, *supra* note 9, at 402-03, 412.
70. *Id.* at 412.
71. *Id*. at 400.
72. *Id*. at 410-11.
73. *Id.* at 410 (citing Merli v. Heckler, 600 F. Supp. 249, 250 (D.N.J. 1984)).
74. *Id*. at 403.
75. *Id*.
76. *Id*.
77. *Id.* at 410.
78. *Id.* at 410-11.

B. ALLEGED HARM TO THE FEDERAL COURT SYSTEM

The claimant, however, is not the only entity supposedly harmed by the SSA's intransigence. Not only has non-acquiescence caused "a massive rise in the number of social security cases in federal court[s],"[79] it has specifically led to an increase in complicated class action suits involving multiple claimants.[80] Worse than the sheer number or types of lawsuits, some argue the SSA has unnecessarily burdened the courts with the "time-consuming and unnecessary litigation" of deciding the same issue over and over merely because it refuses to follow court determined precedents.[81] Allegedly, scarce government litigation resources and taxpayer dollars would be saved by the SSA acquiescing to all circuit court decisions since it is claimed, without substantiation, that the claimant will undoubtedly prevail anyway once the federal court applies legal precedent.[82] Furthermore, the Agency's belief that it "is entirely free to disregard binding law in the circuit"[83] has supposedly damaged the relationship between the courts and the Agency, forcing the courts to scrutinize every Agency decision.[84]

Ultimately, critics argue non-acquiescence violates the most fundamental tenet of judicial review as set forth over two hundred years ago by *Marbury v. Madison*[85] – that the federal government's agencies, like individuals, are bound to follow the law as interpreted by the courts.[86] Society as a whole is supposedly harmed by the Agency's actions,[87] for non-acquiescence ultimately "thwarts the intent of Congress and of the people whom Congress represents."[88] The whole rationale for federal administrative agency adjudication – of reducing the burden on the federal courts by impartially and fairly hearing claims[89] – is negated by the

79. *Id.* at 400; *see also* Schwartz, *supra* note 8, at 1818.

80. Kubitschek, *supra* note 9, at 414; *see* Ruben, *supra* note 11, at 127.

81. Kubitschek, *supra* note 9, at 412-13 (quoting Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965)); Schwartz, *supra* note 8, at 1853. Some also claim that due to SSA's refusal to adhere to legal precedent, claimants appealing to federal court are forced to seek assistance from legal aid providers, thus reducing the amount of services these providers can provide to other individuals in need. Kubitschek, *supra* note 9, at 416-17.

82. Ruben, *supra* note 11, at 113.

83. Estreicher & Revesz, *supra* note 8, at 682.

84. Kubitschek, *supra* note 9, at 413.

85. 5 U.S. 137 (1803).

86. Estreicher & Revesz, *supra* note 8, at 700; *see also* Schwartz, *supra* note 8, at 1824; Ruben, *supra* note 11, at 110.

87. Kubitschek, *supra* note 9, at 411-12.

88. *Id*. at 412.

89. *Id.* at 414; Schwartz, *supra* note 8, at 1853.

continued practice of non-acquiescence.[90] The basic notion of separation of powers, with three equal branches of government, is undermined by executive agencies – such as the SSA – ignoring the role, and the decisions, of the courts.[91]

C. POTENTIAL MISCARRIAGES OF JUSTICE AND OTHER LEGAL INJUSTICES

Perhaps most offensive of all to the legal profession, the SSA's refusal to follow precedent violates the basic tenet of stare decisis.[92] Stare decisis embodies the fundamental principle of common law that each judicial decision sets or follows a precedent to be applied in deciding similar cases arising within the same jurisdiction.[93] It is this adherence to legal precedent that ensures the law is uniform, predictable, and impartial.[94] By refusing to follow adverse legal precedent and using the same body of law throughout the administrative process, the SSA removes any notion of uniformity, predictability,[95] and impartiality in its administrative adjudication system.[96]

To be fair, non-acquiescence has historically had its defenders, or at least, it apologists. They maintain that because the federal government is allowed to relitigate issues it had previously lost against a different claimant, as provided by *United States v. Mendoza*,[97] non-acquiescence is a valid policy.[98] Other arguments in support of Social Security non-acquiescence include the need for uniformity of both decisions and the administration of the disability adjudication program nationwide,[99] a desire not to overburden the Supreme Court with circuit court appeals,[100] the Agency's inability to appeal its own decisions to the district court,[101] the concept of separation of powers between the executive administrative adjudication systems and the courts,[102] the SSA's statutory requirement "to

90. Schwartz, *supra* note 8, at 1816-17.

91. Kubitschek, *supra* note 9, at 403-04; *see also* Ruben, *supra* note 11, at 109. *See generally* Schwartz, *supra* note 8.

92. Kubitschek, *supra* note 9, at 403-04; *see* Ruben, *supra* note 11, at 109-11. *See generally* Schwartz, *supra* note 8.

93. Ruben, *supra* note 11, at 111.

94. *Id*. at 112-13.

95. *Id.* at 113.

96. *Id.* at 113-14.

97. 464 U.S. 154, 162 (1984).

98. Estreicher & Revesz, *supra* note 8, at 684; Kubitschek, *supra* note 9, at 417-18; *see also* Schwartz, *supra* note 8, at 1876.

99. Kubitschek, *supra* note 9, at 427-32; Axelrod, *supra* note 9, at 772; *see* Schwartz, *supra* note 8, at 1818-19.

100. Kubitschek, *supra* note 9, at 436-37.

101. *Id.* at 426.

102. Axelrod, *supra* note 9, at 771.

interpret and establish rules pursuant to the Social Security Act,"[103] and a desire to avoid the confusion of knowing which law to apply to which claimant.[104]

IV. BINDING PRECEDENT ON FEDERAL AND ADMINISTRATIVE COURTS

As previously discussed, critics attack non-acquiescence on a variety of fronts. There are two ironies associated, however, with Social Security non-acquiescence. The first is that it is in many instances the circuit courts, and not the Agency, that are not following the law. The second is that if the circuit courts were to strictly follow the established law, then in very few instances would there even be a question of whether or not the SSA needs to acquiesce to a circuit court ruling. When hearing a Social Security disability claim, there are only three questions a federal court should consider, whether: (1) there was "substantial evidence" to support the Agency's factual findings,[105] (2) the Agency adjudicated the claimant's application for disability benefits in accordance with the Agency's regulations,[106] and (3) those regulations are in accordance with the Social Security Act.[107]

The answers to the first two questions remain purely factual; either the Agency had substantial evidence and followed its regulations, or it did not. No decision made by a circuit court with regard to these two questions would have any precedential value; rather, it would merely be case specific. Unless the circuit court felt an Agency mistake with regard to these two questions was merely harmless error, the court would be justified in overturning the Agency's decision or remanding the case back to the Agency for correction.[108] However, if the third scenario occurs, where the circuit court is faced with the question of whether the Agency's interpretation of its regulations is correct, the United States Supreme Court has provided a framework to answer the question with its decision in *Chevron v. Natural Resources Defense Council*.[109] In *Chevron*, the Supreme Court considered the construction of the Environmental Protection

103. *Id.*

104. Kubitschek, *supra* note 9, at 439.

105. 42 U.S.C. § 405(g) (2006); Estreicher & Revesz, *supra* note 8, at 693. Substantial evidence is defined as more than a mere scintilla of evidence but may be somewhat less than a preponderance. BLACK'S LAW DICTIONARY 1428 (6th ed. 1992).

106. 42 U.S.C. § 405(g).

107. *Id.*

108. *Id.*

109. 467 U.S. 837 (1984).

Agency's regulations in implementing the Clean Air Act Amendments of 1977.[110]

A. RELEVANT CASE LAW

In upholding the Environmental Protection Agency's regulations, the Supreme Court in *Chevron* and its subsequent progeny developed a two part test for a court to use when reviewing an agency's construction of its regulations.[111] First, the court must determine whether Congress "has directly spoken to the precise question at issue" in the statutes on which the agency regulations are based.[112] If it has, and congressional intent is clear, both the court and the agency must follow the "unambiguously expressed intent of Congress."[113] There are two ways for a court to determine if Congress has done this. The first is for the court to consider the plain language of the statute.[114] The second is for the court to consider the legislative history of the statute to determine if it provides the necessary intent.[115] If either the language of the statute or the legislative intent addresses how the regulations should be written, both the agency and the court are bound by it.[116] If, however, the court concludes Congress has not directly addressed the precise question at issue either in the plain wording of the statute or in the legislative history of the statute's enactment, it must determine if the agency's construction of the statute is reasonable.[117] This determination of the reasonableness of the agency's construction is the second part of the test.

In determining the reasonableness of the regulations, the court should defer to the agency's interpretation as long as the construction is a reasonable policy choice.[118] In making this determination, the court does not have to find that the agency's interpretation is the only one possible, the best one possible, or necessarily the same interpretation as a court would have chosen.[119] Rather, as long as Congress has delegated the authority to the agency to create regulations regarding the implementation of a statute,

110. *Chevron*, 467 U.S. at 839.

111. *Id.* at 842-43.

112. *Id.* at 842.

113. *Id.* at 842-43 (citation omitted).

114. Rust v. Sullivan, 500 U.S. 173, 184 (1991). *See generally* Ernest H. Schopler, Annotation, *Supreme Court's View as to Weight and Effect to be Given, on Subsequent Judicial Construction, to Prior Administrative Construction of Statute*, 39 L. Ed. 2d 942 (1975).

115. *Chevron*, 467 U.S. at 842.

116. *Rust*, 500 U.S. at 184; *see generally* Schopler, *supra* note 114.

117. *Chevron*, 467 U.S. at 843.

118. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); *see also Rust*, 500 U.S. at 173; Schopler, *supra* note 114.

119. *Chevron*, 467 U.S. at 843 n.11.

the agency's regulations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[120] Stated another way, as long as the agency's regulations are neither arbitrary nor capricious, the court should not invalidate the regulations unless it appears from the statute or legislative history that the agency's interpretation is not one that Congress would have sanctioned.[121] What the court may not do, however, is "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[122] Ultimately, both the court's review of the agency's factual determinations under the "substantial evidence" standard, and the agency's construction of its regulations, are deferential to the agency.[123]

B. IMPACT OF CASE LAW

For purposes of agency acquiescence, this framework offers a very narrow window in which the agency would ever have to adopt a court's construction of its regulations. It is axiomatic in jurisprudence that a court has to announce the rationale for its ruling, and not merely a verdict.[124] Only in those limited circumstances in which the court clearly announces as its holding that either, the plain meaning of the Social Security Act, or the clear intent of Congress requires that the SSA's regulations must be constructed a certain way, would acquiescence even possibly apply; and then, only if the Agency decided not to appeal the matter to the Supreme Court. If the holding of the court is not clear on this point, or if the Agency pursues the issue to the Supreme Court, there would be no need to acquiesce. Furthermore, if the court through the *Chevron* analysis did not find either the plain meaning of the Social Security Act, or if the clear intent of Congress required that the Agency's regulation be constructed in a certain way, but the court nevertheless disagreed with the Agency's construction, the Agency would be under no obligation to adopt the court's construction nor modify its own.[125] While bound by the determination in that particular case at bar, there is no requirement to acquiesce and modify the Agency's regulations unless the clear meaning of the statute or Congress' intent is the basis for the court's decision. The Agency in this situation could consider modifying its regulations, but it would be under no

120. *Id.* at 843-44; *see also* Axelrod, *supra* note 9, at 802.
121. *Chevron*, 467 U.S. at 845; *see also* Axelrod, *supra* note 9, at 802.
122. *Chevron*, 467 U.S. at 843-44.
123. Ruben, *supra* note 11, at 109.
124. Corcoran v. Levenhagen, 558 U.S. 1, 1 (2009) (per curiam).
125. *Chevron*, 467 U.S. at 843-45.

legal obligation to do so.[126] In this framework the burden is on the circuit court to announce its rationale for striking down the Agency's construction of its regulations, making the issue very clear for the Supreme Court: does the plain meaning of the statute, or the legislative intent, mandate that the Agency's regulation on an issue must be constructed in a certain way?[127] Absent this level of specificity on the part of the circuit court, the Agency should be given the opportunity to administer the disability programs as entrusted by Congress.[128]

V. CONCLUSION

Currently, there are two distinct bodies of Social Security disability law – the first as envisioned by Congress and administered by the Agency; and the second, evolved from circuit court cases that federal courts are bound to follow, yet followed by the Agency only when it chooses.[129] This dialectic has created a system whereby a disability claimant may properly be denied benefits under the rules and regulations promulgated by the SSA, and then prevail upon reaching the federal courts, which use a different body of governing law.[130] Friction between the two systems is inevitable, not only with the two different bodies of law, but also because they are two separate approaches to jurisprudence – the Agency's administrative inquisitorial, code based system, versus the court's adversarial, common law approach. This friction increases when a federal court, applying its own law, remands a matter back to the SSA, which is incapable of applying the federal court's law unless it is subject to Acquiescence Ruling. The concept of non-acquiescence, therefore, is the natural result of this conflict between two branches of government, applying two separate bodies of law with two separate systems of jurisprudence.[131]

Conflict and frustration for the court, the Agency, and the disability claimant, is inevitable in such a paradigm. The ultimate solution requires either the SSA change and acquiesce to every precedent set by a circuit court, or the courts change how they adjudicate the disability decisions of

126. *Id.*

127. *Id.* at 842; Rust v. Sullivan, 500 U.S. 173, 184 (1991); *see also* Schopler, *supra* note 114.

128. *Chevron*, 467 U.S. at 843-45; *see also* Axelrod, *supra* note 9, at 802.

129. Axelrod, *supra* note 9, at 770-71; Estreicher & Revesz, *supra* note 8, at 681; Kubitschek, *supra* note 9, at 401; Schwartz, *supra* note 8, at 1816.

130. *See* Kubitschek, *supra* note 9, at 402-03, 412.

131. Schwartz, *supra* note 8, at 1826 ("The opportunity to engage in non[-]acquiescence arises when Congress grants adjudicatory authority to an administrative agency, while making the administrative decision subject to judicial review. Non[-]acquiescence reflects a tension over the terms of the partnership in this shared exercise of federal adjudicatory authority.").

the Agency. Advocates of complete Agency acquiescence argue that the SSA's acquiescence to adverse court precedent would have a minimal impact on the Agency, despite the need to run a uniform, nationwide program.[132] The SSA, they maintain, fails to understand that the role of the judiciary, as it has evolved over eight centuries of common law, is to interpret the law and create binding legal precedent.[133] It is this concept of stare decisis that provides the foundation for our common law,[134] which the SSA threatens to destroy by non-acquiescing.

What these advocates fail to appreciate, however, is that Congress could have designed an administrative disability adjudication system based on common law, in which circuit court case law is automatically applied. Congress, however, did not do so. Instead, it created a code based system in which the SSA, and not the courts, was tasked with creating regulations to implement and administer the disability programs.[135] It is because of the precedent set by the Supreme Court in *Chevron* and subsequent cases, the intent of Congress in creating the SSA, and the deference that is to be shown to the Agency, which requires that the courts change, not the Agency. While it is entirely proper for the federal courts to review the SSA's rules and policies "to ensure that they meet the requirements of the authorizing legislation and the Constitution,"[136] that review should not exceed the framework set by *Chevron.*

Ultimately, it is an issue of deference. Congress' intent was to create an Agency that the courts should defer to, and when a question arises as to how to interpret a statute, both the court and the Agency should defer to the intent of Congress. The courts, however, have hijacked the process that Congress created with the court's own interpretation of how it should be. As set forth by 42 U.S.C. § 405(g), there are only three questions a federal court should consider when hearing a Social Security disability claim: was there substantial evidence to support the Agency's factual findings, did the agency follow its regulations, and is the Agency's interpretation of the regulations consistent with what Congress intended? The answer to the first two is simple and factual; either the Agency had substantial evidence and followed its regulations, or it did not. If the circuit court is faced with the third question, then the *Chevron* framework applies. By limiting judicial review to these three questions, the intent of Congress in creating the SSA is respected, the concept of judicial review is honored, and the separation of

132. Ruben, *supra* note 11, at 113.
133. Kubitschek, *supra* note 9, at 434.
134. Ruben, *supra* note 11, at 111.
135. *See id.* at 112.
136. *Id*. at 108 (citation omitted).

powers between the branches of government – with the executive branch determining how its agencies will operate – is followed. The concept of a uniform and fair nationwide disability adjudication system in which there is one set of rules applicable to all, is furthered by this limitation of the federal circuit court's role.

It is undisputed that the SSA's disability programs have a myriad of problems – improperly paying disability benefits to individuals who are working,[137] banning the reporting of attorney misconduct to state bars,[138] failing to regulate nonattorney representatives,[139] paying disability claims merely to eliminate the backlog of cases,[140] and many more that harm the truly disabled of America. None of those problems or the myriad of others with the SSA are solved, however, by mandating the Agency follow every circuit court precedent – including those that are contrary to the *Chevron* analysis. Instead, all that the court does in exceeding its role set by *Chevron* and the scope of judicial review set by the Social Security Act, is make the situation worse to the detriment to the Agency, the courts, the taxpayer, and most of all, the disabled.

137. Swank, *Welfare and Shadow Economy*, *supra* note 18, at 632-33.

138. Swank, *Attorney Misconduct*, *supra* note 26, 508-09.

139. Swank, *Non-Attorney and Unauthorized Practice*, *supra* note 62, at 239-40.

140. Swank, *Welfare and Shadow Economy*, *supra* note 18, at 636; Swank, *Attorney Misconduct*, *supra* note 26, 524-25.