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General Rules Determining the Employment Relationship under Social Security Laws: After Twenty Years an Unsolved Problem

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GENERAL RULES DETERMINING THE EMPLOYMENT RELATIONSHIP UNDER SOCIAL SECURITY LAWS: AFTER TWENTY YEARS AN UNSOLVED PROBLEM

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(Continued from Spring Issue)

PROPOSED TREASURY REGULATIONS

The present statutory language—"the usual common law rules" —is based upon the Status Quo Resolution of 1948. The relevant part of that Resolution provided that the term "employee" in the social security laws should not include "(1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules." [105] To understand the meaning of the present statutory language one must study the governmental battle from which the Status Quo Resolution emerged. This battle pitted the Congress against the Executive—particularly the Bureau of Internal Revenue and the Treasury Department. Congress fought as guardian of the common law and defender against bureaucratic tyranny, symbols capable of stirring emotions and inflaming passions. The Executive did battle as champion of the Supreme Court and protector of the public interest, equally gallant causes. The central issue was often shrouded in a cloud of exaggerated advocacy. Two facts, essential to an understanding of the subject, often became lost in the imbroglio. The first fact is that there is not and never was a single, simple, clear-cut common law definition of the employer-employee relationship. The second is that the Congress, the Executive and the Supreme Court were in basic agreement as to the classification of all but a small fraction of the working force in America. It was the

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105. P.L. 642, 80TH CONG., 2ND SESS. (1948).

borderline occupations which were at issue in the battle. Too often these basic facts were all but forgotten in the melee.

The Sarajevo came on November 26, 1947, when The Commissioner of Internal Revenue proposed new regulations defining the employer-employee relationship for the purpose of Social Security taxation.[106] It was expressly stated in the proposal that the new regulations were in conformance with "the principles enunciated in 'United States v. Silk' (1947) 67 S. Ct. 1463; 1947 Int. Rev. Bull., No. 15, at 36, 'Bartels et al. v. Birmingham et al.,' 1947, 67 S. Ct. 1547; 194 Int. Rev. Bull. No. 15, at 43, and related cases." Whereas the then existing regulations, promulgated in 1936, emphasized the "control" factor, the proposed regulations emphasized "dependency" and the "economic realities" of the situation, which latter terms soon became congressional curse words. The proposed regulations stated at the outset that "The relationship of employer and employee for the purposes of the Social Security legislation * * * is not restricted by the technical legal relation of 'master and servant', as the common law had developed that relation in all its variations * * *". They then provided:[107]

> An individual performing services for a person is generally an employee of such person unless he is performing such services in the pursuit of his own business as an independent contractor. In most cases in which an individual renders services to a person, general understanding and usage make clear the status of that individual either as an employee of such person or as an independent contractor. * * *

Obvious examples of employees and independent contractors were then listed. There is no doubt that Congress and the Supreme Court would have agreed with these classifications. And these lists covered the vast majority of the working force that were potentially subject to social security coverage.[108]

Part (b) of the regulations provided the test for determining in borderline cases whether an individual is an employee or an independent contractor. It was there that the "dependency" and "economic reality" tests were enunciated. The significance of each of these factors[109] including the "control" factor was then explained in detail.

106. 12 FED. REG. 7966 (1947).

107. 12 FED. REG. 7966 (1947).

108. Other groups not listed, such as farm workers and farm operators, comprised a large segment of the working force but were expressly excluded from coverage.

109. Degree of control, permanency of relation, skill required by the individual in facilities for work and opportunities of the individual for profit or loss.

Whereas the then existing regulations emphasized the "control" factor, the proposed new regulations only grudgingly admitted its significance. After indicating that the higher the degree of control the greater likelihood that an employer-employee relationship was present, the regulations stated:

> * * * *Although control is characteristically associated with the employer-employee relationship,* determination of whether, as a matter of economic reality, an individual is an employee of the person for whom he is performing services, or is an independent contractor, is not to be made solely on the basis of control which such person may or can exercise over the details of such services. (Italics supplied.)

In a backhanded way, however, the italicized clause is an admission that the "control" test is the generally decisive rule. This is certainly true of the non-borderline cases.

Legislative History of Status Quo Resolution

Shortly after the new regulations were proposed, Status Quo Resolutions designed to nullify them were introduced in both houses of Congress. *H.J. Res.* 296 was introduced in the House of Representatives by Representative Gearhart, from California, on January 15, 1948 and was referred to the Committee on Ways and Means. On January 30, 1948, Senator Butler, from Nebraska, introduced an identical resolution, *S.J. Res.* 180, whereupon it was referred to the Senate Finance Committee. Except for one notable exception, the Administration assumed a posture of direct opposition to both the resolutions. The official statement of the Treasury Department to the House Ways and Means Committee on *H.J. Res.* 296,[110] stated that the resolution "would substitute the 'common-law rules' for the principles of economic reality recently set forth by the Supreme Court, * * *." Although without intending to do so, the Administration was inviting Congressional critics to put an extreme interpretation on the proposed new regulations. This, of course, is what happened. The House Ways and Means Committee report on the Status Quo Resolution [111] portrays the proposed regulations as a complete abandonment of common law principles whereas "The legislative history of the 1939 amendments * * * shows conclusively that the Congress intended the usual common-law rules in determining whether an individual is an employee." And in debate on the floor of the House, proponents of the measure followed the same

110. H. Rept. 1319, 80th Cong., 2nd Sess. 13 (1948).
111. H. Rept. 1319, 80th Cong., 2nd Sess. (948).

tack.[112] In a way the opponents of the Status Quo Resolution contributed to the portrayal of the proposed regulations as assaults on the revered common law by castigating the phrase "the usual common law rules" as indefinite and uncertain.[113]

The resolution was pushed through the House with remarkable speed. It was introduced in the House on January 15th and referred to the Committee on Ways and Means. This speed was undoubtedly due to the fact that the Committee made the agencies aware that the resolution was to be processed swiftly.[114] The Committee Report on the resolution was filed in the House on Tuesday, February 3rd and two days later the Rules Committee, after hearing three members of the Committee on Ways and Means, granted a rule on the resolution. On February 27th it was called up, debated and passed the House by a vote of 275 to 52. This was indeed expeditious action. Most members of the House thought they were defending the honor of the revered common law and striking a blow in defense of liberty against bureaucratic tyranny and judicial autocracy.

In the Senate the same general approach was evident. The proposed regulations were viewed and generally condemned as a departure from sacred common law moorings. However, in contrast to the dominant view in the House,[115] the Senate practically exonerated the Supreme Court from any wrongdoing in the matter. This is extremely important in relation to the current question of the vitality and authority of the *Silk, Greyvan* and *Bartels v. Birmingham* cases. The general view in the Senate was that these cases did not justify the vast changes proposed by the agency regulations and that, properly interpreted, they were a correct appraisal of the law.

The Treasury Department, undoubtedly somewhat shaken by the swift and stunning defeat administered in the House, resumed the battle in the Senate. By this time the propaganda efforts of the Administration were beginning to be felt. The Administration depicted itself not only as the defenders of the Supreme Court in this matter but also as guardians of the public interest. According to the Administration from one-half to three-quarters of a million persons would be deprived of Social Security benefits if the Status Quo Resolution were

112. 94 CONG. REC. 1893-1904 (1948). This is particularly true of the remarks of Representative Gearhart on pages 1863-1895 of Volume 94 of the CONGRESSIONAL RECORD.

113. 94 CONG. REC. 1897-1998 (1948).

114. See debate on *H.J. Res.* 296 by Congressman Eberharter, 94 CONG. REC. 1898 (1948).

115. Exceptions were Representative Mills, Democrat from Arkansas, 94 CONG. REC. 1903 (1948) and a brief filed by Representative Reed, Republican from New York, 94 CONG. REC. 1899-1902 (1948).

passed. Proponents of the resolution were stung by this claim and fought back. Much of the Congressional discussion in the hearings and debates was directed to this somewhat collateral but, from a partisan political point of view, potent issue.

The Administration's position was that under the tests announced in the *Silk, Greyvan* and *Bartels v. Birmingham* cases these groups should always have been covered. From the inception of these laws the Federal Security Agency had been doing this. It was crediting toward benefits these groups with quarters of coverage even though the Treasury Department, following a narrower interpretation, was not collecting taxes from the persons themselves or from their employers.[116] Some members of the Senate Finance Committee were surprised to hear that the Federal Security Agency was crediting and paying benefits to persons from whom and for whom no social security tax collection had been made.[117] This information supplied by Mr. Ewing conclusively demonstrated that the resolution as passed by the House was definitely not, as labelled, a "Status Quo Resolution".

On May 6, 1948, the Committee favorably reported *H.J. Res.* 296 to the Senate. In its report the Finance Committee maintained the Congressional posture first as guardian of the common law [118] and as defender against bureaucratic tyranny.[119] In addition the Senate Finance Committee came forth as champion of a fresh cause. Not only was the Federal Security Agency seeking to "make law" by "unbounded and shifting" regulations but also it was dissipating "the old age and survivors insurance trust fund through benefit payments to persons, not 'employees' under the act, who have not, therefore, made contributions to the trust fund." This last charge must have been a bitter one for the Federal Security Agency to hear. In testimony before the Senate Finance Committee representatives of the agency went to great lengths to point out to the committee that eligibility for social security benefits was not based upon tax contributions to the trust fund but rather depended upon whether a person was in covered employment. The agency pointed out instances where by order of court benefits were paid even though tax contributions had not and could not retrospectively be made.[120] Furthermore, the agency representatives had indicated to

116. *Hearings before the Senate Finance Committee,* 80TH CONG., 2ND SESS. 126, 135 (1948).

117. *Hearings before Senate Finance Committee,* 80TH CONG., 2ND SESS. 140 (1948).

118. SEN. REPT. No. 1255, 80TH CONG., 2ND SESS. 1 (1948).

119. SEN. REPT. No. 1255, 80TH CONG., 2ND SESS. 8 (1948).

120. *Hearings before Senate Finance Committee in H.J. Res. 296,* 80TH CONG., 2ND SESS. 141 (1948).

the committee that the credit toward benefits had been awarded by the agency without tax contributions because of a difference of interpertation of the statutory term "employee" by the Treasury Department and the Federal Security Agency and that in the end the Supreme Court had sustained its rather than the Treasury's interpretation.

However, the most striking feature of the Senate Finance Committee Report is its attitude toward the Supreme Court decisions in the *Silk, Greyvan* and *Bartels v. Birmingham* cases. Whereas the House Committee Report assailed these decisions, the Senate Report did not. The Senate Report confined its fire exclusively to the administrative agencies. It indicated that the Supreme Court decisions in the above cases, when properly understood, represented an accurate interpretation of the Social Security laws.[121] According to the Report the administrative agencies had seized upon "prefatory remarks of the Court" relating to "economic dependence" and "economic reality" to justify their new proposed regulations. This, it states, was completely unwarranted. "Rather than implementing the Supreme Court decisions, the proposed Treasury regulation attempts to surmount, supersede and negative them." [122] The Report points out that these prefatory remarks must be understood in the light of "the facts involved, the decision, and to their moving rules." In three of the four situations presented for decisions in these cases the Court upheld the *taxpayers* and held the agencies had sought erroneously to extend under existing regulations coverage beyond the terms of the Act. According to the Report, this indicates the Court had no intention of making any of the sweeping expansions in the coverage of the Act proposed by the new regulations. On the contrary says the Report the Court was merely indicating that the common law tests should not be narrowly applied; they should be "realistically applied". Out of an abundance of caution, however, the Report concludes this discussion with the reservation that if its interpretation of the Supreme Court cases is wrong and that of the agencies is right, then the Status Quo Resolution is not to be interpreted as consistent with the cases but as a restoration of the usual common-law rules realistically applied.

This same approach was followed by Senator Milliken in explaining *H.J. Res. 296* on the floor of the Senate.[123] He directed his fire against the Treasury Department for seeking to make law by regulation and the Federal Security Agency for dissipating the trust fund.[124]

121. SEN. REPT. No. 1255, 80TH CONG., 2ND SESS. 13-17 (1948).
122. SEN. REPT. No. 1255, 80TH CONG., 2ND SESS. 17 (1948).
123. 94 CONG. REC. 7021-7026 (1948).
124. 94 CONG. REC. 7021-7026 (1948).

He absolved the Supreme Court of any wrongdoing in the *Silk, Greyvan* and *Bartels v. Birmingham* cases with a caveat that if others interpret these cases to support the agencies then the Resolution is inconsistent with the cases. In debate Senator Milliken reemphasized the position of the Senate Finance Committee that these cases stood for a "realistic application" of the common law rules—not a repudiation of them.[125] Even Senator Hatch who led the opposition to the Resolution in the Senate agreed that the Supreme Court had not abandoned the common-law test. However, he pointed out that, in the words of Justice Rutledge, "The assumed simplicity and uniformity resulting from 'Common law standards' does not exist". For this reason he doubted the value of the Resolution which proclaimed that the "usual common-law rules" were to apply. As to the Treasury Department regulations, he said that if they were unwarranted under the Social Security laws, the Courts could be relied upon to invalidate them.[126]

The consideration of *H.J. Res.* 296 was complicated in the Senate by the fact that an amendment increasing benefits under the old age assistance, aid to dependent children, and aid to the blind provisions in the Social Security laws was attached to it. Senators Barkley and Pepper complained that this confused the issue because they favored these increased benefits but opposed the Resolution.[127] In any event the Resolution was passed by the Senate by the overwhelming margin of 74-6.[128] On the same day the House concurred in the Senate amendments and sent the Resolution to the White House. But the explanation of the measure on the House floor by Representative Reed of New York is extremely important. He abandoned the earlier approach of the House Ways and Means Committee which had condemned the Supreme Court decisions in the *Silk, Greyvan, and Bartels v. Birmingham* cases.[129] Instead, he adopted the interpretation of these decisions put forth by the Senate Finance Committee and Senator Milliken.[130] This same approach was followed on both the House and Senate floors when the Resolution was passed over President Truman's veto.[131]

The legislative history clearly establishes that the dominant Congressional opinion was that *H.J. Res.* 296 was a restatement of the law

125. 94 CONG. REC. 7021-7026 (1948).
126. 94 CONG. REC. 7026-7029 (1948).
127. 94 CONG. REC. 7124-7127 (1948).
128. 94 CONG. REC. 7134 (1948).
129. 94 CONG. REC. 7214 (1948).
130. 94 CONG. REC. 7214 (1948).
131. 94 CONG. REC. 8087-8093, 8188-8191 (1948).

and was consistent with the *Silk, Greyvan* and *Bartels v. Birmingham* cases.

In 1949 the Truman Administration urged Congress to repeal the Gearhart or Status Quo Resolution and extend coverage, as employees, to the 500,000 to 750,000 persons in the occupational groups which would have been covered if the Resolution had not been enacted.[132] A congressional compromise gave the Administration some of the extension of coverage it asked but rejected the requested repeal of the Resolution. The terminology of the Resolution was retained as part of a new definition of "employee". The new definition also provided specific coverage, as employees, for many of the occupational groups in question. In retaining the "usual common law rules" provision the Conference Committee stated: [133]

> With regard to the meaning of the phrase the usual common law rules applicable in determining the employer-employee relationship, this opportunity is taken to reiterate and endorse the statement made in the Report of the Committee on Ways and Means in connection with the Social Security Act Amendments of 1939:
>
> A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied (p. 76).
>
> This statement made in 1939 is equally applicable to the phrase in the bill as agreed upon in the conference agreement, which contemplates a realistic interpretation of the common law rules.

This was part of the Social Security Act Amendments of 1950,[134] the main provisions of which extended coverage for the first time to the self-employed. Consequently over 500,000 of the persons in the occupational groups in question were covered as employees and the remainder were covered as self-employed persons. The House would have gone further than the Senate in accommodating the Administration. The House version of the bill [135] would have covered as employees all the occupation groups in question. In addition it would have incorporated in its new definition of "employee" the six test factors the 1947 Treasury regulations proposed. However, the

132. *Hearings before House Ways and Means Committee on H.R. 2893,* 81ST CONG., 1ST SESS. Part 2 1087-1088 (1949).

133. H. REPT. No. 2771, 81ST CONG., 2ND SESS. 104 (1950).

134. 64 STAT. 477 (1950).

135. H. REPT. No. 1300, 81ST CONG., 1ST SESS. 81-91. (1949).

Senate version eliminated these factors and many of the occupational groups.[136] In conference three of the occupational groups eliminated by the Senate were restored. This resulted in coverage, as employees, for over half a million workers. However, the Treasury regulations factors were not restored.

That part of the definition of "employee" which originated in the Gearhart or Status Quo Resolution and which makes the common law rules applicable has remained unchanged since the 1950 Amendments Act. The meaning of this clause is to be found in the legislative history of the above Resolution. This history makes perfectly clear that the Resolution was not intended to upset the *Silk, Greyvan* and *Bartels v. Birmingham* interpretations of the word "employee". Therefore for the purpose of guidance in the interpretation of this term, these cases are good law today.

The Status Quo Resolution: A Restatement or Repudiation of the 1947 Supreme Court Cases

One of the avowed purposes of the Gearhart or Status Quo Resolution was to achieve a higher degree of certainty in the law.[137] It has not had that effect however. This is not too surprising. The shifts in interpretation during legislative consideration of the Resolution, the hedging in the Committee Reports on the effect of the Resolution on the 1947 Supreme Court cases and the general lack of precision of the language of the Resolution, all pointed to uncertainty rather than clarity. First the ever present variations in views as to the content of the "usual common law rules applicable to the employer-employee relationship" persist. Some courts view the rules as being exclusively concerned with the factor of control—"the common law control test". On the other hand others think the common law rules indicate that control is one among a number of relevant factors. Second there is a wide difference of opinion as to the effect of the 1948 Resolution on the 1947 Supreme Court cases. Some view the Resolution as a direct and complete repudiation of the cases. In complete contradiction others —notably Judge Clark of the Court of Appeals for the Second Circuit —view the Resolution as a codification and restatement of the law of the 1947 cases. In many other cases the courts appear to ignore the Resolution completely while others ignore the 1947 cases entirely. After twenty-two years the basic test for determining the employer-

136. Sen. Rept. 1669, 81st Cong., 2nd Sess. 95-97 (1950).

137. 94 Cong. Rec. 1894 (1948).

employee relationship under the Social Security laws remains uncertain and unclear.

Before examining the cases subsequent to the enactment of the Status Quo Resolution a word of caution should be repeated. It is almost impossible to know how much the announced rule of law has to do with the result in a case. A judge may be disposed to find that cab drivers or commission salesmen are independent contractors no matter how the rule of law is verbalized. For him this is going to be the result whether the rule as he sees it establishes control as the exclusive factor or merely one among many factors to be considered and whether the 1948 Resolution repudiates or codifies the 1947 Supreme Court cases. As was said earlier, this impotence of rules of law in close cases (which means most of the civil cases that get before the courts) is not confined to Social Security cases. It is an inherent characteristic of the judicial process which must be kept in mind as we analyze these cases lest we overemphasize the effect of variations in the rules of laws on the outcome of cases. This is not to say that a different understanding of the rule would never affect the outcome. In some cases every indication is that it would.[138]

The first Court of Appeal to consider the impact of the Status Quo Resolution was the Fourth Circuit in the case of *Ewing v. Vaughn*,[139] in which Vaughn who was drawing Social Security benefits at the time sought review of the decision of the Appeals Council of the Social Security Administration reducing his benefits. The Appeals Council had held his activity as a "flour broker" to be "employment" requiring the reduction of his Social Security benefits in accordance with the amount of wages he earned as such an "employee". Judge Prettyman, speaking for himself and Judges Parker and Dobie, said the reasoning of the Appeals Council was based on the concept of "economic reality" as developed in the 1947 Supreme Court cases and that the 1948 Resolution calling for the common law test reversed that view. Judge Prettyman said that the factors of control, provision of tools and a place to work are all part of the common law definition and dictate that Vaughn is not an employee. The effect of this case is to identify the 1947 Supreme Court cases with the "economic reality concept" and to indicate that the cases so understood were repudiated by the 1948 Resolution.

In December of that same year the Court of Appeals for the Eighth Circuit held coal jobbers (persons who unload and store coal

138. Metropolitan Roofing Co. v. U.S., 125 F. Supp. 670 (Mass. 1954).

139. 169 F.2d 837 (4th Cir. 1948). See Crossett Lumber Co. v. U.S., 79 F. Supp. 20 (Ark. 1948).

into customers' bins) to be employees and subject to Social Security taxes.[140] Judge Woodrough observed that *Silk* and *Bartels v. Birmingham* must be read in the light of the 1948 Status Quo Resolution. He alluded to a number of factors in addition to control such as irregularity of employment, payment per ton unloaded and stored, and use of own tools. Finally he cited and quoted from the 1945 case of *Grace v. Magruder*,[141] for the proposition that according to common law principles as well as the purposes of the Social Security laws coal jobbers were employees. One is left with the impression that Judge Woodrough believed the 1947 Supreme Court cases had departed from the common law principles which were then restored by the Status Quo Resolution but on this point the opinion is cryptic and ambiguous.

The following year three additional circuits interpreted the Status Quo Resolution as repudiating the principles of the 1947 Supreme Court cases. Judge Major, in a Seventh Circuit case,[142] thoroughly examined the incidents in the development of the term "employee" in the Social Security laws. He noted the early agency regulations, the abortive effort of the Board to secure Congressional expansion of the term in 1939, the 1947 Supreme Court cases and finally the legislative history of the 1948 Status Quo Resolution. He read the Resolution as a repudiation of the *Silk* case. Even so the factors that he apparently considered relevant to determine whether the cab drivers were or were not employees included a number of factors enumerated in the *Silk* case, namely, opportunities for profit or loss, investment in facilities, permanency of relation, and control. On the basis of these, he held the drivers to be independent contractors. Judge Swygert dissented in a well-reasoned opinion stressing the point that many factors are relevant and must be weighed. Four months later the Fifth Circuit also held cab drivers not to be employees in an opinion adopting the position that by the Status Quo Resolution Congress "rebuked the overzeal of the courts in trying to make a better law than the words of Congress had made." [143] Approximately, two weeks after the Seventh Circuit decided the *Party Cab Co.* case, the Tenth Circuit [144] joined the swelling ranks of courts of appeals interpreting the Status Quo Resolution as repudiating the 1947 Supreme Court cases. In that case the court held an outside commission salesman to be an independent contractor.

140. U.S. v. Kane, 171 F.2d 54 (8th Cir. 1948).

141. 148 F.2d 679, *cert. den.*, 326 U.S. 720 (D.C. 1945).

142. Party Cab Co. v. U.S., 172 F.2d 87 (7th Cir. 1949); 24 N.D. LAW. 578 (1949).

143. New Deal Cab Co. v. Fahs, 174 F.2d 318, 319 (5th Cir. 1949).

144. Benson v. Social Security Board, 172 F.2d 682 (1949).

The first reported case taking a position contrary to these five circuits is *Shreveport Laundries v. U. S.*[145] in which District Judge Porterie held a laundry pick up station operator to be an independent contractor and said:

> In our decision of this case we are not considering that the passage by Congress of the [Status Quo Resolution] subsequent in time to the [*Silk* and *Bartels v. Birmingham*] decisions is a rejection of the doctrine of the Supreme Court established in the two cases.

This decision by Judge Porterie of the Fifth Circuit was handed down at about the same time the Court of Appeals for the Fifth Circuit was deciding that the Resolution had the effect of repudiating these decisions. Significantly enough in a subsequent case [146] Judge Porterie recanted and adopted the orthodox (in the Fifth Circuit) position that *Silk, Greyvan* and *Bartels v. Birmingham* rejected common law tests and that Congress repudiated these opinions with the Status Quo Resolution. Also whereas in the *Shreveport* laundries case a number of factors including control were analyzed, in the *Rambin* case the factor of control was emphasized to the exclusion of all others.

The Court of Appeals for the Eighth Circuit continued its ambiguous and cryptic treatment of the effect of the 1948 Resolution on the 1947 Supreme Court decisions. In *Dimmitt-Richhoff-Bayer Real Estate Co. v. Finnegan,*[147] certain real estate salesmen were held to be independent contractors as to whom no Social Security tax liability applied. In his opinion Judge Sanborn cited the *Silk* case as a controlling authority. Later he indicated that the Status Quo Resolution was directed at the ill-starred Treasury Regulations proposed for adoption on November 27th, 1947. Still later he concluded that the Resolution was aimed at "Treasury Regulations or court decisions relaxing or changing the common law concept of the employer-employee relationship." [148] It is not clear whether Judge Sanborn considered the 1947 Supreme Court cases to be such eroneous "court decisions."

In the face of this almost unanimous interpretation by the other circuits, the Court of Appeals for the Second Circuit in *Ringling Bros.-Barnum & Bailey Com. Shows v. Higgins*[149] adopted a diametrically opposed position. In a split decision written by Judge Clark and joined by Augustus Hand, Clark said that the Gearhart or Status Quo Resolu-

145. 84 F. Supp. 435 (La. 1949).

146. Rambin v. Ewing, 106 F. Supp. 268 (W.D. La. 1952).

147. 179 F.2d 882 (8th Cir. 1950).

148. 179 F.2d 882, 888.

149. 189 F.2d 865 (2nd Cir. 1951).

tion was, in effect, a codification or restatement of the 1947 Supreme Court cases not a repudiation of them. Judge Clark summarized the background of the enactment of the Status Quo Resolution—the 1947 Supreme Court cases and then the proposed new Treasury regulations—accurately observing that "the so called Gearhart Resolution—was specifically directed at this new regulation." And to many in Congress the "issue [was] one of legislative preservation of the integrity of its own enactments against bureaucratic expansion."

At issue in the case was the status of circus performers who were denominated independent contractors in their contracts. Judge Clark said that the circus had the power of discharge, that payment was for agreed upon sums per week so that there was no element of profit and loss for the performers and that although the circus exercised little control over the detail of acts performers presented, it nevertheless had the ultimate power of direction and control as to where the entire circus played and how the acts were fitted into one integrated show. Evaluating all relevant factors, he held the performers to be employees properly the subject of Social Security tax liability.

Judge Swan dissented on the grounds that, in his opinion, the 1948 amendment repudiated the 1947 Supreme Court cases and restored the common law control test as enunciated in *Radio City Music Hall.*[150] In this case the circus lacked the authority to control the details of the performance therefore the performers were not employees under the act.

Since the *Ringling* case, only one new Circuit of the Court of Appeals has had occasion to consider this subject. The Court of Appeals for the Ninth Circuit in *Westover v. Stockholders Publishing Co.*[151] held newspaper route district men and dealers, who were the conduit through which papers passed from the publisher to the carrier boys, to be employees and properly the subject of Social Security tax liability. In his opinion Judge Walsh said that a "realistic application

150. Radio City Music Hall v. U.S., 135 F.2d 715 (2nd Cir. 1943). Although Judge Clark's views as to the continuing vitality of the 1947 Supreme Court cases have never been directly challenged by any subsequent Second Circuit opinion, the case of Zipser v. Ewing, 197 F.2d 728 (2nd Cir. 1952), presents a curious inconsistency with the reasoning of the *Ringling* opinion. In *Zipser,* Judge Frank's opinion, joined by Judges Augustus Hand and Clark himself, cites the Status Quo Resolution, and the *Radio City Music Hall* case but makes no mention of the 1947 Supreme Court cases. Judge Frank goes on to say that *Ringling* is consistent with *Radio City Music Hall* on the point "that it is the right to direct which is important." However Judge Frank does not mention that *Ringling,* unlike *Radio City Music Hall,* also considers many other factors in addition to control to be important. Pointing more toward *Ringling* is the 1957 case of Ben v. U.S., 241 F.2d 127 (2nd Cir. 1957) in which a one paragraph per curiam opinion of the Court of Appeals for the Second Circuit cites as authority the *Silk, Bartels v. Birmingham, Ringling,* and *Westover* cases. Significantly enough *Zipser* is not mentioned.

151. 237 F.2d 948 (9th Cir. 1956).

is to be made of the common law rules * * * and the term 'employment' and 'employee' are to be construed, not in a restricted case, but so as to accomplish the purposes of the legislation involved. Those persons are 'employes' who, as a matter of economic reality, are dependent upon the business to which they render service." He then enumerated factors such as risk, control permanency and others he thought would "bear logically upon the issue of the workers' actual economic dependence upon the business of the alleged employer". Judge Walsh cited the *Silk, Bartels v. Birmingham* and *Ringling* cases as authority for these general propositions. He did not discuss the Status Quo Resolution but the obvious inference is that he agreed with Judge Clark's discussion in *Ringling*.

The present position of the Courts of Appeals for the various circuits may be summarized as follows. The test to determine the employer-employee relationship in the Tenth Circuit, if not limited to, certainly gives overwhelming significance to the factor of control over the details, methods, manner and means by which work is done.[152] All other circuits which are on record consider the control factor to be one of many factors to be evaluated. The Ninth Circuit would point these factors to the ultimate criteria of "economic dependence" and "economic reality".[153]

The Circuits that have thus far considered the question are split four (Fourth, Fifth, Seventh and Tenth) to two (Second and Ninth) with one (Eighth) undecided as to whether the Status Quo Resolution repudiates or restates the principles of the 1947 Supreme Court cases.

The districts courts have generally tended, first to greatly emphasize control of the means of performance as the basic test and second, to either ignore the Status Quo Resolution or consider it to have repudiated the principles of the 1947 Supreme Court cases. As we have seen, a Massachusetts District Court in the First Circuit [154] greatly emphasized control and considered the 1948 Status Quo Resolution to have been a repudiation of the *Silk* case. The Court of Appeals for the First Circuit has yet to pass upon the question. The same is true of the Third Circuit where three district courts have adopted the view that the Resolution repudiated the 1947 Supreme Court cases. In *Schmidt v. Ewing,*[155] a meat inspector was denied Social Security benefits when he was held not to be an employee because the company had no right to control the result, means or manner in which he inspected meat. Although paid by the company, he was assigned to the company by the

152. Benson v. Social Security Board, 172 F.2d 682 (10th Cir. 1949).
153. Westover v. Stockholders Publishing Co., 237 F.2d 948 (9th Cir. 1956).
154. Metropolitan Roofing Co. v. U.S., 125 F. Supp. 670 (Mass. 1954).
155. 108 F. Supp. 505 (M.S. Pa. 1952).

State Department of Agriculture, performed his services in accordance with rules and regulations issued by the Department and reported regularly to the Department. In *Millards Inc. v. U. S.*[156] siding applicators were held to be independent contractors as to whom the company was not liable for Social Security taxes. As in the two previous district court cases set out above, the trial judge ascribed the "economic reality" test to the 1947 Supreme Court cases and then indicated that this was repudiated by the 1948 Resolution. In this case Judge Hartshorne went on to say that evidence that applicators did not work for others, called the company's superintendent "boss", referred inquiries about application jobs to the company and that the company carries its sign on the job were laregly beside the point because they were directed to the repudiated *Silk* and *Bartels v. Birmingham* test of dependency as a matter of economic reality. This unwarranted restriction of the probative value of these facts stems from Judge Hartshorne's belief that the right to control the details and means by which the result is accomplished is the exclusive factor to be considered. As in the *Metropolitan Roofing Case* in Massachusetts dealing with applicators, if the judge had understood that the proper test called for consideration of factors other than control, the result in the case might well have been different.

Some courts have cited the 1947 Supreme Court cases but ignored the 1948 Resolution completely.[157] There is a slight possibility that these courts were aware of and silently adopted the view that the Resolution restates the law of the cases but there is nothing in the opinions of the judges to indicate that this is so.

Some courts have cited the 1947 Supreme Court cases, cited the Senate Report which accompanied the 1948 Resolution, but made no mention of the Resolution or its relation to the cases.[158] Others have cited the 1948 Resolution while ignoring the 1947 Supreme Court cases.[159] Others have cited the 1948 Resolution while ignoring the 1947 Supreme Court cases.

156. 146 F. Supp. 385 (D.N.J. 1956).

157. Brady v. Periodical Publishers' Service Bureau, 173 F.2d 776 (6th Cir. 1949), held magazine solicitors and collectors to be independent contractors because the company "does not control their means and manner of work."

158. Weatherguard Corporation v. U.S., 146 F. Supp. 942 (Ct. of Cl. 1947), held commission salesmen of storm windows and doors to be employes upon whose employment Social Security taxes had been properly levied. After examining a number of factors such as control, skill and provision of tools, Judge Jones concluded that the purposes of the Social Security legislation as disclosed by the Supreme Court in *Silk* suggest that the salesmen should be considered employees.

159. In Zipley v. U.S., 156 F. Supp. 141 (E.D. Pa. 1957) commission salesmen and siding applicators were held to be independent contractors and in Willard Storage Battery Co. v. Carey, 103 F. Supp. 7 (N.D. Ohio 1952) physicians who, on a part-time basis at the company, treated company personnel were held independent contractors.

Conclusion

The history of the development of the basic rules applicable in determining the employer-employee relationship under the Social Security laws presents an interesting picture of the operation of our legal system. It depicts the functions performed by the various processes—legislative, administrative, and judicial—in our law. It shows them at their best and at their worst—their strengths and their weaknesses.

As it should be in a democracy the legislative process pulls the heavy oar. For the vast, vast majority of persons the action of Congress, influenced greatly by the legislative recommendations of the President, determines their Social Security status. When the Social Security Act came into being by Congressional action upon Presidential recommendation, most workers had no difficulty determining whether they were in covered employment or were outside the scope of the law. Action of Congress had settled their rights and liabilities. Similarly in 1950 the Social Security rights and liabilities of vast numbers of self-employed persons was conclusively settled by Congressional action authorizing their coverage. At the same time Congress, with one broad sweep, not piecemeal as in the judicial process, settled the status as employees of a number of occupational groups—life insurance salesmen, commission drivers and homeworkers—whose status had been the subject of judicial pulling and hauling for years.

For the vast majority of persons whose status is clear, the administrative process also performs valuable services. On the one hand, it is the conduit through which the actions of Congress are interpreted and passed on to the millions of persons throughout the country. On the other hand, it performs the tremendous bookkeeping and tax collection jobs whereby benefit eligibility is recorded and tax liability is satisfied. Those whose status under the law is clear have little need of the judicial process or the adjudicatory phases of the administrative process.

These processes are important for those whose status is unclear—for those who have legal problems. Immediately after enactment of the Social Security laws, the Treasury Department and the Social Security Board anticipated some of these problems and, to aid in their solution, promulgated interpretive regulations. Subsequently, the adjudication phases of these agencies' processes were occupied in determining whether specific individuals in borderline occupation groups were or were not covered. And the judicial process came into play when the disappointed parties in the administrative process sought further relief in the courts. This clearly demonstrates that the basic function of the

judicial process is to handle disputes which grow out of borderline problematic situations.

In this study we have seen our various legal processes at their best and at their worst. If one shares the writer's view that the Social Security laws are one of the great contributions of the New Deal to the alleviation of economic distress during old age and unemployment, then its enactment was one of Congress's finest hours. Similarly the efficient administration of the vast program by the Treasury Department and the Social Security Board and its successors is one of the great achievements of our administrative process. And the perception demonstrated by the Supreme Court in the *Silk, Greyvan* and *Bartels v. Birmingham* cases is a tribute to the wisdom of our highest judicial organ.

But every closet has its skeletons. The Status Quo Resolution itself is not the most constructive piece of legislation Congress has produced. Spawned by a Congressional debate largely devoted to false issues, it is vague and ambiguous. Its express purpose was to squelch the proposed new Treasury regulations of 1947. But the case against the regulations is not nearly so strong when examined with unbiased hindsight. They were not the seismic break with tradition that Congress charged. In fact if it had been indicated that the proposed regulations were consistent with, rather than an assault upon the common law, it would be difficult to find fault with them. One cannot help but suspect that many in the 80th Congress supported the Resolution out of pent-up rebellion against the New Deal Administration. It was the first Republican-controlled Congress since the New Deal and since World War II. It was the Congress which enacted the Taft-Hartley Act whereby the "pendulum" swung away from the Wagner Act. It was the Congress which reversed the case of *N.L.R.B. v. Hearst Publications* by excluding newsboys from coverage under the federal labor laws. It was the Congress which proposed the two term Presidential limit—a clear slap at President Franklin D. Roosevelt. The Resolution was undoubtedly, to many, a further device to whittle the New Deal bureaucrats down to size. Such venomous spite is Congress at its worst. But the Administration is not without blame. It should have anticipated the inflammatory nature of an assault on common law traditions. And when calm reflection reveals that the assault was purely fictitious, the error appears all the greater. In the judicial process where the Supreme Court appears to have acquited itself well, many of the lower federal courts have not been as perceptive. Not only is there widespread confusion in the present law, but also in many cases it is evident the judges were not aware of basic statutes such as the Status Quo Resolution and prior decisions such as the *Silk* case. It must be con-

cluded that each of the various processes are chargeable with errors in the development of this area of the law.

As we have said the present status of the law in this area is unclear. The courts have differed widely as to the general principles applicable in determining the employer-employee relationship. The Treasury Department continues to use its original 20-year-old formula, ostensibly relying, for the most part, on the factor of control. While some judges appear to do the same, most seem to recognize the relevance of factors other than control. Few, however, have perceived as clearly as Judge Clark of the Second Circuit Court of Appeals in the *Ringling* case, the precise test that the 1947 Supreme Court cases and the 1948 Status Quo Resolution strive to express.

The precise test has been variously verbalized. Justice Reed speaking for the Supreme Court identified a number of factors including control which are relevant. He also indicated that the overall purposes of the legislation must be taken into account. The Senate Finance Committee said that they agreed with Justice Reed's concept, but used different words to express it. Their verbalization of the test was "the usual common law rules *realistically applied*". The important point that Justice Reed and the committee are striving to make clear and the point that Judge Clark clearly perceives [160] is that the test for the "employer-employee" relationship under the Social Security laws embraces a number of factors. These include control, opportunity for profit or loss, amount of investment, and degree of skill required for the work.

In addition, Justice Reed said that the purposes of the legislation must be taken into account, a view which might appear inconsistent with the usual common law rules. However, there is no inconsistency in, on the one hand, taking into account the purposes of the legislation and on the other hand consulting relevant common law rules. When a term is used by a legislative body, its common law background in other fields of the law (such as vicarious liability in tort) is to a certain extent known to the legislators. But it is equally true that those who enact the legislation have a purpose which may occasionally require an interpretation different than the one derived from other legal fields. Therefore, to discern the correct meaning in the particular case the purpose of the legislation as well as the common law must be taken into account.

Judge Learned Hand makes this point very strikingly in one of the early Social Security cases, *Texas Co. v. Higgins*.[161] In that case, Judge Hand said that bulk oil plant distributors appeared to him to

160. 189 F.2d 865, 869 (2nd Cir. 1951).
161. 118 F.2d 636 (2nd Cir. 1941).

clearly not be employees even though some tort cases had held that they were. Hand said that bulk oil distributors may have been considered servants in tort cases because "it should be remembered that a vital consideration in imposing liability may well have been that the injured person was likely otherwise to be without any actual remedy." [162] A great judicial wisdom underlies this observation. The judge and jury always are and should be aware of the realities of the case before them. The result can never be ignored. The rules of law must always be tools by which a just result is achieved and consequently this result must always be uppermost in the mind of the judge, juror or agency official. This is the common law approach at its best. It is applicable in all areas of the law. In a tort case the judge and jury must always be aware that recompense and liability depend upon their understanding of the facts and law. The same is true in Social Security cases. *Benefits* and *tax liability* depend upon the adjudicating official's understanding of the facts and law. In borderline cases, the justice of the result, its compatibility with the purpose of the legislation, will and should be a factor that is evaluated by them. This is the approach of Justice Reed and the Senate Finance Committee. It is the orthodox common law approach, summed up by the well known common law canon of statutory construction: "Statutes are to be interpreted in the light of their purpose." [163]

The fact that proper interpretation of a statute requires that its purpose be taken into account leads to a word of caution. Cases like *NLRB v. Hearst Publications* [164] and U.S. v. Silk [165] are considered leading cases for the interpretation of the term "employee" in social legislation. Within limits, this approach is sound. In the group of cases dealing wtih the term "employee"—*Hearst* interpreting the NLRA, *Silk* interpreting the Social Security laws, *Rutherford Food Corp. v. McComb,*[166] the FLSA, and *Cosmopolitan Co. v. McAllister,*[167] the Jones Act—Justice Reed cross-fertilized cases dealing with various statutes. But he did so to indicate the proper interpretive approach, *i.e.,* the relevance of a number of factors besides control and the significance of the purposes of legislation. Lower federal courts have used the Social Security cases in a similar manner in litigation involving

162. 118 F.2d 636, 639 (2nd Cir. 1941).

163. 3 SUTHERLAND, STATUTORY CONSTRUCTION 153 (Horack, 3rd ed. 1943).

164. 322 U.S. 111 (1944).

165. 331 U.S. 704 (1947).

166. 331 U.S. 722 (1947).

167. 337 U.S. 783 (1949).

other statutes.[168] However, the authority of the Social Security cases outside the Social Security field, is justifiable only to the extent that the purposes of the other statutes coincide with the purposes of the Social Security laws.

At the risk of oversimplification, it is possible to discern a common element in the various factors which the courts and agencies have recognized as relevant in determining the employer-employee relationship. All of the factors help to determine whether or not the person is in his own business, whether as Justice Wolfe of the Utah Supreme Court [169] has said, he is engaged in an "independent calling". If he is, then he is held to be an independent contractor rather than an employee. When the courts and agencies have followed this approach they would appear to be more closely attuned to the Congressional purpose of the legislation. This is particularly true today. The recent provision of old age and survivors insurance for the self-employed makes the concept of "independent calling" even more akin to the over-all Congressional purpose behind Social Security legislation. Since 1950, and with certain exceptions, one who carries on a trade or business is covered as a self-employed person. The clear inference is that one who is not engaged in a trade or business of his own—not in an "independent calling"—but who is nevertheless regularly engaged in work of some kind is to be covered as an employee.

In the main, this seems to be the real, but unarticulated, approach of the Treasury Department. Schochets when in business for themselves were held to be self-employed [170] whereas when working regularly at a poultry company, they were held to be employees.[171] A physician while in residency worked part time for a particular organiza-

168. *F.L.S.A.:*

Tobin v. LaDuke, 190 F.2d 677 (9th Cir. 1951), lumber loaders held employees; Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952), truck drivers and wood workers held employees; Mitchell v. Strickland Trans. Co., 228 F.2d 124 (5th Cir. 1955), night watchmen held employees; Mitchell v. McCarty, 239 F.2d 721 (7th Cir. 1957), McComb v. Wagner, 89 F. Supp. 304 (E.D.N.Y. 1950), homeworkers held employees, reversed for other reasons 187 F.2d 977 (2nd Cir. 1951).

Unfair Labor Practice:

N.L.R.B. v. Nu Car Carriers, 189 F.2d 756 (3rd Cir. 1951), truck drivers held employees.

Selective Service Reinstatement:

Plomb Tool Co. v. Sanger, 193 F.2d 260 (9th Cir. 1952), commission salesmen held independent contractors.

Tort Claims Act:

Strangi v. U.S., 211 F.2d 305 (5th Cir. 1954), brush burner held independent contractor.

169. Stover Bedding Co. v. Industrial Commission, 107 P.2d 1027, 1029-1045 (1940).

170. Rev. Rul. 57-80, CB 1957-1, 324.

171. Rev. Rul. 57-79, CB 1957-1, 323.

tion and was held to be an employee during this part time work.[172] His status was distinguished from a physician in private practice who worked part time for a particular organization and who had been held not to be an employee.[173] In neither of these examples did the right to control the means and details of the work reside in the alleged employer. The real distinction can be found in the "own business" or "independent calling concepts".

This was the approach of Judge Clark in the *Ringling* case where the circus performers, although really not subject to control as to the means and method of performance, were still not truly in business for themselves. They worked for the circus. On the other hand, other lower federal courts have failed to perceive this approach. The rash of recent cases dealing with siding applicators exemplify this. In these cases, it is demonstrated that the applicators are really not in business for themselves. They work for the company that sells the siding. Yet they have been held not to be employees.

In borderline cases, this "own business" or "independent calling" test appears to be much more helpful than the "control" test. Indeed it can be said that both the master-servant tort cases and the Social Security law cases demonstrate that the general proposition concerning the right to control is not too helpful in the solution of concrete borderline cases. This is the precise reason why agencies and courts have resorted to additional factors. Although the right to control will generally be present where an employer-employee relationship exists, this factor alone is not too helpful in deciding borderline cases. It is interesting to note that Justice Wolfe takes the position that the "independent calling" test is the original and most orthodox common law rule in determining the employer-employee relationship, and that the "control" test was a later perversion of the original rule.[174] If this be true, then the development of the law in the Social Security area represents a return to the early, orthodox common law view.

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172. REV. RUL. 57-21 CB 1957-1, 317.

173. REV. RUL. 84 CB 1953-1, 404.

174. Justice Wolfe's position is that from antiquity the master has been held civilly liable for the acts of his servant. At the beginning of the industrial revolution problem cases began to appear wherein a more remote person hired another, who was independently set up in business, to do a specific job. Respondeat superior did not apply to the more remote person because the individual who was hired was engaged in an "independent calling" and was properly answerable himself for injuries growing out of work he or his own servants did. Individuals exercising "independent callings" were "independent contractors". At first courts probed to determine whether the individual who was hired was actually engaged in an "independent calling". In time this analysis gave way to the application of the rule of thumb known as the "control test". Stover Bedding Co. v. Industrial Commission, 107 P.2d 1027, 1029-1045 (1940); Wolfe, *Determinations of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015, 1022 (1941). See also Asia, *Employment Relation: Common Law Concepts and Legislative Definition*, 55 YALE L.J. 76, 77 (1945).

Practical Consequences

There are two practical consequences that flow from these conclusions. First, the Internal Revenue Service should feel under no compulsion to persist in the sham reliance in its rulings on the control test even when the result reached clearly is inconsistent therewith. Nothing in the statute, the Supreme Court interpretations thereof or the regulations requires it. A more flexible approach is called for in the rulings and is consistent with proper interpretations of the statute and cases. Second, the Supreme Court should clarify the disagreement among the circuits as to the applicable test by indicating that the proper approach is substantially the same as that of Judge Clark in the *Ringling* case, the majority of the circuits to the contrary notwithstanding.