The Social Security Court Proposal an Answer to a Critique

Frederick B. Arner

Follow this and additional works at: http://scholarship.law.nd.edu/jleg

Recommended Citation
Available at: http://scholarship.law.nd.edu/jleg/vol10/iss2/4
THE SOCIAL SECURITY COURT PROPOSAL: AN ANSWER TO A CRITIQUE

Frederick B. Arner*

On March 3, 1982, Representative J.J. Pickle (D-Tx.), Chairman of the Subcommittee on Ways and Means Social Security of the House Ways and Means Committee, introduced H.R. 5700, which included provisions for establishing a Social Security Court. The two major arguments for such a court can be stated simply and the issues closely drawn. First, the court is designed to result in more uniformity in decision-making by the judiciary and a concomitant increase in uniformity at all levels of the adjudicative process. Second, a Social Security Court would provide relief to an overburdened federal judiciary and a vehicle for the effective handling of social security cases.

* Mr. Arner is a consultant to the Office of Hearings and Appeals, Social Security Administration. From 1975 to January 1983 he served as professional staff, Subcommittee on Social Security, Ways and Means Committee with principal responsibility for the Disability Insurance Program and oversight of administration of the Social Security Program. Previously to that he served as a Senior Specialist in Social Security Legislation and Chief, Education and Public Welfare Division, Congressional Research Service. In that capacity he rendered technical staff assistance to the Ways and Means and Senate Finance Committees on Social Security and Medicare legislation from 1956 to 1973. In 1959 and 1960 he served as Committee Counsel on the Ways and Means Subcommittee on the administration of the Social Security Laws which examined the Disability Insurance Program.


This article was written by Mr. Arner in his private capacity. No official support or endorsement by the Social Security Administration or the Department of Health and Human Services is intended or should be inferred.

2. This argument was summarized by the National Commission on Social Security in its recommendation for the establishment of a Social Security Court:

   This new court could make significant improvements in the appeals process. Because they reviewed only social security cases, judges of the court would acquire an expertise in the area that judges in Federal District Courts usually lack. By creating a uniform body of precedential material, the court's decisions would have a significant effect on the earlier stages of the adjudicative process as well. With all appeals going to a single court, it could no longer be argued, as it is now, that the need for uniform nationwide decisions precludes using the sometimes conflicting decisions of the several circuit courts as binding precedents.


3. This argument was presented by the Bork Committee in 1977 as follows:

   It can only be disheartening for a litigant whose claim requires no more than a thoughtful and disinterested factfinder to be forced into competition with all other civil and criminal business for the precious time of an Article III judge. Although Article III courts are uniquely qualified to protect individual freedoms, interpret Federal laws, and preserve democratic processes of government—the indispensable functions of the Federal court—they are not unique in their ability to adjudicate relatively
In the year ending February 1983, Social Security cases pending in all federal courts increased by thirty-three percent, from 20,375 to 27,112. In the first two months of the 1983 calendar year alone, 3,108 cases were filed and pending cases increased by 2,151 cases. In each of the last two fiscal years, filings have increased by 3,000 cases. It is estimated that the increase will be even greater in the next two years.  

Mr. J.P. Ogilvy recently criticized the Social Security Court proposal, in an article published in the *Journal of Legislation*. In that article, Mr. Ogilvy asserted that the need for a Social Security Court is based upon “faulty assumptions” and that the two major arguments for the court do not withstand “close scrutiny.” This article will examine those assertions and the alternatives to a Social Security Court presented by Mr. Ogilvy.

Ogilvy describes rather thoroughly the court proposal. That description will not be presented again here. The present article should be read together with Mr. Ogilvy’s comprehensive view of the issues and for his citations to additional relevant materials.

**BACKGROUND FOR THE COURT PROPOSAL**

The first proposal for similar court legislation was contained in H.R. 8076, introduced in the 95th Congress. The major difference between the two proposals is that H.R. 5700 would create a social security, rather than a disability court. The scope of the court’s jurisdiction was expanded in H.R. 5700 to prevent a potentially cumbersome mechanism whereby disability issues would have gone to the new court and non-disability issues would have remained with the district courts. For instance under H.R. 8076, any case with both insured status and disa-

---

4. Social Security Administration statistics show case filings increasing as follows:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>9,163</td>
</tr>
<tr>
<td>1982</td>
<td>12,039</td>
</tr>
<tr>
<td>1983</td>
<td>14,944 (estimate)</td>
</tr>
<tr>
<td>1984</td>
<td>20,103 (estimate)</td>
</tr>
</tbody>
</table>

The 1983 estimate seems very conservative in as much as 8,307 cases have been filed in the first six months of the 1983 Fiscal Year. Social Security Ad., Social Security Litigation Monthly Reports.

5. Consultant, Center for Applied Legal Studies, Georgetown University Law Center, Washington, D.C.


7. *Id.* at 232-34.

bility issues would have to have been split. Moreover, the idea of offering the claimant alternative judicial forums, as is done in tax legislation, seemed inappropriate for social security cases.  

H.R. 5700 also differs from the earlier version in that it institutes a more limited appeal to higher Federal Courts. The Court of Appeals for the District of Columbia Circuit would have exclusive jurisdiction. Appeals to the court of appeals would also be limited to statutory interpretation and constitutional issues.

During the mark-up on H.R. 5700, in March 1982, Chairman Peter Rodino of the Judiciary Committee requested that the section of the bill dealing with the Social Security Court and other amendments dealing with court remands and attorneys' fees be stricken from the bill and addressed jointly by the Judiciary and Ways and Means Committees. Subsequently, Mr. Rodino said it was too early for hearings and expressed concern about the constitutionality of the legislation in view of the case pending before the United States Supreme Court regarding the Bankruptcy Court. Doubts as to the constitutionality of the Social Security Court were largely resolved in June, 1982, by the opinion of the Court in Northern Pipeline Construction Co. v. Marathon Pipeline Co., et al. The Social Security Court, like the Tax Court would deal with "public rights," over which Article III does not bar the jurisdiction of a specialized court.

LACK OF UNIFORMITY AMONG LEVELS OF ADJUDICATION

Advocates of the Social Security Court proposal maintain that the new court is necessary to replace federal district courts and courts of appeals as the reviewing body for administrative decisions involving Social Security. The proponents of the proposal believe that a Social Security Court, unlike its predecessors, will provide more uniform deci-

---

9. This appears in accord with the views of Chairman Robert Kastenmeier (D-Wis.) of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the House Committee on the Judiciary, which shares jurisdiction over H.R. 5700. Rep. Kastenmeier writes that there "should only be a choice of one forum per litigant." Kastenmeier & Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 Harv. J. on Legis. 301 (1979).

10. 102 S. Ct. 2858 (1982). Justice Brennan's opinion states:

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present case, for it suffices to observe that a matter of public rights must at a minimum arise 'between the government and others.' . . . In contrast, "the liability of one individual to another under the law as defined," Crowell v. Benson, 285 U.S., at 51, is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S., at 917-918 (1970). Private-rights disputes on the other hand, lie at the core of the historically recognized judicial power. 102 S. Ct. at 2870-71. A constitutional challenge was rejected by the Tax Court itself on the basis of Supreme Court decisions approving authority in Congress to create non-Article III courts to adjudicate cases involving the Government as a party. Burns, Stix Friedman and Co., 57 T.C. 392 (1971).
Mr. Ogilvy believes that assertions of lack of uniformity in case law overstate the case and, even if true, may not be that important a consideration.

Mr. Ogilvy agrees that there is a lack of uniformity in decision-making among and within the various levels of adjudication—the state agencies, the Administrative Law Judges (ALJ), and the courts. He is quick to emphasize, however, that decisional inconsistencies are greater at the administrative level and that the differences in judicial opinions may not indicate a problem, but instead may be "the healthy functioning of an independent judiciary." Mr. Ogilvy maintains that the courts "have been remarkably uniform in their legal interpretation of the Act." This assertion is questioned by proponents of the Social Security Court.

The great diversity of adjudicative result at all levels of the review process, including those of the federal courts, is responsible for confusion and uncertainty in the disability area. Two basic elements of the present review process contribute to this result: (1) the necessity of applying a broad standard of disability to individuals with diverse impairments and widely varying vocational and educational backgrounds, and (2) a multi-layered adjudication and appeals system which by its very nature leads to uneven results. This diversity which results from definitional and structural reasons has been compounded by some Courts and ALJ's who make independent policy judgments under authority they see as flowing from their role as an "independent judiciary." It is a basic premise of the Social Security Court proposal that uniformity and independent court review are not necessarily incompatible and that a specialized court will be better able to balance these elements than the present system. Since 1960, the Ways and Means Committee has wrestled with these problems. The Social Security Court proposal is just one facet of these attempts to achieve more uniform decisionmaking.

1. Ogilvy, supra note 6, at 234.
2. Id. at 234 n. 40.
3. Id. at 236.
4. Id. at 235-36.
5. The view of the proper role of the ALJ's and the Court in determining policy varies greatly. Some examples of Court decisions which fill policy vacuums or actually override policy positions established by the SSA are set forth subsequently in this article. There are other more restrictive views, however, indicating that both the ALJ's and the courts should exercise great restraint in the policy area. See J. Maslaw, C. Goetz, F. Goodman, W. Schwartz, D. Verkils, & M. Carrow, Social Security Hearings and Appeals 121 (1978) [hereinafter cited as CENTER REPORT]. A case of a court exercising such restraint is Cummins v. Schweiker, 670 F.2d 81 (1982).
6. These attempts have been of a legislative and oversight nature starting with a Ways and Means Subcommittee study in 1959 and continuing through the reporting of H.R. 5700 in 1982. The 1959 Subcommittee report focused on the definition of disability to the extent that it called for the Social Security Administration to develop more specific criteria for the evaluation of the non-medical factors. SUBCOM. ON THE ADMINISTRATION OF SOCIAL SECURITY, ADMINISTRATION OF SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, PRELIMINARY REPORT TO THE COMMITTEE ON WAYS AND MEANS (1960). These efforts eventually resulted in the so-called vocational 'grid' regulations in 1979, 20 C.F.R. § 404,
Court Decisions as Precedents

Mr. Ogilvy argues that there “is no reason to suppose that the decisions of the Social Security Court will have any more value or acceptance as precedent that the decisions of the present reviewing courts.” However, having said that, he seems to worry that there may be more uniformity as a result of the proposal. He states that proponents “assume that a single Social Security Court will issue uniform and consistent decisions which will not differ from interpretation of the law by the Secretary,” and that this “assumption seems to be unrealistically optimistic at best, and highly undesirable at worst.” He states that the Social Security Court is “designed to assure the issuance of internally consistent opinions intended to have precedential effect in subsequent cases” but points out that “nothing in the law requires the Secretary to acquiesce in the decisions of the court.”

Proponents assume that the Secretary will be bound by the decisions of the court which he may appeal, although he may change the regulations or request that Congress change the law. That the court’s decisions bind the Secretary presumably would happen by operation of law under the proposal, but perhaps it should be explicitly stated in the legislation or in the legislative history. It is certainly reasonable to believe that there should not be an acquiescence problem with a Social Security Court.

Eileen Sweeney, Staff Attorney, National Senior Citizen Law

---

17. Ogilvy, supra note 6, at 243.
18. Id.
19. Id.
Center, believes, as do many other social security claimant representatives, that "this practice (of 'non-acquiescence') is clearly illegal."

She states that the "creation of a 'Social Security Court' is unnecessary and essentially rewards the Social Security Administration for its years of arrogant disregard of court rulings." Sweeney concludes that the "SSA should be required to follow the law for a few years and then Congress should come back and re-evaluate the need for a social security court." If the Social Security Administration (SSA) acquiesced in every circuit court decision, however, there would be chaos in case law precedent throughout the country. These conflicting precedents would, in varying degrees, filter back to the ALJ's, causing further lack of uniformity among the decision makers. Some might argue that this may be beneficial to individual claimants, but uniformity in a national benefits program would undoubtedly suffer. Perhaps the area where the government performance can be faulted most validly, in addition to their failure to appeal more cases, is where SSA ignores circuit court decisions and does not indicate by ruling that they either approve or disapprove. In this situation, the ALJ's are caught between agency policy and contrary judicial pronouncement in the circuit where they sit.

The most extensive study of the problem of following judicial pronouncements is contained in a report by the National Center for Administrative Justice.21 The Center report examines the arguments on

---


21. CENTER REPORT, supra note 15. The study was done under contract with the SSA at the recommendation of the Committee on Ways and Means. H.R. REP. No. 679, 96th Cong., 1st Sess. 2 (1975). The question of how the SSA deals with court decisions has long been of concern to Congress and other interested parties. Basically, the SSA maintains that a district or circuit court decision is binding only in the specific case it decides. The SSA may acquiesce in adverse court decisions by issuing a regulation or ruling, binding upon components. If a court decision establishes certain procedural or evidentiary requirements, the administrative law judge is required to make a reasonable effort to follow the court's view when handling similar cases. However, if a district or circuit court's decision contains interpretations of the law and regulations which are inconsistent with the Secretary's interpretation of policy, the State agencies and the administrative law judges are to follow the Secretary's interpretation.

Unhappiness with this policy is illustrated by the reaction to the SSA's recent treatment of the decision in Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981), which dealt with the termination of grandfathered SSI recipients and whether a showing of medical improvement need be shown. A Social Security Ruling of non-acquiescence was issued which stated that the proper standard was that stated in the regulation and not that stated by the court. Soc. Sec. Rul. 82-10c (Jan. 1982).

The question of whether medical improvement needs to be shown in termination cases is another illustration of differing circuit court interpretations. The Eleventh Circuit Court of Appeals has recently handed down a decision that an action to terminate benefits was not based on substantial evidence when the claimant continued to manifest the same impairments and consequent pain that resulted in the initial award of benefits. Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); but see Torres v. Schweiker, 682 F.2d 109 (3rd Cir. 1982) and Crosby v. Schweiker, 650 F.2d 777 (5th Cir. 1981) which state that the burden of proof is on the claimant at all times including a termination proceeding. For a full discussion of the medical improvement issue see STAFF OF HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY CONTINUING DISABILITY INVESTIGATION PROGRAM; BACKGROUND AND
both sides of the Social Security Court issue and concludes that the need for decisional uniformity does not "convincingly justify SSA's persistent refusal to acquiesce . . . even on a circuit-by-circuit basis."\footnote{22}

The Center's report states:

An acquiescence should, as under present practice, be published as a Social Security Ruling. Nonacquiescence, however, should also be announced and, wherever feasible, accompanied by a statement setting forth reasons for the agency's decision. Such a statement would serve several purposes. It would advise ALJs and the Appeals Council how the particular judicial precedent should be treated in future cases. It might help to reassure district and circuit judges that their holdings were not lightly or arbitrarily ignored. Most important, the duty to prepare a reasoned explanation of why the agency had decided neither to appeal nor to acquiesce would force SSA officials to confront the issue squarely rather than brush it off with a routine quiet nonacquiescence.\footnote{23}

The report also states that consideration should also be given to changing the criteria and directing the "ALJs to follow local judicial precedent on all issues (not merely 'procedural and evidentiary matters') when not inconsistent with regulations, Social Security Rulings, explicit nonacquiescences, or other authoritative pronouncements."\footnote{24}

H.R. 5700 provides a mechanism to effectuate internal consistency in decisions of the Social Security Court and to insure that the decisions have precedential effect throughout the various levels of review. The bill provides that the decision of one judge becomes the decision of the full court within thirty days. However, within this period, the chief judge can direct that the decision be reviewed by a panel of at least three of the judges. The decision of the panel shall "be the decision of the Social Security Court."\footnote{25} A similar procedure has helped assure internal consistency in tax court decision making.\footnote{26} H.R. 5700 also requires the court to publish all decisions which the chief judge determines should serve as precedent in subsequent cases.

The "uniform interpretation" examples which Ogilvy cites appear to be instances where the courts have either not followed agency policy regulations or merely filled a policy vacuum. There is a substantial

\footnotesize{\begin{itemize}
\item \textit{Center Report, supra} note 15, at 113.
\item \textit{Id.} at 114-15.
\item \textit{Id.} at 115.
\item \textit{§ 1130(a)(4)}.
\item This is the so called conference system. The Tax Court legislation states that review shall be by the "Tax Court." Harold Dubroff in his work on the Tax Court states: "The court conference is a distinct feature of Tax Court procedure. In large part, it justifies the assertion that the Tax Court is a single, national court, not sixteen separate courts (the division of the court). Notwithstanding occasional misunderstandings on the part of the observers as to the nature of conference review, the conference procedure generally has been praised for its role in providing uniformity in Tax Court opinions." H. Dubroff, \textit{The United State Tax Court: An Historical Analysis} 352-53 (1979).}
\end{itemize}}
concern over whether this degree of policy independence is in accord with congressional intent. The 1974 staff report of the Ways and Means Committee gives the following background:

The definition of disability is phrased in broad language and the legislative reports which accompanied the enactment of the definition in 1954 and 1956 supplied few guidelines for its interpretation. The Harrison Subcommittee believed that the Social Security Administration was following the 'pragmatic approach advocated by the Advisory Council on Social Security to the Senate Committee on Finance (1949)—a legislative definition written in rather broad terms to be implemented by more specific administrative regulations on the basis of operational experience.'

The subcommittee went on to say that at that time (1960) 'the development of operational “case law” has been going on for some time, but very little of it, thus far, has been made public in the form of regulations.' The subcommittee believed that lack of precedent materials in the form of regulations or agency rulings was leaving a vacuum and ‘the distinct possibility exists that if the situation remains unchanged the courts rather than the Department or Congress will set the standards.’ Some of these concerns the subcommittee stated might well affect the actuarial status of the disability program.27

Mr. Ogilvy also declares that there would be “pressure upon the court to develop general and broadly applicable rules at the expense of careful, individualized consideration of the cases.”28 It is not readily apparent why Social Security Court judges, as opposed to district judges, would make less careful or individualized decisions. Mr. Ogilvy and other opponents are saying perhaps that Social Security Court judges would not be as free to make “individualized” judgments as to the policy of the program.

It appears that many courts have refused to follow SSA policy and regulation and that there has been a lack of uniformity in how they are interpreted throughout the country. The proclivities of the courts to substitute their own policy judgments are often prefaced by the statement that the Social Security Act is “remedial in nature.”29 Mr. Ogilvy, in illustrating a different point, quotes Professor Jerry L. Mashaw to the effect that it “is his belief that liberal decisions by district court judges and judges in the courts of appeals [for the Fourth and Sixth Circuits] have made the disability program into a regional

---

28. Ogilvy, supra note 6, at 244.
29. This concept which apparently sees inherent and somewhat mysterious equity powers to deal with Social Security cases seems to be shared to some degree by Ogilvy who states that the "rate of reversals and remands may be a positive force in effectuating the remedial legislative intent underlying the Social Security Act." Id. at 248. This view of inherent "remedial" power is not limited to the Courts. The Ways and Means Committee report on H.R. 6181 states "it appears that substantial numbers of ALJs are not following the regulations in allowing cases under a special [category of] residual functional capacity less than sedentary." H.R. REP. No. 588, 97th Cong., 2d Sess. 17 (1982).
unemployment program for miners."\(^{30}\)

**Kerner Decision—Changing Burden of Proof**

Mr. Ogilvy cites specific areas of jurisprudence to buttress his assertion that principles of law are "remarkably" uniform.\(^{31}\) He notes the famous *Kerner v. Fleming*\(^{32}\) decision and the caselaw on pain. The 1960 *Kerner* case is an illustration of the courts occupying a policy vacuum. *Kerner* made a substantive change in the program by imposing the burden of proof on the government to show the availability of work after the claimant had shown he could not do his usual work.\(^{33}\) When the government finally and reluctantly acquiesced in *Kerner* in the late 1960's, a massive use of vocational specialists was needed to meet the new burden of proof requirement.\(^{34}\)

This administrative burden, in part, led to the promulgation of the vocational "grid" regulation in 1978. The vocational grid was an attempt to provide uniform standards regarding the availability of jobs, using administrative notice rather than individual expert witnesses.\(^{35}\) In Fiscal Year 1978-1979, vocational experts were used in about forty percent of the ALJ cases.\(^{36}\) This declined to thirteen percent in 1980, but is again increasing. In theory, under the new regulations, the use of vocational experts should have been virtually eliminated. However, some courts of appeals fail to follow the regulation and still require "in person expert" testimony by vocational specialists in certain situations. The validity of the vocational grid regulations is before the Supreme Court this term.\(^{37}\) This is another illustration of divergent circuit court opinions interpreting existing law.

\(^{30}\) Ogilvy, *supra* note 6, at 239 n.52.

\(^{31}\) Id. at 236 n.42.

\(^{32}\) Kerner v. Fleming, 283 F.2d 916 (2d Cir. 1960).

\(^{33}\) Id. at 921. The Ways and Means staff print, *supra* note 27, gives a full description of this process in the chapter headed: *Standards and Definition of Disability: Who Sets Them—The Congress, the Social Security Administration or the Courts* at 45-55.

\(^{34}\) In 1965, vocational experts were used in 5,086 cases; in 1970, 8,722; in 1975, 23,303; and peaking at a rate of 91,667 cases in 1978. In Fiscal Year 1979, there was a decrease of 40,000 to 54,104 cases. There was another decrease to 32,866 cases in Fiscal Year 1980, but these cases have increased to about 40,000 cases each in 1981 and 1982.


\(^{37}\) Schweiker v. Campbell, No. 81-1983 on writ of certiorari from the Second Circuit decision, 665 F.2d 48. A Social Security ruling of non-acquiescence has been issued which is applicable to all circuits. *But cf.* Broz v. Schweiker, 677 F.2d 1351 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (1982) (regulations if properly applied are within Secretary's rulemaking powers and do not contravene claimant's right to a hearing).

The Supreme Court decided *Campbell* (sub nom. Heckler v. Campbell) on May 16, 1983. In it's decision upholding the use of the medical-vocational guidelines, the Court stated that [The] principle of administrative law—that when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond . . . is inapplicable (in this case), however, when the agency has promulgated valid regulations. Its purpose is to provide a procedural safeguard: to ensure the accuracy of the facts of which an agency takes notice. But when the accuracy of those facts already has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection.

. . . . We think the Secretary reasonably could choose to rely on these [medical-
Substantial Evidence Rule and Court Remands

Equally important to the uniform application of legal principles is interpretation of procedural aspects of the program which have substantive implications. It seems reasonable to assume that a Social Security Court could effectuate a more uniform interpretation of substantial evidence rule. Mr. Ogilvy deals rather summarily with this rule, stating that:

It is doubtful that the present method of judicial review of final administrative decisions results in significant variations in principles or outcomes. Most district court reversals are based simply on the absence of substantial evidence to support the Secretary's decision; they announce no rules or principles of general application.38

A major study by the National Law Center of George Washington University dealt with the problems of the substantial evidence rule and in this context raises the question of the advisability of creating a specialized court. This study found that "the social security disability insurance benefits program and its great reliance upon medical evidence may indicate the need for a redefinition of the 'substantial evidence' rule to be applied in the judicial review of Social Security Administration findings."39 Moreover, Robert G. Dixon, Jr., wrote in his highly publicized study for the Administrative Conference in 1973 that "neither the initial congressional definition of disability nor the re-definition of 1967 seems to be administratively manageable if the courts ignore the substantial evidence rule."40

In 1979 the Carter Administration recommended that the law be amended to eliminate the Federal courts' review of factual determinations under the "substantial evidence rule."41 Health and Human

---

vocational guidelines in appropriate cases rather than on the testimony of a vocational expert in each case.

Slip op. at 11-12.

38. Ogilvy, supra note 6, at 236-37.


41. The Social Security Administration has made numerous complaints over the years that many courts had shown lack of restraint in substituting their judgment of the facts instead of applying what the SSA considers the proper interpretation of the substantial evidence rule. For example, in answer to a question in the Ways and Means Committee Staff study in 1974 the Social Security Administration pointed to the difficulties in appealing such cases which continued "to place great weight on subjective complaints and make independent evaluations of the evidence." They pointed out that:

The fact that the court had readjudicated the case on the evidence of record is usually not a basis for a recommendation to seek appellate review, even where the court seems to have disregarded the substantial evidence rule. Appeal is recommended in cases where serious program implications and a strong factual record exists.
Services Secretary Joseph Califano, in reply to a written question from the Social Security Subcommittee, stated that the substantial evidence rule has not worked well in the past. He argued that

[The] task of reviewing the facts of individual cases in a mass benefits program like DI or SSI is neither appropriate for the federal courts nor necessary to assure fairness to claimants. Because of the large number of cases and that each one turns on its facts, the government rarely appeals these cases. The result is haphazard intervention by Federal district judges for the benefit of a small minority of claimants.

The Subcommittee on Social Security, however, rejected the Carter Administration's recommendation for elimination of the "substantial evidence rule." The Administration pursued a different approach to the problem when H.R. 3236 was before the Senate Finance Committee. Social Security Commissioner Stanford Ross recommended that the stricter standard of "arbitrary and capricious" be substituted for "substantial evidence" in Court review of factual determinations. This recommendation was adopted by the Finance Committee. However, the Conference Committee rejected the new standard.

The conference agreement deletes the provisions of the Senate bill be-
cause of the uncertainty as to the ramifications of the rule proposed and the concern that the administrative process is not operating with the degree of credibility which would justify elimination of the 'substantial evidence rule' . . .

The conference committee would like to reiterate what both committees stated in their reports on Public Law 94-202 that the courts should interpret the substantial evidence rule with strict adherence to its principles since the practice of some courts in making de novo factual determinations could result in very serious problems for the Federal judiciary and the social security programs. Proponents believe that "strict adherence" to or at least the uniform application of the substantial evidence rule has a much better chance of being accomplished by a Social Security Court than by the present system.

Similarly, more uniform guidelines on the use of court remands would almost have to result from a Social Security Court. As with the substantial evidence rule, remands have been a very useful vehicle for district court judges who disagree with administrative decisions but are not willing to reverse or even deal with the cases. The Center for Administrative Justice report states that while "the substantial evidence test narrowly circumscribes the power of the courts to enter final judgments in favor of the claimant, the companion good cause provision gives them an almost unbounded discretion to set aside the administrative decision and order an enlargement of the record." Congress, in the 1980 Amendments, cited the Center's report and attempted to remedy this situation by adding to the "good cause" provision a requirement that the Social Security Court's remand would be authorized only upon a showing that there is new material evidence and that there was good cause for failure to incorporate it into the record in a prior proceeding. Experience under the 1980 Amendments remand provision, however, does not indicate any great change in the performance of the district courts.

48. CENTER REPORT, supra note 15, at 132-33. The Center Report stated:
Those who lament the fact that district judges often seem to disregard the substantial evidence test should put that concern in perspective. While the substantial evidence test narrowly circumscribes the power of the courts to enter final judgments in favor of the claimant, the companion good cause provision gives them an almost unbounded discretion to set aside the administrative decision and order an enlargement of the record; the judge who believes that the weight of the record evidence favors the claimant but cannot in good conscience reverse under the substantial evidence test; or the judge who believes that the weight of the evidence supports the Secretary's denial but that the administrative record itself does not reflect all of the relevant facts; or the judge who believes that representation by counsel is an essential ingredient of due process but is unwilling to hazard a constitutional ruling that could be tested on appeal—all may use the good cause provision as a convenient basis for securing an administrative reevaluation.

50. Pub. L. No. 96-265, § 307, 94 Stat. 441, 458 (1980). This section also amended the Secretary's unrestricted power to have a case remanded before an answer had been filed.
51. Remands to administrative levels numbered under 2,000 cases in 1975-1976, but increased to
Mr. Ogilvy acknowledges that "the federal district courts contribute to delay to the extent that they remand matters to the Secretary for further study rather than affirming or reversing outright the decision of the Secretary." He points out, however, that the Social Security Court proposal also contains remand authority, even though Ogilvy does indicate the possibility that the Social Security Court might issue fewer remands. Proponents of the court proposal would argue that the current remand authority, similar to "substantial evidence rule," is more controllable by a Social Security Court. Other, more radical changes such as eliminating court remand authority might not be necessary.

Evaluation of Pain

The view that court decisions are uniform as to the evaluation of pain is directly contrary to the view of the SSA and the Ways and Means Committee, which has proposed a uniform directive on how to evaluate it. The need for such a directive would not be as great, presumably, if a Social Security Court were in full operation. At the very least, Congress would only need to focus on the case law developed in a single court.

One of the rationales for appeal from the Social Security Court to the District of Columbia Circuit is avoidance of the situation where, even with a statutory provision, there would be multiple circuit court interpretations for evaluating pain.

Ogilvy argues that the various decisions on pain are relatively uniform. This uniformity, however, is not so apparent. For instance, Lund v. Weinberger, decided by the Court of Appeals for the Eighth Circuit has handed down a decision which is being interpreted throughout the circuit as standing for the proposition that if there is no factual basis in the record to reject subjective complaints of pain then a finding of disability is justified. Thus, in this circuit, the government
must rebut a presumption of disability for each claimant who subjectively alleges pain. This and other court decisions seem contrary to the provisions of the 1967 Amendments to the Social Security Act. 59

The Second and Sixth Circuits, on the other hand, follow the statute and regulations to the effect that the source of pain must be established by anatomical, physiological, or psychological abnormalities demonstrable by medically acceptable clinical and laboratory diagnostic techniques. These courts then go on to state that the degree or extent of the severity of this pain need not necessarily be proven by such techniques. Such cases hold that the subjective statements of a claimant as to the disabling severity of his or her pain may serve as a basis for establishing disability, even if this testimony or other subjective evidence of pain is unaccompanied by verifying clinical findings or other objective medical evidence confirming the pain’s disabling severity. 60

CASELOAD BURDEN OF FEDERAL COURTS

Mr. Ogilvy states that the burden of social security cases is not “accelerating,” rather that the problem is shrinking. 61 He declares that “after a dramatic increase in filings during the year ending June 30, 1976, there has been a steady decline in the number of filings each year.” 62 In this regard, we have over two more years of statistics than those used by Ogilvy which show that social security court case disposi-
tions are not keeping pace with the dramatic increase in social security filings. Moreover, a flood of disability benefit termination cases are making their way through the administrative levels and will soon begin to have an impact on the federal judiciary.

Mr. Ogilvy's court statistics only go through the year ending June 1980. At that time there were about 9,000 case filings annually (including Medicare) and the number of pending cases stood at 13,154. At the end of calendar 1982 there had been 13,188 cases filed that year (not including Medicare) and pendings stood at 24,941. The burden is real and accelerating.

Mr. Ogilvy argues that uneven distribution of filings throughout the country suggests "the opportunity and advisability of tailoring local solutions" rather than the creation of a Social Security Court. He states:

Social security cases do not create substantial caseload burdens in a clear majority of the districts; the means adopted to alleviate the actual burdens should not be predicated on false assumptions of universal or uniform problems.

The most recent statistics, however, indicate a substantial growth of social security cases having national dimensions.

Moreover, it is difficult to see how ability to control a heavy and uneven workload cannot be seen as an argument for the Social Security Court. Certainly the federal judiciary has not to date been up to the task. Uneven caseloads have been characteristic of the social security cases throughout the history of the disability program. It seems axiomatic that a centrally organized specialized court could allocate its resources in such a manner that the huge backlogs in some districts could be eliminated or, at the very least, equally distributed nationally.

To illustrate the backlog, just last spring, the author of this article spoke with a woman from Eastern Kentucky whose attorney had told her that it would be three or four years before the district court would decide her case. To verify this situation, that Court's Administrative Office did a computer run which indicated that the attorney's information was basically correct. Further, Chairman J.J. Pickle (D-Tx.) stated in the introductory statement on H.R. 5700 that:

There is a very substantial variation between judicial districts in disposition time which goes to the very heart of the question of whether justice is being served by the current system. The median disposition

63. See supra note 4.
64. It is estimated that termination cases alone may increase filings by 2,000 court cases in the current fiscal year and by about 4,000 cases in subsequent years.
65. Ogilvy, supra note 6, at 238. ANNUAL REPORT OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972-1982, Table C 3A.
66. SSA Civil Litigation Monthly Report (Dec. 1982). See supra note 4. At the present rate of increase, pending cases will reach 30,000 by the summer of 1983. Id.
67. Ogilvy, supra note 6, at 239.
68. Id.
69. See supra note 4.
for cases in the Northern District of West Virginia was 12 months for the year ending June 30, 1981, which was the median time nationwide. However, the median time for the Southern District of West Virginia was 54 months and 10 percent of the cases had been pending 69 months. Why these disparities occur is not altogether clear but a Social Security Court would be free to concentrate on their removal which apparently the district court system is not.

Mr. Ogilvy points out that magistrates are increasingly being used to dispose of social security cases. A provision authorizing their use is also contained in the Social Security Court bill. Ogilvy notes that some of the heavy workload districts still do not use them. However, if it is determined that the increased use of magistrates is desirable in meeting workload requirements, it would still seem reasonable that a Social Security Court could more effectively implement such a policy for their uniform use.

Spokespersons for legal advocacy groups seem to down play the delays in case decisions at the court level. Eileen Sweeney, of the Senior Citizens Law Center, believes that the court is unnecessary since the real delays are at the administrative level. She testified during the March 1982 Ways and Means Committee hearings that:

It is not uncommon for appellants to experience delays of up to six months at the reconsideration level alone. And, SSA has done everything in its power to assure that delays of up to six months will continue at the ALJ level.

Sweeney also states that the SSA contributes to the delay by chronically asking for extensions of time for filing their replies to claimants. Under the Federal Rules of Civil Procedure, the government has sixty days to file a reply and, although precise statistics are lacking, the government often asks for an extension. In most cases the courts are granting them on a pro forma basis. In those districts which do not grant extensions, or grant only short ones, the government must devote additional resources, which may be taken away from the courts in districts more lenient in granting extensions. The situation is somewhat akin to the Blankenship type of court decisions where various federal courts

---

70. 127 CONG. REC. H635 (March 3, 1982).
71. Ogilvy, supra note 6, at 239.
72. They are called Commissioners in H.R. 5700 § 1130(e)(3) following terminology used by the tax court.
73. Ogilvy, supra note 6, at 239 n.60.
74. Supra note 20, at 217.
75. Id. at 218.
76. A district court in Kentucky imposed a 90-day limit on hearing cases at a time when ALJ average processing time was about 220 days. The Government appealed the decision saying that such an order could not be implemented and the Sixth Circuit Court of Appeal in Blankenship v. Secretary of HEW, 587 F.2d 329 (1978), vacated the decision saying that, although 220 days was not reasonable, neither was 90 days under the circumstances. The court stated "that elaboration of the 'reasonable time' requirement by rule-making is the preferable remedy" and remanded the case to the district court with instructions to HEW to come up with some regulations "to remedy the problem of unreasonable delay." On August 26, 1980, the Department submitted the regulations to the district court proposing a 165-day
have attempted to impose time limits on ALJ decision-making. Both situations would appear to be aided by a specialized court where a policy on filing time extensions and administrative level adjudication time limits could be made relatively uniform throughout the country. In this regard the Social Security Court would enhance the principle of equal justice under the law.

FUNCTIONS, GOALS AND VALUES OF JUDICIAL REVIEW

Mr. Ogilvy presents a rather elaborate statement of the "functions, goals, or values of judicial review,"77 and applies them to the proposed Social Security Court. His analysis is based almost exclusively on the Center report, which contains a lengthy discussion of judicial review of social security cases.78 Mr. Ogilvy states, as does the Center report, that the "principal benefit of judicial review is the added accuracy it may impart to the claims determination process."79 This is accomplished by the corrective function and the regulative function, the "in terrorem effect"80 and the precedential effect. Ogilvy stated that the Social Security Court would not adequately accomplish these goals.81

Mr. Ogilvy ignores, however, that the Center report also applied these criteria to the current judicial system and concluded that the present system "does not paint a very cheerful picture."82 Moreover, the report stated that the Center's analysis "permits the conclusion that a disability court could be constructed to capture most of the best features of the existing review scheme, while avoiding most of the pitfalls."83

The Center report states that as to the creation of a uniform body of law the Article III reviewing structure is necessary to some degree because these cases must be finally resolved at the Supreme Court level. The report further states, however, that it is not clear that the district and appeals Article III courts are needed to funnel appropriate Social Security cases to the Supreme Court and that a disability court seems to have "clear advantages" over "a federal judiciary that is institutionally incapable of producing uniform precedents through Supreme Court review of any but the most significant issues of interpretation."84 The Center report declares that the Article I court [Social Security Court]...
might have to be organized in two tiers to provide adequate filter to the high court and to affectuate more uniformity of outcomes at the initial levels of the decision structure. Ogilvy states, as to the "corrective" function, that theoretically there is no reason to believe that the special court judges, also operating under the substantial evidence rule, will be willing to substitute their own judgment for that of the ALJ in order to arrive at a correct "result". Whether "substituting their judgment" will lead to more "correct" decisions is somewhat questionable, but, as stated earlier, a Social Security Court would appear to have a much better chance of at least applying the substantial evidence rule in a more uniform manner. As to decisional quality, the Center report states that, although district court judges might generally be superior in ability, there would be trade-offs as to the specialized court judges. The report emphasizes that [quality decision making depends on factors other than basic intellect and training. Specialized experience may produce a surer grasp of technical problems and also of the potential impact of any particular decision on the general fabric of a program. Here [Social Security] court . . . review has a clear advantage over district court review.] 

INDEPENDENCE OF THE COURT

The legitimizing function of judicial review which the Center report sees as having some uncertain value under the present system is of particular concern to Ogilvy as applied to the Social Security Court. He states:

There also appears to be a real danger of institutional bias in favor of the Social Security Administration. The members of the Court probably will be drawn, in large part, from the pool of past and present Administrative Law Judges, Appeals Council Members, and Agency officials who would undoubtedly tend to share the Secretary's outlook with regard to most matters which would come before the Court. Furthermore, since the judges are appointed by the President to perform a specialist rather than a generalist function, it would be much easier to appoint judges who share an administration's narrow concern with the fiscal integrity of the trust fund, thereby assuring an anti-claimant bias on the panel. The relative ease with which the Social Security Court judges could be removed and the finite term of their appointments also makes the Court more susceptible than Article III judges to pressures and influences.

The Center report, however, seems to conclude that the problem of

85. Id. at 149.
86. Ogilvy, supra note 6, at 243-45.
87. CENTER REPORT, supra note 15, at 149.
88. Ogilvy, supra note 6, at 215-16.
"policy bias" is of less concern than the effect that elements such as the pressures of workload may have on independence. The report states:

Policy bias is not likely to be as important in SSA matters as it is in many regulatory agencies. On that score, an independent reviewing body seems relatively unimportant. Institutional bias, however, is another matter. Given existing case-load pressures and the critical responsibility of ALJs to develop the record, an independent counterweight to administrative pressure to produce seems peculiarly important.\(^9\)

In conclusion, the Center report states:

In our view, if a disability court is created, it should be made as much like an Article III court as possible. Specialization should guard against the inappropriate policy views sometimes imposed by a generalist judiciary. Protection from institutional and policy bias can only be assured by substantial independence from administrative and congressional control.\(^9\)

The Center's recommendation that the court be as similar as possible to the Article III courts raise a number of issues. Although the Social Security Court was generally patterned after the Tax Court, its term is for ten years as opposed to fifteen years for the Tax Court. If independence is to be emphasized perhaps a term at least as long as the Tax Court should be authorized.

As Professor Harold Dubroff notes in his definitive history of the Tax Court,\(^9\) when the Board of Tax Appeals was made a court in 1969, one of the determinative factors in why it was constituted under Article I rather than Article III of the Constitution was the question of the judges' tenure. Dubroff recounts how Senator Long expressed the view of many Congressmen in 1969 that Article III status to the Tax Court might result in the judges' refusal to faithfully apply the tax laws.\(^9\)

Another possible factor in the independence of the Court which is not mentioned by Ogilvy is the method of selection of the chief judge. Under the proposed legislation he would be selected by the President. However, the tax court legislation provides that the Tax Court itself "shall at least biennially designate a judge to act as chief judge."\(^9\) It could be argued that perhaps this mechanism would provide more independence for Social Security Court than appointment by the President. On the other hand, the crucial functions of administering the "conference" functions which will assure internal consistency might suffer with such changing leadership. However, the professional support staff for the chief judge would presumably continue in place.

Some legal aid groups appearing before the subcommittee were

---

89. CENTER REPORT, supra note 15, at 149.
90. Id. at 150.
91. H. DUBROFF, supra note 29.
92. Id. at 211-12.
Social Security Court

concerned about the quality and independence of the Social Security Court. Eileen Sweeney testified:

Given that the vast majority of cases coming before the court will concern disability claims, we are concerned that it may be difficult to attract judges of the same caliber as those on the federal bench and that lack of variety will result in such routinization of case review that the court will eventually become nothing more than a 'rubber stamp' for the Secretary; in effect a new Appeals Council.94

On the other hand, when the court was first proposed in the mid-1970's reservations were expressed by SSA officials that it would take policy making functions away from the Secretary. Interestingly, this view is echoed by the comment of the Administrative Conference which is printed in the 1982 hearings on H.R. 5700.95

Loren Smith, Chairman of the Conference, writes:

Furthermore, because one of the court's principal functions is to create a body of precedential material governing subsequent SSA actions, there is a danger that the court may, by degrees, tend to fuse (or confuse) its role with that of the Secretary.

Indeed, we perceive a subtle internal contradiction in the proposals in H.R. 5700. On the other hand, the bill seeks to achieve greater uniformity and consistency in results through increased administrative control. To this end section 7 of the bill gives increased emphasis to the use of regulations of the Secretary and the other administrative issuances to govern determinations at every level, while section 6 directs the Secretary to review on his own motion at least 15% of the decisions rendered in favor of claimants. We applaud this emphasis on centralized management and control of the adjudicative process, which is generally consistent with Part C of our recommendation. But while sections 6 and 7 strengthen the role of the Secretary (acting, of course, through the Social Security Administration and the Appeals Council), section 12 weakens it, by establishing a specialized court with a mandate to develop a body of precedents guiding administration of the Social Security Act. A collision of these two principles of control seems inevitable if the bill is enacted in its present form.96

Formulation of policy and supervision of its uniform application at all levels throughout the country would remain the primary responsibility of the Secretary. Presumably the Social Security Court would not intrude into this function any more or less than is currently done by district and circuit courts. If it did establish case precedents which the Secretary sees as contrary to what he considers appropriate policy, the Social Security Court offers a better mechanism than the existing system for pinpointing and highlighting the issues so that they may be resolved by administrative or legislative action. The court is designed

95. Id. at 255.
96. Id.
neither as a rubber stamp for the Secretary nor as a vehicle to usurp his policy making function.

**Jurisdiction of the Court**

The Social Security Court would, under H.R. 5700, have a broader jurisdiction than under previous proposals, in that it would cover all Title II issues including coverage and benefit eligibility and all such issues for the Supplemental Security Income program. The social security caseloads are substantial and growing. The great preponderance of these cases involve disability, but the balance of the cases would be varied.

Ogilvy states that the Social Security Court leaves with the District Courts some thirty five percent of the "Social Security" cases because its jurisdiction does not include Medicare, Black Lung, and AFDC welfare cases.97 However, the excluded cases constitute only three percent of this broadened definition of Social Security cases98 and, therefore, does not support his conclusion that "if workload relief is the goal of the Social Security Court, the pending proposal does not achieve it."99 The Center report seems concerned about the limited nature of the jurisdiction of the court and the loss of the generalist outlook of judges in such a specialized court. To accommodate this loss, the Center report suggests that "[s]ome compromise might be effected by constructing a broader disability court, which would hear SSA, VA, federal worker's compensation, and perhaps some other claims. Alternatively, a broader benefits court might be envisioned that would have jurisdiction to review medical insurance, food stamps, and other federal benefits determinations."100 Similarly, the Bork Committee recommended spe-

97. Ogilvy, supra note 6, at 240.
98. According to the Office of U.S. Court in terms of cases commenced in the year ending June 1982 there were 8,002 disability insurance cases, 2,378 SSI cases (probably almost all disability), 138 retirement and survivors, 461 health insurance, and 180 Black Lung. There were also 1,653 characterized as 'other'. However, these cases were just those which some District Courts had not broken down into the above categories. The most recent statistics show the following breakdown for cases filed in the first three months of this calendar year.

<table>
<thead>
<tr>
<th>Year</th>
<th>1. Disability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Title II</td>
</tr>
<tr>
<td></td>
<td>SSI</td>
</tr>
<tr>
<td></td>
<td>Concurrent</td>
</tr>
<tr>
<td>2. Black Lung</td>
<td>1</td>
</tr>
<tr>
<td>3. RSI</td>
<td>79</td>
</tr>
<tr>
<td>4. SSI (non-disability)</td>
<td>12</td>
</tr>
<tr>
<td>5. AFDC</td>
<td>6</td>
</tr>
<tr>
<td>6. Child Support</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4644</td>
</tr>
</tbody>
</table>

**SOURCE:** Social Security Monthly Litigation Reports (March 1983)
There were also some 67 Medicare cases filed in the first three months in the Federal Courts (General Counsel, Department of Health and Human Services). The Black Lung, AFDC, Child Support and health cases constitute less than two percent of total filings.

99. Ogilvy, supra note 6, at 240.
100. CENTER REPORT, supra note 15, at 149.
cialized tribunals of broader “welfare” jurisdiction than that proposed in the Social Security Court:

These proposals avoid a major pitfall of comparable proposals, for the administrative court would not be specialized by a single subject matter. The administrative judge would be able to maintain a broad perspective while developing increased familiarity and expertise in dealing with administrative cases. In addition, the caseload would be sufficiently general to attract judges of high caliber.101

The jurisdiction of the Court could be extended over time if this is desired. However, at least during the period the court was being established it would appear that jurisdiction over all social security and SSI cases would provide a sufficient challenge to the judges.

Appellate Review

Ogilvy notes that the new court proposal has the positive aspect of limiting review to statutory and constitutional questions, and to one court of appeals—the District of Columbia Circuit.102 He notes that this may limit workload and produce more “consistency” between courts on principles.103 He again reiterates his belief that there have not been serious disagreements on the legal principles between the circuits and questions the wisdom of having only two courts below the Supreme Court deal with a serious question of statutory interpretation.104 Ogilvy’s concern for the opportunity for several courts to consider a question by drawing on and expanding upon the scholarly considerations of prior decisions,”105 must be balanced against the advantages of the potentially greater background and expertise a single review court would develop in dealing with the social security law.

In this regard the history of the tax court may present some interesting parallels. One of the arguments against creation of the tax court as an Article III Court in the 1969 legislation was the lack of uniformity in taxation case law which was coming out of the many forums in the federal judiciary at that time.106 Harold Dubroff writes:

The major concern of the Justice Department was that the entire structure of the system by which tax disputes were litigated was suspect. Tax cases could be tried in three separate systems of trial forums, each with different procedures, attitudes and jurisdictional requirements. Appeals from the trial level courts could be taken to eleven intermediate appellate tribunals, which frequently disagreed with one another, and to a single court of final review which had a legendary distaste for tax cases. In these circumstances the existing system was

102. Ogilvy, supra note 6, at 244.
103. Id.
104. Id.
105. Id.
106. H. DUBROFF, supra note 26, at 208-10.
subject to criticism as being unfair to taxpayers, unfair to the Government, and inconsistent with the goal of establishing a uniform and rational body of interpretations of the tax laws.\textsuperscript{107}

Chief Justice Warren Burger has indicated that the Judicial Conference supports the general concept of a Social Security Court with judicial review to the federal courts restricted to issues of constitutionality and statutory interpretation.\textsuperscript{108} The Conference believes, however, that appellate review of Social Security Court decisions should be to the various circuit courts because "it would increase the work-load for the District of Columbia Circuit."\textsuperscript{109} A possible alternative might be appeal to the newly created "United States Court of Appeals for the Federal Circuit." Some aspects of the legislative history of the new "Federal Circuit" court would indicate that the hearing of social security appeals might be an appropriate addition to its jurisdiction.\textsuperscript{110}

The Supreme Court has been increasingly concerned about the growing workload in the federal courts and how it affects the ability of the high court to do its job.\textsuperscript{111} One of the alternatives under active discussion by the Justices seems to follow pretty closely what has been outlined in the Social Security Court proposal.

The \textit{New York Times} describes a suggestion by Justice White in the following manner:

Questions on which the intermediate appeals courts disagree are not necessarily momentous or in themselves worthy of the Supreme Court's time. But the Court feels a special obligation to take such cases, rather than tolerate a situation in which Federal law may mean one thing in the United States Court of Appeals for the Second Circuit in New York and the opposite in the Ninth Circuit in California. About half the 180 or so cases the Court accepts each year involve conflicts between two or more of the 12 Federal circuits. If the conflicts could be reduced, so could demands on the Court.

Justice White proposed that Congress create appeals courts and give them nationwide jurisdiction over particular types of cases, an idea that Justice Brennan said "surely is a suggestion worth exploring."

\textsuperscript{107} \textit{Id.} at 208-09.

\textsuperscript{108} In the year ending June 1981 there were 642 Social Security cases appealed to the circuit courts while in 1982 this had increased to 779. This work-load is not evenly distributed. For instance the 6th Circuit in 1981 had 150 cases (9% of its civil case work-load) while the 2nd Circuit had 76 cases (3.5% of its civil case work-load). Only 12 cases were appealed to the D.C. Circuit (2% of its civil work-load). \textit{ANNUAL REPORTS OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table B7.}


\textsuperscript{110} Pub. Law No. 97-164, 96 Stat. 25 (1982). This court would have jurisdiction over appeals of suits against the government for damages or for the refund of income taxes, appeals from the Court of International Trade, appeals from the Patent and Trademark Office, all Federal contract appeals where the U.S. is a defendant and appeals from the Merit Appeals Protection Board. The legislative history emphasizes the new Court is not "a specialized Court" and perhaps adding Social Security cases to its jurisdiction would be in keeping with this philosophy. \textit{H.R. REP. No. 312, 97th Cong., 2d Sess. 17 (1981).}

Neither Justice specified types of cases, but presumably the courts would handle questions arising under such complex Federal codes as the tax or Social Security laws.\footnote{112}

**COSTS AND WORKLOAD**

Proponents of the Social Security Court have made no claims that the creation of the court will yield cost savings, but Mr. Ogilvy states that in this “era of cutbacks in government spending, the cost effectiveness of a specialized court could mean the difference between adoption and rejection, all other matters being equal.”\footnote{113} The desirability of the court, however, should not be decided on the basis of a few million dollars in administrative costs.\footnote{114} One of the pervasive problems of the disability insurance program in recent history has been a failure to provide adequate and timely resources to administer a program which pays benefits totaling over eighteen billion dollars per year.\footnote{115}

Ogilvy gives the Social Security Court high marks on the number of judges available to speedily dispose of cases.\footnote{116} He presents an interesting analysis of the amount of time needed by district court judges to do social security cases and applies these to a twenty judge Social Security Court. He states that according to the figures he uses, a great deal of leeway is indicated before the twenty judges would be overworked.\footnote{117} He states that at “a continuing level of about 9,000 social security cases per year, the judges would be responsible for 450 cases each.”\footnote{118} One cannot assume, however, that the 1980 statistics of 9,000 filings will continue, in fact, filings had increased to almost 13,000 in 1982 and will probably pass 15,000 this year.\footnote{119} Perhaps there should be a re-examination of the number of judges provided by the legislation in view of these changed circumstances.

\footnote{112}{Justice Speaking Out On Reducing Their Caseload, N.Y. Times, Sept. 14, 1982, at A24.}
\footnote{113}{Ogilvy, supra note 6, at 240.}
\footnote{114}{Ogilvy states that the cost of “care and feeding” of the new Court would be $10 million a year. Its salary scale is slightly below that for District Courts but there would certainly be start-up costs. \textit{Id.}}
\footnote{115}{Also about $8 billion goes out in SSI-Disability benefits a year. The Social Security actuaries have pointed to this “penny-wise pound foolish” thinking as follows: During this period (1971-74), administrative expenses remained almost level, while practically every other measure of the size of the DI program was increasing rapidly. Furthermore, a similar decline did not occur during this period in the ratio of administrative expense to benefit payments for the OASI program, to which the same benefit increases applied. In our opinion, the sharp decline in the ratio for the DI program was due to ill-advised budgetary decisions which kept administrative costs and personnel levels down but which resulted in a concomitant explosion in the number of benefits awarded during the period. \textit{(Actuarial Note No. 101, Nov. 1980, at 8).}}
\footnote{116}{Ogilvy, supra note 6, at 246.}
\footnote{117}{\textit{Id.} at 246-47.}
\footnote{118}{\textit{Id.}}
\footnote{119}{\textit{Supra} note 4.}
Mr. Ogilvy presents a number of alternatives which he says may accomplish the joint goals of judicial review and decreased judicial workload more effectively “than a radical shift” to a special court.\(^{120}\)

Elimination or Stricter Standard of Review

It can be reasonably argued that a Social Security Court would prevent the more “radical” shifts which are presented as Ogilvy’s first two alternatives—namely the elimination of judicial review and the replacement of the substantial evidence rule with a standard of “arbitrary and capricious.”\(^{121}\) Although presented as viable alternatives, Ogilvy does not take them seriously. He cites the Center report to support his contention that the values of judicial review “militate against such a radical departure from the norm.”\(^{122}\)

The Social Security Court proposal rejects neither judicial review nor the substantial evidence rule. It holds out the promise of a more universal application of the traditional view of the substantial evidence rule, however, and promises more control over what some people consider abuses of the authority to remand. Such a change would go a long way to silence those who advocate the elimination or curtailment of judicial review.

Clearer or Stricter Eligibility Standard

Ogilvy’s third alternative appears to be another straw man which he strikes down. Under the subheading of “Congressional Alternatives,”\(^{123}\) he cites a number of proposals affecting the definition of disability which have come before the Ways and Means Committee in recent years, including the Reagan Administration’s recommendation in 1981 to base eligibility for disability benefits on the medical factors alone.\(^{124}\) In the 1980 Amendments and in the 1982 proposals, there was a conscious effort by Ways and Means not to change the definition of disability but rather to concentrate on seeing that the current one was administered on a uniform basis.\(^{125}\) The Ways and Means Committee also intended to see how the vocational grid regulations, discussed by Ogilvy under the subheading “Administrative Alternatives,” affected the program before any legislative change in the definition of

---

\(^{120}\) Ogilvy, \textit{supra} note 6, at 247.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Ogilvy, \textit{supra} note 6, at 248.

\(^{124}\) Id. at 248 n.106.

\(^{125}\) \textit{Supra} note 20. A partial exception to this was the provision in H.R. 6181 providing criteria for the evaluation of pain. As stated earlier this was deemed necessary because of inconsistent Court decisions which presumably would not exist under a Social Security Court. Ogilvy also notes the evaluation of pain provision as an illustration of this type of alternative, but doubts that it “cures any perceived misinterpretations of the Act.” Ogilvy, \textit{supra} note 6, at 249 n.109.
disability was made. Ogilvy's enthusiasm about the grid regulations seems somewhat restrained, however, since twice in his article he states that it remains to be seen whether any real improvement will result.

Modified Reconsideration Process

Ogilvy notes that for at least ten years the SSA has experimented with the proposition of introducing “face-to-face” contact at the reconsideration level and that it is conceivable “that involving the claimant at an earlier stage will increase client satisfaction and decrease incentive to appeal.” In the closing minutes of the 97th Congress, Congress approved legislation which would bring about “face-to-face” contact at the reconsideration level in termination cases. Although it is to be hoped that this will bring about more uniformity and credibility in the early stages of the process, such a change would have neither an immediate nor substantial effect on the problems which exist at the court level.

Other Agency Options

Ogilvy suggests that the SSA should appeal more court decisions, issue more rulings, and publish more Appeals Council decisions which have precedential value. Consistency in case law can be achieved in a much more timely and rational manner, however, under a Social Security Court system. The SSA is in the process of promulgating rulings which will provide uniform guidelines for adjudicating disability. This effort should promote uniformity between the state agencies and

---

126. Id. at 235, 249.
127. Id. at 249-50.
128. H.R. 7093, 97th Cong., signed on January 12, 1983, P.L. 97-455, § 2-7, 96 Stat. 2498-2502. H.R. 6181 the more comprehensive amendment to the disability program which had been approved by Ways and Means earlier in 1982 contained this provision coupled with a proposal to partially “close the record” at the reconsideration level in termination cases. The latter provision did not appear in H.R. 7093. The Ways and Means report on H.R. 6181 states: Face-to-face contact at reconsideration is probably one of the most studied ideas for improving the appeals process. Its adoption has been supported a number of times in the past by the Social Security Administration, but never implemented. For instance, in the Social Security Subcommittee’s 1979 hearings on disability insurance Secretary Califano said he was instituting such a proceeding as part of the administrative action he was taking to implement disability program reform. The principle rationale for face-to-face at reconsideration has been the idea that it might enhance claimant acceptance of the denial at the State agency level and reduce the number of appeals. Your Committee believes that face-to-face at reconsideration might also be a useful step in reducing the disparity in adjudication between the ALJs and the State agencies since this is one of the major differences between the procedures at these levels. The past experiments with face-to-face generally show a higher level of allowance and lower level of appeals resulting from the procedure. The real issue is whether face-to-face at reconsideration leads to better decision-making and enhanced respect for the system by applicants. This provision in the bill will provide a real test as to the effectiveness and fairness of a face-to-face reconsideration and the closing of the record, and if it proves successful it could, over time, be extended to the reconsideration process of initial claims.

129. See supra note 16.
the ALJ's but would not necessarily reduce the number of appeals to the district courts or reduce their proclivities for making varied interpretations of the law. Ogilvy states that high rates of reversal "tend to encourage appeals; conversely, more uniform decisions within the agency should result in fewer requests for judicial review." On the other hand, some might argue that a reduced reversal rate at the ALJ level—now substantially over fifty percent—opens up an additional population for appeal to the courts.

Judicial Alternatives

Ogilvy states that the district courts can expand the use of magistrates to meet workload problems. The use of magistrates varies markedly from district to district and has only increased by about 500 cases a year in the period from 1978 to 1982. If this mechanism is to play a major role in meeting social security workload problems, a special court would seem to be a more effective position to implement this decision on a national basis.

130. Ogilvy, supra note 6, at 250.
131. Id. at 250-51.
132. See ANNUAL REPORTS, supra note 62.