



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 2 | Number 1

Article 4

1986

Government Nonacquiescence Case in Point: Social Security Litigation

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Administrative Law Commons](#), [Agency Commons](#), [Courts Commons](#), [Jurisprudence Commons](#), [Litigation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

(1986) "Government Nonacquiescence Case in Point: Social Security Litigation," *Touro Law Review*: Vol. 2: No. 1, Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol2/iss1/4>

This Note is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

NOTE

GOVERNMENT NONACQUIESCENCE CASE IN POINT: SOCIAL SECURITY LITIGATION

INTRODUCTION

“A fundamental change is taking place in America, and the world sees it. The most legal minded of societies, as it has been by instinct and tradition, now has a government that feels and displays a profound contempt for the law.”¹

Federal administration agencies, particularly the Department of Health and Human Services (HHS) and more specifically, the Social Security Administration (SSA), are refusing to apply the decisions of the lower federal courts to anyone but the particular litigant of a given case.² Therefore, other people who are similarly situated to a prevailing plaintiff and who are within the courts’ jurisdiction must nevertheless litigate the identical issue for themselves.

Whereas intercircuit nonacquiescence by the government is generally accepted by the courts,³ intracircuit nonacquiescence has been

1. N.Y. Times, May 21, 1984, at A17, col. 5.

2. See *infra* notes 10-11.

3. See, e.g., Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 583 n.10 (1985) (citing Commission on Revision of the Federal Court Appellate Systems, Structure and Internal Procedures: Recommendation for Change, 67 F.R.D. 195 (1975)) [hereinafter cited as *Intracircuit Nonacquiescence*]. But cf. *Califano v. Yamasaki*, 44 U.S. 682, 702-03. The *Califano* Court affirmed the certification of a nationwide class, even though the result would be to foreclose different circuit courts from adjudicating the matter. *Id.* at 702-03. The class in this case was comprised of Social Security recipients whose benefits have been or would be reduced without notice or opportunity to be heard in court. *Id.* at 689. Accord *Lynch v. Rank*, 604 F. Supp. 30, 35-36 (N.D. Cal. 1984). The *Lynch* court certified a nationwide class to challenge the test for terminating supplemental security income benefits. *Id.* at 35, 40. The court held that although relitigation of this issue would be foreclosed in other districts and circuits, the Supreme Court, upon review, would have the benefit of at least two other circuit court opinions which had already decided or were presently addressing this same issue. *Id.* at 38. Therefore, because of the plaintiffs’ position as poor and disabled persons, equity required a finding of nationwide class certification. *Id.* Hence, the courts above have found compelling reasons to disallow even intercircuit relitigation.

greatly criticized by the courts, the legislature and the legal community.⁴ “Numerous circuit and district courts—in the Second, Fourth, Sixth, Eighth, Ninth and Tenth Circuits—have confronted and either expressly or implicitly rejected the Secretary’s contention that SSA may refuse to follow a federal circuit court decision in subsequent cases within the circuit.”⁵

The Supreme Court has not yet directly addressed the propriety of the government’s practice of intracircuit nonacquiescence. However, during the 1983 term, the Supreme Court held that the government may not relitigate the same issue against the same party in a different circuit.⁶ Yet, the government was not barred from relitigating the same issue against a different party where the prior suit was a district court case which was not appealed and the court of appeals for that particular circuit had not previously spoken on the issue.⁷

In response to the conflicting interpretations of certain areas of the Social Security Act by the administrative agency and the courts, Congress enacted the Social Security Disability Benefits Reform Act of 1984. The legislature adopted the judicial interpretation of certain areas of the Social Security Act, without directly addressing the government’s nonacquiescence policy.⁸

Recently the Southern District of New York sharply criticized the government’s nonacquiescence policy and granted a preliminary injunction against HHS, precluding HHS from denying benefits in the future on grounds contrary to the law of the Second Circuit.⁹ In a lengthy opinion, the court analyzed the agency’s prior nonacquiescence policy and its revised policy set forth in Interim Circular 185.

4. See, e.g., *Intracircuit Nonacquiescence*, *supra* note 3, at 582 n.5. See also *Steiberger v. Heckler*, 615 F. Supp. 1315, 1354 (S.D.N.Y. 1985) (noting the legislature’s concern with the legality and wisdom of the agency’s nonacquiescence policy and the view of the United States Attorney for the Southern District of New York that such a policy does not justify refusing to follow clear circuit law within that circuit).

5. *Steiberger*, 615 F. Supp. at 1353. The court briefly reviewed the cases in which these circuits expressed their criticism of the agency’s nonacquiescence policy. See also *Intracircuit Nonacquiescence*, *supra* note 3, at 585 n.22.

6. *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575, 578 (1984). The Court held that the government was estopped from bringing an action in which they had lost against the same defendant on the same issue in another circuit. *Id.* at 576.

7. See *United States v. Mendoza*, 104 S. Ct. 568, 574 (1984).

8. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (codified as amended in scattered sections of 42 U.S.C.). See also *Steiberger*, 615 F. Supp. at 1354.

9. *Steiberger*, 615 F. Supp. at 1399.

The court found that both of these policies violated the principles of equal protection, due process and separation of powers.¹⁰

This note will analyze the arguments which the agency has asserted as the basis for its nonacquiescence and highlight the impracticalities and illegalities of such a policy. Although the focus of this note will address the nonacquiescence policy of the SSA, other federal administrative agencies advocate and follow this practice as well.¹¹

I. *The Government's Position*

A common practice among federal administrative agencies has been to refuse to apply an adverse decision of a lower federal court in a particular case to all similarly situated litigants, even if these claims arise within the same circuit.¹² In recent years the department of HHS has been the agency which most often perpetuates this practice of nonacquiescence.¹³ The Secretary of HHS has taken the position that only decisions rendered by the Supreme Court have a

10. *Id.* at 1367, 1374. For a discussion of Interim Circular No. 185, see *infra* notes 123-39 and accompanying text.

11. See, e.g., *Intracircuit Nonacquiescence*, *supra* note 3, at 587-89 (explaining the policies of the National Labor Relations Board (NLRB) and the Internal Revenue Service (IRS)). See also National Law Journal, Nov. 4, 1985, at 5, col. 1 (reporting Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, No. 83-2231, (D.C. Cir. Oct. 22, 1985)), in which the F.E.R.C.'s nonacquiescence in a prior administration's policy and an Eleventh Circuit decision involving the same parties as the case herein, was soundly rebuked.

The postal service has also practiced nonacquiescence to circuit law on occasion. See, e.g., *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462 (3d Cir. 1977); *May Dep't Store Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977) (government contended they were immune to garnishment procedures).

12. See, e.g., *Intracircuit Nonacquiescence*, *supra* note 3, at 584 n.11 (citing cases involving HHS, NLRB, and IRS).

13. Various circuit and district courts have discussed this practice and found it to be undesirable. See, e.g., *Switzer v. Heckler*, 742 F.2d 832 (7th Cir. 1984); *Cornella v. Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Pack v. Heckler*, 740 F.2d 292 (4th Cir. 1984); *Murray v. Heckler*, 722 F.2d 499 (9th Cir. 1983); *Kuehner v. Schweiker*, 717 F.2d 813 (3d Cir. 1983); *Kuzman v. Schweiker*, 714 F.2d 176 (3d Cir. 1983); *Burnett v. Secretary of H.E.W.*, 711 F.2d 1056 (6th Cir. 1983); *Simpson v. Schweiker*, 699 F.2d 966 (11th Cir. 1982); *Cassidy v. Schweiker*, 663 F.2d 745 (7th Cir. 1981); *Hayes v. Secretary of H.E.W.*, 656 F.2d 204 (6th Cir. 1981); *Crosby v. Schweiker*, 650 F.2d 777 (5th Cir. 1981); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Miranda v. Secretary of H.E.W.*, 514 F.2d 996 (1st Cir. 1975); *Steiberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985); *Polaski v. Heckler*, 585 F. Supp. 997 (D. Minn. 1984); *Holden v. Heckler*, 584 F. Supp. 463 (N.D. Ohio 1984) (plaintiff's application for attorneys fees, costs and expenses granted in 615 F. Supp. 686 (N.D. Ohio 1985)); *Hyatt v. Heckler*, 579 F. Supp. 985 (D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985); *Hillhouse v. Harris*, 547 F. Supp. 88 (W.D. Ark. 1982), *aff'd per curiam*, 715 F.2d 428 (8th Cir. 1983) (*dicta*).

binding precedential effect on the agency.¹⁴ Therefore, from the agency's perspective, all decisions of the United States circuit and district courts bind only the litigants involved in a particular case and do not serve as precedent which must be followed in other similar cases.¹⁵

The agency has advanced several arguments in support of their position of nonacquiescence. These arguments include: 1) Non-mutual offensive collateral estoppel does not bar the government from relitigating an issue in subsequent cases;¹⁶ 2) The agency is not bound by stare decisis;¹⁷ 3) Acquiescence violates the protections that Federal Rule of Civil Procedure 23 intended to provide to parties opposing a class;¹⁸ and finally, 4) Routine nonacquiescence is no longer the policy of HHS as provided in Interim Circular 185.¹⁹ The validity of each of these arguments shall be considered in turn.

1. *Collateral Estoppel: Mendoza*

Collateral estoppel²⁰ is a judicially developed doctrine created to encourage judicial economy and conclusive resolutions of disputes. This doctrine serves to relieve the parties of the problems inherent in multiple lawsuits such as the possibility of inconsistent decisions, the waste of judicial resources and the cost and exacerbation of such lawsuits.²¹

14. See, e.g., *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984); *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982) (quoting Appeals Council decision), *aff'd per curiam*, 715 F.2d 428, 430 (8th Cir. 1983) (quoting Appeals Council decision). See also Memorandum to ALJs from Associate Comm'r of Hearings and Appeals, Louis B. Hays, dated Jan. 7, 1982, which stated: "[F]ederal courts do not run SSA's programs. . . . ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of Supreme Court." *Id.*

15. *Hyatt v. Heckler*, 579 F. Supp. at 996 (class action challenging SSA's policy of denying and terminating benefits in violation of Fourth Circuit decisions).

16. Defendants' Memorandum Concerning Instruction to Administrative Law Judges at 11-13, *Steiberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) [hereinafter cited as Defendants' Memo.].

17. *Id.* at 5-11.

18. *Id.* at 13-14.

19. *Id.* at 18.

20. Collateral estoppel or issue preclusion, a sub-doctrine of *res judicata*, is the term used when "determinations of issues actually litigated and necessary to the judgment [are] conclusive in a subsequent suit as against a person bound by a prior judgment." 1B J. MOORE, J. LUCAS & T. CURRIER, *MOORE'S FEDERAL PRACTICE* ¶ 0.401, at n.13 (2d ed. 1984) [hereinafter cited as MOORE].

21. See, e.g., *Allen v. Curry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

Traditionally, collateral estoppel required mutuality of parties or persons in privity with them.²² However, in 1971, the requirement of mutuality was abandoned when the Court allowed the use of non-mutual defensive collateral estoppel.²³ Eight years later the Supreme Court in *Parklane v. Shore* approved the use of offensive collateral estoppel by a non-party to such action.²⁴ In *Parklane*, plaintiff's use of offensive collateral estoppel sought to foreclose the defendant from relitigating an issue which the defendant had previously litigated unsuccessfully in another action brought by a different party.²⁵ In 1984, the Court examined the doctrine of collateral estoppel in the context of federal government litigation in two companion cases.

In *United States v. Stauffer Chemical Company*,²⁶ the Court held that collateral estoppel can be applied against the government when the government had lost a previous case in a different circuit involving both the same adverse party and the same controlling issue.²⁷ In that case, Stauffer Chemical Company sought to use a favorable Tenth Circuit decision of a suit brought by them against the Environmental Protection Agency as a defense in a suit brought in the Sixth Circuit. The prior Tenth Circuit decision held that private contractors were not authorized representatives under the Clean Air Act and enjoined the Environmental Protection Agency from using such private contractors to inspect Stauffer's plants.²⁸ When the government again tried to use private contractors to inspect another of

22. The Supreme Court in 1912 stated, "It is a principle of general elementary law that the estoppel of a judgment must be mutual." *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111, 127 (1912). See also 1B MOORE, *supra* note 20, at ¶ 0.411(1).

23. *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971) (wherein the Court held that a patentee who sues an alleged infringer and loses on a determination that the patent is invalid, may not relitigate the issue of patent validity in a suit against another alleged infringer). Therefore, mutuality was held to no longer be a prerequisite for the application of collateral estoppel.

24. *Parklane v. Shore*, 439 U.S. 322 (1979).

25. *Id.* at 331-32. The Court upheld the use of collateral estoppel provided, the following conditions are met:

(1) the party asserting collateral estoppel could not easily have joined in the action relied on; (2) the party against whom collateral estoppel is being asserted had the incentive to defend the first action vigorously; (3) the judgment relied on is not inconsistent with previous decisions; and (4) there are no procedural opportunities in the second action which were unavailable in the first action which might be likely to cause a different result.

Id.

26. 104 S. Ct. 575 (1984).

27. *Id.* at 580. See also *Stauffer Chem. Co. v. E.P.A.*, 647 F.2d 1075 (10th Cir. 1981). The issue raised was who qualified as an authorized representative of the government in order to conduct inspections for the purpose of enforcing the Clean Air Act.

28. *United States v. Stauffer Chem. Co.*, 104 S. Ct. at 577.

Stauffer's plants located in the Sixth Circuit, but were refused access, the Environmental Protection Agency brought suit in that circuit.²⁹ The Supreme Court's reasoning hinged on the fact that the issues and the parties involved in both actions were identical.³⁰ Although the Court indicated that the government would be free to relitigate this issue with other parties in the Sixth Circuit,³¹ this does not suggest that the Court would approve of this in the Tenth Circuit. This is true because the Court of Appeals for the Tenth Circuit had now addressed and answered the issue, whereas the Court of Appeals for the Sixth Circuit had not conclusively settled the issue.³²

In *United States v. Mendoza*,³³ which was decided the same day as *Stauffer*, the Court held that nonmutual offensive collateral estoppel did not bar the government from relitigating issues such as those presented in that case.³⁴ *Mendoza* involved a petition by a Filipino national for naturalization under the Nationality Act of 1940.³⁵ Mendoza's claim for naturalization was based on the assertion that the government's administration of the Nationality Act denied him due process of law. The merits of this claim were not reached by either the District Court or the Court of Appeals for the Ninth Circuit.³⁶ Rather, both courts held that the government was estopped from litigating that constitutional issue as a result of an earlier decision in a case brought by other Filipino nationals in the Northern District of California, from which no appeal had been taken.³⁷

29. *Id.*

30. *Id.* at 580.

31. *Id.* Justice White, in his concurrence, remarked that he would not extend this holding as far as the majority would. He felt an injustice would result if Stauffer could apply collateral estoppel against the EPA in the Sixth Circuit. Yet, if the Sixth Circuit had a contrary ruling, all other parties in the Sixth Circuit could not obtain the benefit of such prior decision. Therefore, Justice White would allow collateral estoppel in this case only to the extent that the circuit in which the suit is now brought does not have contrary case law on the issue. *Id.* at 581-84 (White, J., concurring). See Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 126 (1984) [hereinafter cited as Levin & Leeson].

32. The panel of the Sixth Circuit was split as to the basis for deciding that the EPA could not force Stauffer to accept private contractors as authorized inspectors for the EPA. Therefore, the court of appeals held, in the alternative, that the government was collaterally estopped and that private contractors could not be authorized inspectors for the EPA. *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1177 (6th Cir. 1982). For a further discussion of the Sixth Circuit's decision, see Levin & Leeson, *supra* note 31, at 122-24.

33. 104 S. Ct. 568 (1984).

34. *Id.* at 574.

35. 8 U.S.C. §§ 1001-1005 (Supp. V 1940).

36. *Mendoza*, 104 S. Ct. at 570.

37. *Id.* See *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). For a further discussion of *Mendoza*, see Levin & Leeson, *supra* note 31, at 115-21.

In reversing the Ninth Circuit, the Supreme Court reasoned that the use of

nonmutual collateral estoppel against the government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue. Allowing one final adjudication would deprive this court of the benefit it receives from permitting several court of appeals to explore a difficult question before this Court grants certiorari.³⁸

The Court further observed that the government differs from a private litigant in the "geographic breadth of government litigation and . . . the nature of the issues the government litigates."³⁹ Additionally, the Court noted that if nonmutual collateral estoppel was routinely applied against the government, the Solicitor General's policy for determining when to appeal an adverse decision would have to be modified.⁴⁰ Generally a private litigant will appeal if he believes that he will prevail, whereas the government considers several factors other than the likelihood of success in making that determination.⁴¹ Such factors include the limited resources of the government and the crowded dockets of the courts.⁴² The Supreme Court remarked that if nonmutual collateral estoppel were applied against the government, the Solicitor General would no longer evaluate the decision to appeal using the aforementioned criteria. Instead, the government might feel compelled to appeal every adverse decision in order to avoid preclusion on an issue.⁴³

HHS asserts that the *Mendoza* decision gives them a right to relitigate all adverse decisions in subsequent litigation of the same issue against persons who were not parties.⁴⁴ The agency argues that the Supreme Court in *Mendoza* intended to preserve the Agency's discretion in seeking review of unfavorable judgments as well as the

See generally Note, *Collateral Estoppel and Nonacquiescence: Precluding Government in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986).

38. *Mendoza*, 104 S. Ct. at 572.

39. *Id.*

40. *Id.*

41. *Id.* at 573.

42. *Id.* *See also* Defendants' Memo., *supra* note 16, at 12 n.14 (explaining the factors the Solicitor General will consider in determining whether an appeal should be sought). "Such decisions rest on a host of factors including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the government, and a sensitivity to the crowded docket of the Court." *Id.*

43. *Mendoza*, 104 S. Ct. at 573.

44. Defendants' Memo., *supra* note 16, at 11.

benefits the Court derives from “permitting several courts of appeals to explore a difficult question before [it] grants certiorari.”⁴⁵

In so stating, the agency fails to recognize that while the Supreme Court approved the agency’s discretionary power to appeal a case, the Court in no way implied that the agency was not bound by the judiciary’s interpretations of the law. In *Mendoza*, the Supreme Court stated that “[w]hile the Executive Branch must of course defer to the Judicial Branch for final resolution of question of constitutional law, the former nonetheless controls the progress of government litigation through the federal courts.”⁴⁶ Hence, the Court tried to maintain the government’s flexibility to pursue certain issues, yet it did not condone ignoring the law of the circuit.⁴⁷ In *Mendoza*, the circuit court had not spoken on the issue. The prior case was an unappealed district court decision.⁴⁸ Due to the nature of the prior case, the government may not have litigated the case as vigorously as necessary to justify a finding of collateral estoppel.⁴⁹ In that case, sixty-eight Filipino nationals sought naturalization under the Nationality Act of 1940 for service to the U.S. during World War II.⁵⁰ Because for several months the U.S. government failed to station, in the Phillipine Islands, an authorized person to naturalize these members of the armed services pursuant to the Act, the government was found to have denied them their right of due process of law.⁵¹ Although the statute of limitations had expired almost thirty years earlier,⁵² the government could not assert that claim due to their own

45. *Id.* at 12-13 (referring to RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment c, § 29(7) comment i (1982)). See *Mendoza*, 104 S. Ct. at 572.

46. *Mendoza*, 104 S. Ct. at 573.

47. See *Intracircuit Nonacquiescence*, *supra* note 3, at 591-92 (discussing the distinction between *stare decisis* and collateral estoppel). See *infra* notes 74-78 and accompanying text.

48. *Mendoza*, 104 S. Ct. at 571 n.2 (reiterating the facts and holdings of *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. at 931). The *Mendoza* court noted that the government had withdrawn the appeal of this case after a new administration had taken over the Commission. The government had subsequently re-evaluated their position and decided to grant naturalization to those persons who filed petitions before the withdrawal of this appeal. *Mendoza*’s petition was filed after the withdrawal. *Id.* at 571 n.2.

49. See *supra* note 25. The concern is that a party adversely affected by collateral estoppel did not have a “‘full and fair’ opportunity to litigate” the issue in the prior proceeding. *Parklane*, 439 U.S. at 332.

50. Nationality Act of 1940, 8 U.S.C. §§ 1001-1005 (Supp. V 1940).

51. *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. at 951.

52. Nationality Act of 1940 as amended by the Second War Powers Act of 1942, 8 U.S.C. § 701. Petitions filed under this section were subsequently required to be filed by December 31, 1946. From October 26, 1945, until August, 1946, there was no authorized agent in the Philippines to conduct such naturalization process. See *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. at 934-36.

misconduct.⁵³ The government chose not to appeal this case from the district court because of the limited scope of its application.⁵⁴ Only a finite group was affected by the Nationality Act and an even smaller group was affected by the government's misconduct. The group of affected persons was even further narrowed by the passage of time.⁵⁵ The Supreme Court, itself, recognized the unique circumstances of the *Mendoza* case by not foreclosing the possibility of the use of collateral estoppel in other situations. The Court explicitly stated that "[t]he United States may not be collaterally estopped on an issue such as this. . . ."⁵⁶ Reemphasizing this later in the case, the Court stated that "[n]onmutual collateral estoppel . . . does not apply to the government in such a way as to preclude relitigation of issues such as those involved in this case."⁵⁷ It has been suggested that the Supreme Court may have reached a contrary conclusion if physical hardship would have resulted from the actions of the government as is the case in Social Security litigation.⁵⁸

In applying *Mendoza*, the Fifth Circuit noted that the Supreme Court was ambiguous for the aforementioned reasons as to the scope of the *Mendoza* holding;⁵⁹ nonetheless, the court of appeals found *Mendoza* controlling in the case before them. The issue before the Fifth Circuit dealt with the statutory interpretation of Title XVIII of the Social Security Act.⁶⁰

53. *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. at 939.

54. *Mendoza*, 104 S. Ct. at 571 n.2.

55. See Levin & Leeson, *supra* note 31, at 116-17. The government claimed that it had miscalculated the effect of the district court's holding in *68 Filipinos*. The government thought in 1975 "that the holding made possible no more than 25,000 naturalization petitions, but subsequently, the government became persuaded that the correct number was between 60,000 and 80,000." Levin & Leeson, *supra* note 31, at 116 n.22 (citing *Mendoza*, 672 F.2d at 1325 (9th Cir. 1982)). Therefore, the government sought to relitigate the issue.

Levin and Leeson view the Ninth Circuit opinion as a result-oriented decision. In support of this view, they note that the court reflected on the fact that persons like *Mendoza* were at least sixty years of age and had survived Japanese occupation and the Bataan Death March. *Id.* at 116-17 nn. 25-26.

The Nationality Act provides for the naturalization process to be eased for American allies who fought in the Philippines during World War II. The number of such persons who survived this era and who desire naturalization dwindle as time passes. 8 U.S.C. §§ 1001-1005 (Supp. V 1940).

56. *Mendoza*, 104 S. Ct. at 570.

57. *Id.* at 574.

58. See *Intracircuit Nonacquiescence*, *supra* note 3, at 591.

59. *Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 323 n.8 (5th Cir. 1984).

60. At issue was the term "is notified" contained in § 1395oo(f)(1). If such term means on the date the Board's decision is mailed to the provider (medical facilities providing care to disabled persons under the Medicare Act), then the Secretary's notice of her intention to reverse this decision is untimely. If, however, the date on which the Board's decision reaches the

While the policy considerations announced in *Mendoza*⁶¹ and reiterated by the Fifth Circuit⁶² were relevant in those particular cases, the general practice of nonacquiescence impedes the goals the Court sought to achieve in those cases. For instance, one policy consideration discussed was the concern for preserving the government's prerogative in choosing which cases to pursue, thereby saving government resources and minimizing the burden on the already crowded court dockets.⁶³ Yet, in nonacquiescing to circuit court law, the agency is consistently engaged in the relitigation of the same issues, thereby expending a significant amount of resources and valuable court time. As one commentator has remarked, "if repeated litigation of the same matter is allowed, courts, attorneys, and litigants will be involved in the expenditure of time and effort in a way that would seem grossly wasteful of the resources of society."⁶⁴ Additionally, if the agency is permitted to litigate an issue only once in a circuit, they will have a greater incentive to litigate the matter fully.⁶⁵

Moreover, the concern the Supreme Court expressed in *Mendoza* as to thwarting the development of the law if estoppel were applied against the government is not applicable to the agency's intra-circuit nonacquiescence practice.⁶⁶ The opportunity for the law to develop fully would continue if the government were to abide by the law of the circuit, since they would still be free to litigate the issue in other circuits, thereby allowing "several circuits to explore difficult questions."⁶⁷ For the same reasons this would have no effect on the Court's practice of waiting for a conflict to arise among the circuits before granting certiorari.⁶⁸ In *Mendoza*, the Supreme Court ex-

provider is controlling, then the Secretary's notice is timely. Plaintiffs contended that this issue had been decided in their favor by the District Court for the Western District of Kentucky; hence, the Secretary was collaterally estopped from relitigating this point. *Id.* at 320, 322.

61. The Court observed that it should exercise restraint in expanding the doctrines of collateral estoppel against the government because the government should be allowed the freedom to make policy changes when a new Administration takes office. The Court also noted this expansion would be undesirable due to the Court's policy of deferring review of a difficult question until the circuit courts have considered that question. In addition, the Solicitor General might be forced to appeal all adverse decisions if collateral estoppel were to apply against the government. *Mendoza*, 104 S. Ct. at 573.

62. *Sun Towers, Inc.*, 725 F. Supp. at 323.

63. *Mendoza*, 104 S. Ct. at 572-73.

64. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 175 (1977) [hereinafter cited as Vestal].

65. *See id.* at 169.

66. *Mendoza*, 104 S. Ct. at 572.

67. *Id.*

68. Sup. Ct. R. 17.1.

pressed a fear that this practice would have to change since use of collateral estoppel would freeze the law after the first final decision was rendered on any particular legal issue.⁶⁹ The Court's concern, however, addressed the freezing of intercircuit "percolation"⁷⁰ of difficult legal issues, not defiance of intracircuit law. Therefore, the Supreme Court was not advocating, as the Social Security Administration would suggest, that "percolation" via relitigation is appropriate within a circuit which has previously addressed the issue.⁷¹

2. *Stare Decisis*/Separation of Powers

A. *Stare Decisis*

The doctrine of stare decisis makes each court decision a statement of the law and precedent to be binding upon future cases before the same or inferior court owing obedience to that court.⁷² The precedential effect encompasses only the law and not the facts of each case.⁷³ The purpose of the doctrine is to promote consistency and uniformity of law, which is a basic principle of American jurisprudence.

Stare decisis differs from collateral estoppel in the breadth of its effect. Under the doctrine of stare decisis a circuit court decision on a particular legal issue will bind all lower courts within that circuit.⁷⁴ Collateral estoppel can potentially have a greater geographical effect than stare decisis. Under the doctrine of collateral estoppel, once a court renders a final verdict on a legal issue, it is conclusive in subsequent litigation as against a person bound by the prior judgment.⁷⁵ Therefore, a district court decision may preclude

69. *Mendoza*, 104 S. Ct. at 572. See also *Steiberger*, 615 F. Supp. at 1358-59 (discussing *Mendoza*).

70. Levin & Leeson, *supra* note 31, at 118. "Percolation" is a term used to describe a situation in which an issue is explored by several different circuits in order for the law to develop. Generally, the Supreme Court will wait for a conflict to arise among the circuits before granting *certiorari*.

71. Indeed, Justice White has stated that he would not condone the use of collateral estoppel in such a way as to upset prior settled circuit court law. *United States v. Stauffer Chem. Co.*, 104 S. Ct. at 581-84 (White, J., concurring). At least four courts have held "that the *Mendoza* decision does not support the defendants' contention that the SSA's nonacquiescence policy is lawful." *Steiberger*, 615 F. Supp. at 1361 (citing *Lopez v. Heckler*, 725 F.2d at 1497 n.5); *Holden*, 584 F. Supp. at 491; *Hyatt*, 579 F. Supp. at 1001-02).

72. 1B MOORE, *supra* note 20, at ¶ 0.402(1). Literally translated, *stare decisis* means "let stand what has been decided and do not disturb what is settled." *Id.*

73. *Id.*

74. See *Intracircuit Nonacquiescence*, *supra* note 3, at 592.

75. 1B MOORE, *supra* note 20, at ¶ 0.401.

an issue from being litigated in a court within a different circuit.⁷⁶ In the interests of judicial economy, collateral estoppel can be an exception to the “law of the circuit” doctrine whereby “decisions of a court of appeals are the law of that circuit but do not bind courts in other circuits.”⁷⁷ As previously discussed, the Supreme Court in *Mendoza* refused to estop the government. However, the Court in no way gave credence to the agency’s policy of disregarding the doctrine of stare decisis.⁷⁸

The agency views itself as a co-equal branch of the United States government and as such is not bound by the doctrine of stare decisis.⁷⁹ Reasoning that only subordinates of the judiciary are bound by the doctrine, the agency professes that, as a co-equal branch, it is not bound.⁸⁰ The agency further asserts that it is in the same position as a private litigant and like other private litigants stare decisis serves as a prediction of the law and not as a commandment of the law.⁸¹

Technically, there are two ways in which stare decisis should affect the agency’s position: (1) Once a circuit court of appeals decides a claim adversely to the agency’s position, any further litigation on that issue occurring in a district court within that circuit must likewise be decided adversely to the agency’s position. District courts must follow the precedent set by the circuit court and thus, they may not overrule it;⁸² and (2) a number of circuit courts have taken the position that a federal administrative agency is of the same status as a trial court,⁸³ hence, agencies are themselves bound by the prece-

76. *Intracircuit Nonacquiescence*, *supra* note 3, at 592.

77. *Id.* at 583 (citing Vestal, *supra* note 64, at 140-60).

78. For a discussion of the distinctions of collateral estoppel, as applied in *Mendoza*, and *stare decisis*, see *supra* notes 66-71 and accompanying text.

79. Defendants’ Memo., *supra* note 16, at 9.

80. *Id.*

81. *Id.*

82. Each trial court must be explicit and form its conclusion as to the facts. Based on such facts, the court may determine what is of precedential value to the case. Where precedent is not applicable, reversal of such decision is warranted. See *Kuehner v. Schweiker*, 717 F.2d 813, 817-18 (3d Cir. 1983) (reversing a dismissal by the district court because of the court’s failure to apply relevant precedent to the case at bar).

83. See, e.g., *Morand Bros. v. NLRB*, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953); *Allegheny Hosp. v. NLRB*, 608 F.2d 966, 969-70 (3d Cir. 1979); *Hillhouse v. Harris*, 547 F. Supp. 88 (W.D. Ark. 1982) (*dicta*), *aff’d per curiam*, 715 F.2d 428 (8th Cir. 1983); *Cleveland v. Federal Power Comm’n*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Ithaca C. v. NLRB*, 623 F.2d 224, 227 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Hyatt v. Heckler*, 579 F. Supp. 985 (1984).

The courts above have taken the position that federal administrative agencies are bound by the law of the circuit in which the case arises. This view is also adopted by Moore: “The current and better view is that [federal agencies] must follow the law of the circuit in which review will proceed.” 1B MOORE, *supra* note 20, at ¶ 0.402(1).

dent of the circuit court. In light of these two principles, the agency's position is erroneous and has been rejected by the courts.⁸⁴

In the first instance, because *stare decisis* mandates that lower courts in the same circuit must follow the rationale and decision of its circuit court on that same legal issue, the agency's argument that *stare decisis* is only an indicator of judicial feeling on a topic belittles the importance of this doctrine. The consistency and uniformity this doctrine preserves has been extolled as the most important doctrine in jurisprudence.⁸⁵

In addition, the agency claims that only through their policy of nonacquiescence can it effectuate a change in the law.⁸⁶ Contrary to the agency's position, this is not the only method of changing the law, nor is it the best method.⁸⁷ The agency is fully aware that only the circuit court and Supreme Court may overrule present circuit law, yet the agency rarely appeals from district court to circuit court and has never petitioned for review by the Supreme Court on any of the issues involved in their nonacquiescence practice.⁸⁸

84. For a discussion of the courts' rejection of the agency's erroneous position, see *infra* notes 105-11.

85. See Levin & Leeson, *supra* note 31, at 129-30.

86. See *Steiberger*, 615 F. Supp. at 1360.

87. Other means are available to the agency to effectuate a change in the law. For example, the agency could seek review by the Supreme Court, seek a rehearing of the case en banc, lobby in Congress, or seek declaratory relief. See Levin & Leeson, *supra* note 31, at 133-39. See also *id.* at 136 (proposing a change in the judicial system to include a new Intercircuit Tribunal "with the authority to resolve issues of national law on a national basis."); Vestal, *supra* note 64, at 174-79 (advocating issue preclusion against the government on constitutional questions and establishing a National Court of Appeals in order to maintain uniformity of law nationwide); N.Y. Times, Mar. 9, 1986, at A1, col. 4 (Reagan Administration proposing the creation of a new court designed specifically to hear Social Security disability or retirement cases. The proposed court would consist of 30 judges, each serving 10-year terms); *Intracircuit Nonacquiescence*, *supra* note 3, at 593, 602-03 (noting that an en banc hearing usually is not granted unless there are conflicting precedents within the circuit).

88. See *Douglas v. Schweiker*, 734 F.2d 399, 400 (8th Cir. 1984); *Steiberger*, 615 F. Supp. at 1353. See also Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 HAMLINE L. REV. 1, 10 (1984) [hereinafter cited as Heaney] (noting that the Secretary of HHS has appealed very few decisions from District Court to Circuit Court for the Eighth Circuit and that the same appears to be true in other circuits, and, that the Secretary has filed only two petitions for *certiorari* from 1979 to 1984; however, these cases were unrelated to the issues encompassed in its present nonacquiescence policy); Kelly & Rothenberg, *The Use Of Collateral Estoppel By A Private Party In Suits Against Public Agency Defendants*, 13 U. MICH. J.L. REF. 303, 307 n.24 (1980) (remarking that it is financially advantageous for the agency to avoid review since favorable decisions to the claimant usually result in an increase in benefits. Hence, the cost of relitigating is outweighed by the benefit received in nonacquiescing and continuing to pay lower benefits to those unable to obtain legal representation).

In the second instance, several circuits have taken the position that federal administrative agencies are bound by stare decisis in much the same way as district courts.⁸⁹ Many of the functions of administrative agencies are similar to that of a trial court. For example, these agencies interpret statutes, apply the law to the facts, and make decisions accordingly. As the Second Circuit stated in *NLRB v. Yeshiva University*,⁹⁰ “the position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a United States District Court . . . and as must a district court, an agency is bound to follow the law of the circuit.”⁹¹

The agency, however, has tried to distinguish itself from *Yeshiva* and other similar cases involving the National Labor Relations Board⁹² (NLRB) in at least one respect. Generally, in cases involving the NLRB, there is at least one private party who would have the incentive and standing to sue.⁹³ The agency, as opposed to the NLRB, is the only adverse party to the claimant and if it did not relitigate an issue no one else could. The premise to this argument is faulty in that it assumes that relitigation is the only means available to the agency to change the law. As discussed earlier, the agency can attempt to change the law by appealing adverse decisions.⁹⁴

The agency has insisted that the only way it would have standing to relitigate under the Article III case and controversy requirement is by nonacquiescing.⁹⁵ Yet, the agency’s nonacquiescence policy itself creates the dilemma in which it claims to find itself. “Once it is understood that the Secretary is under a duty to obey circuit precedent, the Article III objection vanishes in any case in which the Secretary is unwillingly complying.”⁹⁶ This is true because once the agency is under a legal obligation to pay benefits against its will, it will be suffering an economic “injury in fact” and will therefore have standing.⁹⁷

89. See Defendants’ Memo., *supra* note 16, at 9; *Steiberger*, 615 F. Supp. at 1354-55.

90. 582 F.2d 686 (2d Cir. 1978), *aff’d*, 444 U.S. 672 (1980).

91. *NLRB v. Yeshiva Univ.*, 582 F.2d at 6. *Accord Steiberger*, 615 F. Supp. at 1355.

92. See *supra* note 83. See also Defendants’ Memo., *supra* note 16, at 9; *Steiberger*, 615 F. Supp. at 1354-55.

93. See Defendants’ Memo., *supra* note 16, at 16.

94. See *supra* note 87 and accompanying text.

95. U.S. CONST. art. III, § 2.

96. Plaintiffs’ Response to Defendants’ Memorandum Concerning Instruction to Administrative Law Judge at 5 n.5, *Steiberger*, 615 F. Supp. at 1315.

97. *Id.*

Another distinction made by the agency between itself and the NLRB, a proponent of nonacquiescence, was highlighted by the Southern District of New York in *Steiberger v. Heckler*.⁹⁸ This distinction condemns rather than justifies the agency's position. The court noted that the NLRB, under its venue provisions, creates multiple forums for litigation.⁹⁹ Hence, it may be difficult for the NLRB to predict in which forum the litigation may be brought and thus which circuit law applies.¹⁰⁰ HHS, however, is not faced with this uncertainty. The Social Security Act creates a very limited number of forums in which judicial review may be sought.¹⁰¹ For this reason, nonacquiescence is more palatable in the former situation than the latter.¹⁰²

B. Separation of Powers

Assuming, *arguendo*, that the agency is a co-equal branch of the government, it still must abide by the interpretations of law as articulated by the judiciary. The American government is comprised of three distinct and equal branches, each with its own constitutionally authorized responsibilities.¹⁰³

In what has to date been one of the most thorough analyses of the separation of powers doctrine and its impact on the agency's nonacquiescence policy, the Southern District of New York stated, "The judiciary's duty and authority, as first established in *Marbury*, 'to say what the law is' would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force."¹⁰⁴ Although the agency's

98. 615 F. Supp. at 1363-64. The court recited two examples:

(1) Under the National Labor Relations Act, a party may sue in the circuit where the alleged unfair labor practice occurred, where the party resides, where the party transacts business, or in the D.C. Circuit. See 29 U.S.C. § 160(f); (2) A party may choose under the Internal Revenue Code to litigate their claim in federal court or in the tax court, with venue available either at the place of residence, or principal place of business. 26 U.S.C. § 7482(b)(1); 28 U.S.C. § 1402(a)(2).

Id.

99. 615 F. Supp. at 1364. See *Intracircuit Nonacquiescence*, *supra* note 3, at 604 (approving of nonacquiescence where venue is uncertain).

100. *Intracircuit Nonacquiescence*, *supra* note 3, at 604.

101. *Steiberger*, 615 F. Supp. at 1364 (holding that such uncertainty with respect to venue is for the most part not present). See 42 U.S.C. § 405(g) (1982).

102. See *supra* notes 99-101.

103. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Steiberger*, 615 F. Supp. at 1357.

104. *Steiberger*, 615 F. Supp. at 1357 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

interpretations of the Social Security Act are to be given great deference by the courts, the ultimate interpretation is solely within the court's purview.¹⁰⁵ Justice Brennan, in his dissenting opinion from the Supreme Court's refusal to vacate a stay of the district court's original injunction in *Lopez v. Heckler*,¹⁰⁶ stated that "it is clear to me that it is the Secretary who has not paid due respect to a coordinate branch of Government by expressly refusing to implement binding decisions of the Ninth Circuit."¹⁰⁷ By making itself the ultimate interpreter of the Social Security Act, the agency is not only impinging upon the duties of another branch of our tripartite system of government, but it is also not according the judiciary the respect mandated by the Constitution which requires the Executive Branch to "faithfully execute" the law.¹⁰⁸

Although the seminal case of *Marbury v. Madison*¹⁰⁹ arguably left unclear the future binding effect of a lower court's decision,¹¹⁰ many circuits have rejected this interpretation.¹¹¹ Instead, these circuits view *Marbury* and its progeny¹¹² as authority for the proposition that the entire judicial branch and not just the Supreme Court are the final interpreters of the law.¹¹³

Therefore, for the reasons stated above, the agency's persistent refusal to abide by circuit court law cannot be justified in light of the doctrine of stare decisis and separation of powers.

3. Class Actions

The agency has argued that forcing them to acquiesce to circuit court decisions would vitiate the protection afforded to a party op-

105. *Hillhouse v. Harris*, 547 F. Supp. at 97 (citing *Ithaca C. v. NLRB*, 623 F.2d at 238). The court then quoted the Supreme Court in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) ("Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). The *Hillhouse* court felt that this statement applied equally to the relationship of the agency and the lower federal courts. 547 F. Supp. at 98.

106. 572 F. Supp. 26 (C.D. Cal. 1983).

107. *Heckler v. Lopez*, 464 U.S. 879, 887 (1983) (Brennan and Marshall, JJ., dissenting).

108. U.S. Const. art. II, § 3.

109. 5 U.S. (1 Cranch) 137 (1803).

110. See Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("Under *Marbury*, the Court decides a case; it does not pass a statute . . . calling for obedience by all within the purview of the rule that is declared.").

111. See, e.g., *Ithaca C. v. NLRB*, 623 F.2d at 224; *Lopez v. Heckler*, 725 F.2d at 1497 n.5.

112. *United States v. Nixon*, 418 U.S. 683 (1974); *Cooper v. Aaron*, 358 U.S. (1958); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See *Steiberger*, 615 F. Supp. at 1357.

113. *Steiberger*, 615 F. Supp. at 1358.

posing a class action pursuant to Federal Rule of Civil Procedure 23.¹¹⁴ The agency analogizes the nonacquiescence case to a case in which a class member has opted out of the class and yet seeks to use the beneficial judgment in the later suit via collateral estoppel.¹¹⁵ The courts have disallowed this use of collateral estoppel, for it would be a different form of the “one way intervention” the amended Federal Rule of Civil Procedure 23 sought to avoid.¹¹⁶ HHS has stated that if it were to acquiesce the outcome would be a reinstatement of “one way intervention” whereby HHS could not relitigate if they lost, but private individuals could litigate the issue if HHS won.

This argument is misleading in that the agency is *relitigating* issues which are settled within a circuit whereas individuals not involved in the first suit are litigating the issues for their first time. Even so, if the agency were to win in a case before a circuit court, individuals opposing the agency’s position in a later action will find themselves arguing against the stare decisis effect of the earlier case. Of necessity, courts will follow applicable circuit precedent,¹¹⁷ as they are presently doing against the agency. Of course, if either party fails to assert a well grounded claim, appropriate sanctions may then be taken by the court.¹¹⁸

The agency argues that inequities result because of the differing binding effects of a decision rendered against a class as opposed to forcing the agency to acquiesce to decisions in future cases. In a class action all parties are bound by the result. However, in the agency’s view, if it is forced to acquiesce the agency will be bound by an adverse decision whereas favorable decisions to the agency will not foreclose private parties from litigating the same issue in a later

114. Defendants’ Memo., *supra* note 16, at 13 (the court did not address this contention made by the agency).

115. *Id.* Federal Rule of Civil Procedure 23(c)(3) provides that only members of a Rule 23(b)(3) class may opt out of that class. FED. R. CIV. P. 23(c)(3). “It is clearly contemplated that every judgment in every class action will bind all members of the class, except for those who have asked to be excluded in a (b)(3) action. . . . [The rule] recognizes that even a party named in the judgment will not be bound if he has been denied due process of law.” C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 72, at 483 (1983) [hereinafter cited as WRIGHT].

116. WRIGHT, *supra* note 115, at 476-77.

117. See *supra* notes 89-97 and accompanying text.

118. See, e.g., *Intracircuit Nonacquiescence*, *supra* note 3, at 596 n.92 (pointing out that Federal Rule of Civil Procedure 11 requires the attorney to certify on all papers filed with the court that these papers are “well grounded in fact” and “warranted by existing law.”). Thus, an attorney is required to put forth a good faith argument. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4, -5, -14 (1981); Weinstein & Crosthwait, *Some Reflections on the Ethical Obligations of Government Attorneys*, 1 *TOURO L. REV.* 1 (1985).

suit. Assuming *arguendo* that this proposition is correct, the result is not inequitable, considering the position of the parties. Indeed, courts have presumed that the government will apply the law uniformly to all those who are similarly situated. Consequently, courts have on occasion refused to certify classes in actions against the government.¹¹⁹ In these cases, the issue involved rights upon which successful litigation should benefit all those similarly situated.¹²⁰ One commentator in his discussion of this principle has concluded that “when full relief can be given in an individual action it seems perfectly sound that a class injunction is not appropriate [because there is] no purpose of going through the class action routine.”¹²¹ The soundness of this policy is questionable in light of the fact that a government agency, HHS, has proven it will not treat similarly situated individuals the same, absent a class action order.¹²²

Therefore, the agency’s suggestion that an acquiescence policy controverts the protections of Federal Rule of Civil Procedure 23 is meritless since private parties are as much bound by the doctrine of *stare decisis* as is the government. In addition, the inequitable situation which the agency alludes it is a victim of, is justifiable in light of their duty as part of the government to apply the law as enacted by the legislature and interpreted by the judiciary.

4. *Interim Circular 185*

Lastly, the agency has argued that the courts need not rule on the agency’s long-standing nonacquiescence policy, because that policy has recently been modified.¹²³

The court in *Steiberger v. Heckler* found this argument to be unpersuasive.¹²⁴ There, the court analyzed the agency’s previous policy in order to fully understand the implications of the new policy. The agency maintains that the modified policy, Interim Circular 185, would allow the agency to relitigate certain issues, yet avoid the re-

119. *Intracircuit Nonacquiescence*, *supra* note 3, at 596-97. See *Gray v. International Bhd. of Elec. Workers*, 73 F.R.D. 638 (D.C. Cir. 1977); *Kelley & Rothenberg*, *supra* note 88, at 308 (describing the “government operations” rule).

120. *Gray v. International Bhd. of Elec. Workers*, 73 F.R.D. at 640-41.

121. *Id.* (citing 3B MOORE, *supra* note 20, ¶ 23.40, at 83 (Lucas, Supp. 1975)).

122. *Steiberger*, 615 F. Supp. at 1351 (restating the agency’s nonacquiescence policy).

123. 10 SOC. SEC. REP. SERV., NO. 3, INTERIM CIRCULAR NO. 185, at 27 (OFFICE OF HEARINGS AND APPEALS HANDBOOK) (1985) [hereinafter cited as INTERIM CIRCULAR NO. 185].

124. 615 F. Supp. at 1350.

litigation of cases in which “precedent makes the outcome a foregone conclusion.”¹²⁵

While the modified policy may accomplish that purpose, it falls far short of resolving all of the inherent problems of the previous nonacquiescence policy. Indeed it may create new problems as will be discussed in the following section.

II. THE GOVERNMENT’S REVISED POLICY

1. *Application and Procedure*

On June 3, 1985, the agency announced that it was revising its prior nonacquiescence policy contained in section 1-161 of the O.H.A. handbook.¹²⁶ The new policy contained in Interim Circular 185, purports to “accomodat[e] the interests of the courts and claimants by providing that *only* those few cases that the agency, after consultation with the Department of Justice, has determined are appropriate test cases for relitigation may be taken to the courts.”¹²⁷

The Interim Circular provides that upon administrative appellate review of an agency’s denial or termination of benefits,¹²⁸ it will follow circuit precedent under most circumstances. In applying circuit law, the Administrative Law Judge and Appeals Council will be guided by Social Security Rulings (SSRs) which will identify circuit court decisions at variance with established SSA policy as well as “provid[ing] a full description of the case and an explanation of how SSA will apply the decision within the circuit.”¹²⁹

Interim Circular 185 specifically outlines how the Administrative Law Judge (ALJ) and Appeals Council will handle cases in which SSA policy and circuit law differ. The Administrative Law Judge is directed on how to structure his decision in three alternative situations: 1) Where ALJ rules favorably to the claimant under SSA policy, the decision does not have to address or consider the circuit

125. Defendants’ Memo., *supra* note 16, at 18.

126. INTERIM CIRCULAR NO. 185, *supra* note 123, at 27. The prior policy stated: “[W]here a district or circuit court’s decision contains interpretations of the law . . . inconsistent with the Secretary’s interpretations, the ALJ should not consider such decisions binding on future cases simply because the case is not appealed.” *Steiberger*, 615 F. Supp. at 1351 (quoting § 1-161 of INTERIM CIRCULAR NO. 185, *supra* note 123).

127. *Steiberger*, 615 F. Supp. at 1367 (citing Undersecretary of HHS, Charles Baker Affidavit, Baker Declaration ¶ 4) (emphasis in original).

128. Upon denial and reconsideration on the state level (*see infra* note 158), appeal can be taken before an Administrative Law Judge. A further appeal to the Appeals Council may be requested if an adverse decision was rendered by an ALJ.

129. INTERIM CIRCULAR NO. 185, *supra* note 123, at 27.

court case law; 2) Where the ALJ is inclined to rule unfavorably to the claimant, his decision should contain an analysis and decision under both standards; 3) Where “the ALJ is prepared to rule unfavorably to the claimant under SSA policy but favorably to the claimant under the agency’s interpretation of circuit court case law as set forth in the applicable SSR, a *recommended* favorable decision will be issued.”¹³⁰ Again, the opinion should set forth an analysis and decision under both standards.

Likewise, the Appeals Council is directed by Interim Circular 185 to structure their decisions in a certain manner depending on three different situations.¹³¹ First, where the ALJ’s decision is favorable to the claimant, the Appeals Council, before making its own motion to review, must determine whether a favorable decision could have been rendered under circuit court case law. At this point, Appeals Council is not required to make its own motion to review in which case the ALJ’s favorable decision becomes final. (It would seem that the Appeals Council may review the decision despite a favorable finding based on circuit court law if it thinks the ALJ’s decision is contrary to the SSA policy, thus bringing this case into a category three situation.) If it is ambiguous as to whether a decision based on the circuit’s case law would yield a different result, the Appeals Council should remand the case for a rehearing applying the pertinent circuit court case law.

Second, where the ALJ ruled unfavorably to the claimant under SSA Policy and circuit court case law, the claimant may request a review. Such requests will be refused if the Appeals Council finds the ALJ’s decision was supported by “substantial evidence.”¹³² If the Appeals Council decides that the ALJ was incorrect regarding SSA policy, “the usual Appeals Council procedures will be followed.”¹³³ Review however, will be granted if the Appeals Council believes the ALJ’s decision was correct as to the SSA policy but incorrect regarding the circuit court case law. If review is granted, the Appeals Council may take three alternative actions. A) The Appeals Council will issue a favorable decision to the claimant if the Appeals Council finds that applicable circuit case law supports this and an adverse decision to the Secretary would result if claimant were to seek judicial review of an unfavorable decision. B) The Appeals Council may

130. *Id.* at 28 (emphasis in original).

131. *Id.* at 29-30.

132. *Id.* at 29.

133. *Id.* This would seem to bring the case back to a category one situation in which benefits are granted solely on the basis of SSA policy.

remand the case to the ALJ for further consideration based on the circuit law. C) The Appeals Council may submit a revised unfavorable decision to the SSA Special Policy Review Committee when it believes the ALJ's determination was correct as to SSA policy but incorrect as to circuit court case law and it also believes the issue should be relitigated in that circuit.¹³⁴

Third, where the ALJ has determined that a favorable decision to the claimant is justified by circuit court case law but not by SSA policy, the Appeals Council may adopt the ALJ's findings, if it agrees. If the Appeals Council disagreed with the ALJ, it may issue a revised unfavorable decision or remand the case to the ALJ. A copy of the revised unfavorable decision will be forwarded to the SSA Special Policy Review Committee.¹³⁵ This Committee is designated to evaluate this procedure as well as to decide if "the case is an appropriate vehicle for relitigating the issue."¹³⁶ Upon consideration with the Department of Justice, the Appeals Council's unfavorable decision will be issued if relitigation is determined to be appropriate. However, the ALJ's favorable decision will be adopted if the Committee and the Department of Justice believe that the case is inappropriate for relitigation. "Appropriate" is defined in terms of whether "the case might be expected to result in a court decision adverse to the Secretary if an unfavorable administrative decision were issued and judicial review were sought by the claimant."¹³⁷ Therefore, if an adverse decision is likely, the case is inappropriate for litigation.

2. *Potential Abuses by the Agency*

In first considering Interim Circular 185, it is interesting to note that the agency states that they will apply circuit court case law "as interpreted by the agency."¹³⁸ The agency ensures that this interpretation will not be "new adjudicative policy, but rather [will be a statement] of the agency's procedures for reviewing claims from the standpoint of Court of Appeals law and as a part of the Agency's ongoing litigation management program."¹³⁹ In *Steiberger*, the court

134. *Id.* This is the same procedure as where the ALJ finds favorably under circuit court law and unfavorably as to SSA policy and the Appeals Council agrees with that determination. See *infra* note 135 and accompanying text.

135. INTERIM CIRCULAR NO. 185, *supra* note 123, at 30.

136. *Id.*

137. *Id.*

138. *Id.* at 27.

139. *Id.*

assumed the agency will interpret circuit law “reasonably and in good faith.”¹⁴⁰ However, this is not demonstrated by its past practice. For example, in *Steiberger*, the agency maintained that it was abiding by Second Circuit decisional law in regard to the weight given to the testimony of the treating physician.¹⁴¹ However, the court ruled, in fact, that the agency was not acquiescing to the circuit’s decisional law.¹⁴² It remains unclear whether the agency will use their interpretations of circuit law as another mechanism to reinstitute their previous nonacquiescence policy.

The court in *Steiberger* expressed other criticisms of the agency’s revised nonacquiescence policy. Although the court observed that the new policy is a less extensive use of nonacquiescence, the court held the limitations which the agency placed upon itself to be vague and not geared towards attaining the purpose of such a policy, i.e., nationwide uniformity of Social Security law.¹⁴³ The court suggested that if the new policy specified “objectively ascertainable limitations,” on the use of nonacquiescence, the new policy might be tolerable.¹⁴⁴ Three examples of such limitations were given by the court. First, nonacquiescence would only occur where the agency would appeal an adverse decision to the Supreme Court.¹⁴⁵ Second, the agency would relitigate only where the other circuits subsequently rule favorably to it, thereby giving a good faith basis for the agency to assume it may succeed in changing that circuit’s law.¹⁴⁶ Third, the agency would limit relitigation to instances where Congressional action would overrule or undermine the legal basis of an unfavorable decision to the agency.¹⁴⁷

A further criticism articulated by the court dealt with the additional delay associated with instituting further levels of review and the numerous occasions upon which the Appeals Council may remand the case to the ALJ.¹⁴⁸ Of necessity, the court remarked that

140. *Steiberger*, 615 F. Supp. at 1374. *But see id.* at 1373 (in which the court expressed some concern over how the Secretary would interpret the law considering her unsupportable view that she was acquiescing in Second Circuit case law in regard to her application of the “treating physician” rule).

141. *Id.* at 1343-50 (discussing the “treating physician” rule and holding that the Secretary disregarded Second Circuit precedent).

142. *Id.* at 1349. *See generally Vestal, supra* note 64, at 176-79 (discussing the goal of uniform application of laws and alternative means to obtain it).

143. *Steiberger*, 615 F. Supp. at 1373.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

such a complicated review process would not elicit quality opinions from the ALJs and Appeals Council.¹⁴⁹

Furthermore, the agency's proposed system of review tends to leave every opportunity open for an unfavorable decision to be rendered against the claimant using standards promulgated by SSA. However, this does not address the major objection to nonacquiescence; that being the fact that circuit court case law should be applied *ab initio*. For example, if the ALJ finds in favor of the claimant based on SSA policy, the ALJ need not go further in his/her analysis. Moreover, the Appeals Council has the option of reviewing a claimant's unfavorable ALJ decision based on SSA policy, despite the Appeals Council's determination that a favorable verdict was justified on the grounds of circuit court case law. Therefore, circuit court case law seems to receive extra scrutiny by the administrative review process, rather than deference.

Although this new policy may accommodate circuit law, it leaves room for greater abuse by the agency. Inherent in the revised policy is a procedure whereby federal court review will be substantially evaded.¹⁵⁰ If all claimants who appeal from a denial or termination of benefits prevail at the administrative level, based on circuit law, there will be no one left with a controversy to challenge agency policy in circuit court. The much quoted phrase for this type of mootness is an issue which is "capable of repetition yet evading review."¹⁵¹ For these same reasons, it would appear that the agency will be able to avoid the sweeping effects of a class action against it. Since class actions are not certified until individual claimants in the class have exhausted administrative remedies,¹⁵² and, as here, all claimants prevail at the administrative level, no class will reach the

149. *Id.*

150. *Id.* at 1370-71 n.42. The court reviewed this problem and briefly discussed several options wherein this policy could be challenged. Claimants would have standing to challenge the new nonacquiescence policy on the basis of "the delay, cost and effort of pursuing federal remedies," *i.e.*, denial of benefits while awaiting appeal. *Id.* The court also points out that the City of New York would have standing to challenge the policy because those who are initially denied benefits will seek financial assistance from the city. *Id.*

It should be noted that the court was responding to defendants' argument that plaintiffs were not affected by nor did they challenge nonacquiescence in the proceedings at the state agency level. Therefore, the court was refusing to dismiss an action which had already started. However, the court never addressed the possible lack of incentive for claimants to challenge this policy in federal court. Knowing that in all likelihood benefits may be restored to them on the administrative level, claimants may forego the extra time and expense of pursuing this litigation further.

151. *Jones v. Califano*, 576 F.2d 12, 20 (2d Cir. 1978) (citation omitted).

152. 42 U.S.C. § 405(g) (1982) (which provides for exhaustion of administrative remedies prior to seeking judicial review).

point of certification. Nor will a class reach that point if claimants never appeal from an initial denial or termination of benefits.¹⁵³ The policy left unchallenged would then be that of *determining* eligibility¹⁵⁴ based on agency standards rather than circuit law and then forcing claimants to appeal in order to have their eligibility determined based on circuit law. Furthermore, when claimants appeal and the ALJ or Appeal Council determines that the claimant is entitled to benefits under agency policy, circuit law is disregarded.¹⁵⁵

Fortunately, this dilemma will probably not be the end result in all of these cases. In the past, courts have waived the exhaustion of administrative remedy requirements where a situation is created by an agency which defies judicial review.¹⁵⁶ “The rationale of all these cases is that judicial review cannot be entirely foreclosed by the fortuity of a termination of the individual grievance. The test is whether petitioners are adversely affected by the government without a chance of redress.”¹⁵⁷ The situation which arises under the agency’s revised policy presents such a case.

Assuming that the court will waive the exhaustion requirement, there is still the extra burden placed on claimants of seeking the waiver. Additionally, few if any claimants will have the incentive to challenge the agency’s policies in federal court if they have been awarded benefits at the administrative level. Therefore, the agency once again, is in a position to administer and interpret the law in the way it chooses, rather than in a way the courts have mandated.

3. *Equal Protection*

What is perhaps the most significant objection to the revised policy is its bifurcation of standards applicable to claimants. There is a clear distinction drawn between the law applied to claimants on the

153. See *infra* note 162.

154. For a discussion of *Ellis v. Blum*, see *infra* note 158.

155. See INTERIM CIRCULAR NO. 185, *supra* note 123, at 28.

156. See *Jones v. Califano*, 576 F.2d at 20 and cases cited therein. In *Jones*, the claimant brought an action to challenge the method of determining the Supplemental Security Income (SSI) benefits to which she was entitled between the time of her application and the time she was determined eligible. The Appeals Council had determined in this case and on three other occasions that the increment rather than the per capita method must be used. *Id.* at 15-17. The Secretary of HHS continued to use the per capita method. Although the Appeals Council rendered a decision favorable to the claimant, the Secretary refused to abide by this decision. Section 405(g) has no provision for judicial review of a favorable decision, only an adverse one. Hence, the court held the exhaustion requirements to be waived, since otherwise there would be no opportunity for judicial review. *Id.* at 20-21.

157. *Id.* at 20 (citations omitted).

state agency level¹⁵⁸ in determining eligibility for benefits and the law applied to claimants on the federal agency level¹⁵⁹ in determining appeals. This disparate treatment gives rise to an equal protection claim.

On the one hand, the state agency is determining eligibility based on SSA policy, regardless of whether it conflicts with circuit court law. On the other hand, upon appeal of the adverse determination at the state agency level, the ALJ and Appeals Council will consider the applicable circuit court case law. This, more often than not, results in a favorable decision to the claimant.¹⁶⁰ Therefore, only the claimants who persevere to the appeal stage will obtain the more favorable circuit law standard.

The Ninth Circuit in *Lopez v. Heckler*, reiterated the district court's admonishment of the agency for carrying out a policy which created a different yet analogous dual system of review. In its criticism of the nonacquiescence policy in effect prior to Interim Circular 185, the Court of Appeals stated:

[t]he policy of nonacquiescence announced by the Secretary creates two standards governing claimants whose disability benefits are terminated as a result of such nonacquiescence. If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced in *Patti* and *Finnegan*. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.¹⁶¹

There, disparate treatment resulted from the fact that the agency applied SSA policy throughout the administrative level whereas

158. See *Ellis v. Blum*, 643 F.2d 68, 70 (2d Cir. 1981). The federal government contracts with the state for the state to determine initial eligibility of the claimant. For purposes of legal action, these state employees are held to be federal actors. *Id.*

159. This level is comprised of the appellate review process by Administrative Law Judges and the Appeals Council.

160. See, e.g., *DeLeon v. Secretary of HHS*, 734 F.2d 930, 931 n.1 (2d Cir. 1984) (Of the 470,000 individuals whose benefits had been terminated between March, 1981, and early 1984, 160,000 claimants had their benefits reinstated on appeal and an additional 120,000 cases were still pending.); Memorandum of Law In Support of Plaintiffs' Motion for a Preliminary Injunction, at 15 (For the fiscal year 1983, the federal courts reversed or remanded nearly two-thirds of the cases they heard resulting from denial or termination of benefits.); Heaney, *supra* note 88, at 10 (In 1983, the Eighth Circuit reversed approximately 60% of these cases brought to them on appeal. Previously, the normal reversal rate in the Eighth Circuit had been 16-19%).

161. *Lopez v. Heckler*, 713 F.2d at 1439-40.

upon judicial review of the agency's determination, the courts applied their own interpretation of the law.

SSA's revised policy does not alleviate this disparate treatment, but rather, it merely shifts the line of deliniation.¹⁶² In other words, under the old policy there was a distinction between the treatment of those on the administrative appeal level and those on the federal judicial level. Whereas, under the new policy the distinction is drawn between those on the state agency level and those on the administrative appeals level.

When both the old and the new nonacquiescence policies are considered in light of the fact that all of the claimants are poor and disabled individuals, it is startling that the government can maintain such a policy. This policy requires people in the worst possible position in regard to their physical and financial capabilities to vindicate their fundamental rights of due process and equal protection. Consequently, many people do not pursue appeals, thus forfeiting benefits to which they may be entitled. Private litigants should not have to police the government in order to enforce constitutionally and judicially created rights. Although SSA believes its nonacquiescence policy fosters uniformity of law, the reality is that this practice creates an unfair advantage for the government. The agency must recognize that the law binds the government and its citizens with equal force.

CONCLUSION

Intracircuit nonacquiescence has been strongly condemned by every circuit court of appeals to address the issue. The agency's revised nonacquiescence policy has not yet been reviewed by those courts. The Southern District of New York has, as of this writing, been the only court to thoroughly address this policy. That court rejected the revised policy for the same reasons the previous nonacquiescence policy was rejected.

The Supreme Court has not yet spoken on the issue of intracircuit nonacquiescence. Nor is it likely that the Court will review this issue in the near future. Historically, the Court waits for a conflict to arise in the circuits before granting certiorari. On this issue, no conflict

162. *Steiberger*, 615 F. Supp. at 1371. The court reviewed statistics provided by the government. In 1984, 920,719 people were denied benefits on the state agency level. Of these people, only 422,907 appealed the decision through the state reconsideration process. Of the 340,174 claimants denied benefits after state agency reconsideration, only 246,846 sought review by ALJs. "Thus, nearly 600,000 claimants whose claims were denied at the state agency level failed to reach the ALJ hearing level." *Id.*

exists among the circuits, since there has been uniform rejection of this policy. Furthermore, the agency has never petitioned the Court for review of this matter. The agency, having conceded to the fact that they will be bound by a Supreme Court decision, has effectively shielded themselves from this problem by refusing to acquiesce while at the same time failing to seek Supreme Court review.

However, all of the efforts of the litigants, courts and commentators have not been in vain. The agency has modified its nonacquiescence policy with the issuance of Interim Circular 185. Although this new policy has been condemned for many of the same reasons as the old one, it is a first step towards reformation of agency policy while awaiting Supreme Court intervention.

