A RE-EVALUATION OF *MATHEWS V. ELDRIDGE* IN LIGHT OF ADMINISTRATIVE SHORTCOMINGS AND SOCIAL SECURITY NONACQUIESCENCE

Carolyn A. Kubitschek*

Twelve years ago, in *Mathews v. Eldridge*,[1] the Supreme Court of the United States dramatically altered the law of procedural due process. First, the Court ruled that the due process clause of the fifth amendment of the United States Constitution does not require that recipients of Social Security Disability Insurance Benefits (Social Security benefits) have a full hearing prior to the termination of these benefits. The Court distinguished Social Security benefits from public assistance benefits, which it had previously found to require a pretermination hearing.[2] More importantly, the Court instituted a new test to determine what process is due when the government seeks to interfere with a protected property interest. That test consists of balancing three factors: (1) the private interest involved; (2) the public/government interest involved; and (3) the risk of erroneous deprivation of the property interest.

The Supreme Court's decision in *Eldridge* was controversial: many commentators disagreed with both the test which the Court established and the result the Court obtained when it applied that test to Social Security benefits.[3] This Article does not take issue with the tripartite test itself. Rather, it is the thesis of this Article that application of the test should lead to a result contrary to that reached by the Supreme Court. Specifically, this Article asserts that recipients of Social Security benefits are constitutionally entitled to notice and an opportunity to be heard prior to the termination of those benefits.

The conclusion is opposite that reached by the Court in *Eldridge* for two major reasons. First, the Court based its decision upon a number of assumptions about the Social Security benefits program which may or may

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* Assistant Clinical Professor of Law, Hofstra University. B.A., 1970, Oberlin College; J.D., 1973, University of Chicago. The author has represented hundreds of individuals seeking Social Security disability benefits, both in proceedings before the Social Security Administration and in federal court. The author gratefully acknowledges the comments and suggestions of Professor Andrew Schepard.

1. 424 U.S. 319 (1976).

2. Goldberg v. Kelly, 397 U.S. 254 (1970).

3. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

not have been true at the time but certainly are not true now. Second, the Social Security Administration's (SSA) current policy of nonacquiescence[4] tips the balance in favor of the Social Security benefits recipients to require due process hearings prior to termination of benefits. Nonacquiescence, as practiced by SSA, denies injured and ill persons a meaningful opportunity to be heard, one of the two guarantees which form the backbone of the fifth amendment's due process protections,[5] causing thousands of disabled individuals to lose sorely needed Social Security benefits, some for a number of years, some permanently.[6]

This Article begins by analyzing the Supreme Court's decision in *Eldridge*. It then evaluates each of the factors which the Court identified as salient in that case in light of both nonacquiescence and subsequent experience.[7] The Article concludes by recommending that meaningful hearings be held prior to termination of Social Security benefits.[8]

I. AN ANALYSIS OF *MATHEWS V. ELDRIDGE*

Prior to 1976, the United States Supreme Court's criteria for determining whether governmental procedures meet the constitutional requirement that no person "be deprived of life, liberty, or property, without due process of law,"[9] had been vague, requiring only that notice and an opportunity for a hearing[10] be "at a meaningful time and in a meaningful manner."[11] Most pre-1976 decisions revolved around the issue of whether a particular personal interest rose to the level of a constitutionally-protected property interest, which invoked the requirements of the due process clause,[12] and not the issue of the form such a hearing should take. Once the Court determined that a property interest existed, the hearing it required was either an administrative hearing[13] or a judicial, trial-type hearing.[14]

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4. For purposes of this Article, nonacquiescence is defined as an administrative agency's policy of not following precedent set by a court of appeals decision in the circuit which established the precedent, and disregarding that decision, except in the case of the individual involved in that decision. Lopez v. Heckler, 572 F. Supp. 26, 28 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *stay granted*, 463 U.S. 1328, *application to vacate stay denied*, 464 U.S. 879 (1983), *aff'd in part* and *rev'd in part*, 725 F.2d 1489 (9th Cir.), *cert. granted* and *judgment vacated*, 469 U.S. 1082, *on remand*, 106 F.R.D. 268 (C.D. Cal. 1984), *stay denied*, 753 F.2d 1464 (9th Cir. 1985). *See also* Hillhouse v. Harris, 547 F. Supp. 88, 92 (W.D. Ark.), *aff'd*, 715 F.2d 428 (8th Cir. 1983). The agency may follow a limited nonacquiescence policy, specifying those appellate decisions it chooses to ignore, and following all other appellate decisions. *See, e.g.*, Dixon v. United States, 381 U.S. 68, 70-71 (1964). Alternatively, it may follow a comprehensive policy of ignoring the precedential effect of all appellate decisions. *See, e.g.*, Ithaca College v. NLRB, 623 F.2d 224, 226-27 (2d Cir. 1980). During various periods of time over the past 25 years, the Social Security Administration has practiced both of these forms of nonacquiescence.

5. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

6. *See infra* text accompanying notes 9-40.

7. *See infra* text accompanying notes 41-137.

8. *See infra* text accompanying notes 99-137.

9. U.S. CONST. amend. V.

10. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

11. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

12. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Bell v. Burson, 402 U.S. 535 (1971); *Goldberg*, 397 U.S. 254.

13. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583 (1979); *Goldberg*, 397 U.S. 254, 266-71.

14. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972).

In 1976, in the landmark decision of *Mathews v. Eldridge*,[15] the United States Supreme Court addressed the issue of the process due prior to the deprivation of a property interest.[16] It refined the former requirement of "a meaningful manner" into a three-part test. In determining what sort of prior hearing opportunity is constitutionally necessary, the Supreme Court required consideration of: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail."[17]

The Court explicitly ruled that the Constitution does not require an evidentiary predetermination hearing in all cases in which the government seeks to withdraw, from an individual, a benefit which constitutes a protected property interest. In some cases, including the termination of Social Security benefits, something far more informal than an administrative or trial-type hearing is constitutionally sufficient.[18]

The first effect of the decision was to shift the focus of judicial inquiry in due process cases from the issue of whether a particular claim was a constitutionally protected property interest to the issue of what sort of hearing was necessary to protect the claim. In fact, a side effect of this shift in focus was that it became easier for litigants to persuade courts to find property interests in close cases because the necessary consequence of such a finding was no longer a burdensome administrative or judicial hearing.[19]

A more important feature of the *Eldridge* decision is that its test for due process is practical and fact specific, not the more theoretical test established by previous cases. Under the *Eldridge* test, the process that is due prior to a deprivation of property may vary depending upon the individual situation.[20] Moreover, the procedural protections mandated at one point in time may later change because of transformed circumstances. While the new standard has the advantage of flexibility, its lack of certainty causes great confusion and a lack of predictability as to when pretermination hearings are required and when they are not. The standard ensures continuing disputes between

15. 424 U.S. 319 (1976).

16. *Id.* at 333.

17. *Id.* at 335.

18. In at least one sense, the Supreme Court has consistently tied the type of hearing required to the magnitude of the interest involved, requiring greater procedural protections in cases involving deprivations of liberty or life than in those involving deprivations of property. Specifically, the Court has consistently required trial-type hearings before the government may deprive a person of a liberty interest, *see* Vitek v. Jones, 445 U.S. 480, 495-97 (1980); Stanley v. Illinois, 405 U.S. 645, 656-58 (1972), except in cases in which the person has already been partially deprived of liberty in a judicial hearing, *see* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). And the Court has always required a judicial trial before the government may deprive a person of life. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962).

19. *See, e.g., Loudermill*, 470 U.S. at 538-41.

20. For example, if the issue involves suspension of a driver's license, kidney patients living in rural areas without public transportation who must drive to the hospital several times a week for life-preserving dialysis treatments might be entitled to more procedural protections than city dwellers who have access to good transportation and use cars only for weekend excursions. *Compare Bell*, 402 U.S. 535, where the Supreme Court analyzed the due process issue under the assumption that a driver's license was of equal significance to all drivers.

government officials who must implement various programs and the individuals who claim a property interest in those programs.

The Court next considered the facts at bar, a case involving termination of Social Security disability benefits. The SSA pretermination procedures authorized SSA to periodically evaluate the eligibility of each recipient, based upon the recipient's responses to a medical questionnaire, reports from the treating doctor, and, at the agency's option, an examination of the recipient by one of its consulting physicians. If the evaluation was negative, the recipient could review the relevant medical information, respond in writing, and submit additional evidence prior to a final decision. If that decision was unfavorable to the recipient, SSA terminated benefits, effective two months after the date upon which it found the recipient no longer disabled.[21] After the recipient's benefits were terminated, she had the right to a three-tiered administrative review.

The first step, reconsideration, was identical to the initial, pretermination process.[22] If that step was not successful, the recipient had a right to an administrative hearing. That evidentiary hearing enabled the recipient to testify in person, with counsel present if she chose; to present witnesses, including experts; and to submit additional documentary evidence.[23] This postdeprivation hearing was the type of hearing the Supreme Court had envisioned in its decision six years earlier in *Goldberg v. Kelly*.[24] It was also the type of hearing which Eldridge argued was constitutionally mandated *prior* to the termination of benefits.

Finally, after a hearing, a former recipient had the right to request review by the Appeals Council, an appellate administrative tribunal. The Appeals Council reviewed all the documents in the file and listened to a tape of the administrative hearing, but did not conduct a new hearing. Both claimants who lost before the Appeals Council and those to whom the Appeals Council denied review had the right to appeal to the United States district courts.[25] The entire sequence described above has remained unchanged since the *Eldridge* decision.[26]

In *Eldridge*, the Supreme Court used its new test to determine whether those procedures, particularly the pretermination procedures, met due process requirements. The Court first analyzed the magnitude of the individual interest at stake, the interest in continuing to receive Social Security disability benefits.[27] Observing that since a person who ultimately prevailed at a hearing subsequent to termination of benefits would receive full retroactive

21. *Eldridge*, 424 U.S. at 337-38.

22. *Id.* at 339.

23. 20 C.F.R. §§ 404.944, .949, .950, .1444, .1449, .1450 (1988).

24. 397 U.S. 254 (1970). In *Goldberg*, the Court, holding that recipients of public assistance benefits had a protected property interest in those benefits, ruled that the government had to provide those recipients with notice and an opportunity for an administrative hearing prior to the termination of such benefits.

25. *Eldridge*, 424 U.S. at 339 (citing 20 C.F.R. § 404.945 (1975) and 42 U.S.C. § 405(g) (1975)).

26. There is one minor difference. In 1975, recipients did not have an absolute right to examine the contents of their files. *Id.* at 338 n.18. Now they do. 20 C.F.R. § 401.410(a) (1988). And, of course, then they did not have the right to receive benefits prior to their administrative hearings.

27. *Eldridge*, 424 U.S. at 339-43.

benefits, the Court concluded that the individual interest at stake was limited to "uninterrupted receipt of this source of income pending final administrative decision on his claim."[28]

Second, the Court found that many recipients possess other income or assets and therefore can get by without disability benefits for a period of time.[29] The Court speculated that other recipients qualify for Supplemental Security Income (SSI)—a welfare program administered by SSA for needy disabled people which pays continuing benefits pending the outcome of an administrative hearing.[30] Moreover, public assistance, food stamps, or other "potential sources of temporary income"[31] might be available to recipients awaiting hearings. Thus, concluded the Court, the private interests involved were not great.[32]

By contrast, the Supreme Court found that the public interest was significant. The Court implicitly found no public interest in continuing to pay benefits to recipients prior to their administrative hearings. The only public interest was in saving "scarce fiscal and administrative resources"[33] (*i.e.*, in not paying benefits to those who did not qualify for them and in not paying for additional administrative hearings because the recipients would request them as a matter of course if disability benefits were continued until the hearing decision).

Addressing the risk of an erroneous termination of benefits, the Court concluded that the risk was low, basing that conclusion in part on statistical data as to the rate of reversal of Social Security termination decisions and in part on the Court's own assumptions about the nature of Social Security administrative hearings. The Court found that the overall reversal rate was 3.3%.[34] In fact, that figure represented the percentage of disability recipients and applicants who, after having lost at reconsideration, ultimately obtained benefits, including those who did not appeal denials of reconsideration. The Court concluded that the 3.3% figure was artificially low because many recipients who won reinstatement of their disability benefits at administrative hearings owed their successes to the additional medical evidence which they presented at the hearing.[35] Apparently the Court concluded that the fact that the new evidence convinced the Administrative Law Judge (ALJ) to reinstate benefits meant that the original decision to terminate benefits was the right decision at the time on the basis of the available evidence.

The reversal rate was not the sole reason for the Court's conclusion that the risk of erroneous termination of benefits was low. Two other factors weighed heavily. First, the Court assumed that decisions to terminate disability benefits were based upon "good faith judgments of the individuals

28. *Id.* at 340.
29. *Id.* at 340-41.
30. *Id.* at 342 n.27.
31. *Id.* at 342-43.
32. *Id.*
33. *Id.* at 348.
34. *Id.* at 346.
35. *Id.* at 347.

charged by Congress with the administration of social welfare programs."[36] Second, the Court assumed that decisions regarding eligibility for Social Security benefits were based in large part upon "routine, standard, and unbiased reports by physician specialists,"[37] in other words, upon documentary information which would be neither enhanced nor diminished in value by a face-to-face evidentiary hearing.

Having evaluated all three factors, the Court found that they all mitigated against providing hearings prior to termination of benefits: the private interest involved was small, the countervailing government interest significant, and the risk of erroneous deprivation minimal. Accordingly, the Court held that the system as it then existed provided sufficient procedural due process to protect the property interests of Social Security benefits recipients in continuing to receive their benefits.[38] The Court thus sanctioned an extremely informal gathering of medical information prior to termination of benefits, with a formal administrative hearing subsequent to termination.

The denial of benefits to Social Security recipients awaiting hearings on their continued eligibility proved to be injurious to those recipients and unpopular in general. Ultimately, in 1983, Congress passed a law enabling Social Security disability recipients faced with termination to continue receiving benefits until an ALJ reached a decision, after a hearing, that the recipient was no longer disabled.[39] Congress's explicit purpose in enacting that provision was to "help considerably to ease the severe financial and emotional hardship that would otherwise be suffered by disabled persons."[40] Unfortunately, that law does not resolve the due process issue. First, it is temporary; it will expire in December, 1989. Second, the issue remains as to whether even this statute provides sufficient due process protection to recipients of disability benefits.

II. RE-EXAMINING *MATHEWS V. ELDRIDGE*

The Supreme Court based its holding in *Eldridge*, that Social Security recipients are not entitled to a hearing prior to termination of benefits, on a number of factual assumptions about the nature of the Social Security program, and the individuals who receive disability benefits. Some of those assumptions were inaccurate at the time; others, while perhaps accurate in 1976, are no longer true today because of changes in the Social Security program, including nonacquiescence. These now erroneous assumptions undermine the validity of the *Eldridge* Court's conclusions as to each of the three factors upon which it based its due process analysis. Adding nonacqui-

36. *Id.* at 349.

37. *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).

38. *Id.* at 349.

39. Social Security Disability Benefit Appeals Act, Pub. L. No. 97-455, § 2, 96 Stat. 2497 (1982) (codified at 42 U.S.C. § 423(g)(1) (1983)). Congress extended the law, which was only temporary, three times. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 7, 98 Stat. 1803 (1984); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9009, 101 Stat. 1330 (1987); Act of Nov. 10, 1988, Pub. L. No. 100-647, § 8006 (1988).

40. H.R. REP. 618, 98th Cong. 2d Sess. 1 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3055.

escence into the equation leads to a conclusion opposite from that reached by the Supreme Court.

A. *Risk of Erroneous Deprivation*

This Article does not question at least one assumption which the Supreme Court made regarding the risk of erroneous deprivation of benefits. It agrees with the Court that when a court reverses a decision by SSA to terminate benefits, the court's decision is right, the agency's decision wrong, and the proposed termination erroneous. This is so because the judiciary is the final arbiter of disputes, including those between individuals and SSA over eligibility for Social Security benefits.[41]

When the Supreme Court considered the risk of erroneous deprivation occasioned by not holding hearings prior to the termination of Social Security benefits, it made a number of other assumptions, specifically about the manner in which SSA would apply the law, the nature of the evidence relevant to disability, and the purpose of a Social Security hearing.[42] These incorrect assumptions led to the Court's incorrect conclusion as to the extent of the risk of an erroneous deprivation of benefits.

1. *Nonacquiescence as a factor*

The *Eldridge* Court assumed that decisions to terminate disability benefits were based upon "good faith judgments of the individuals charged by Congress with the administration of social welfare programs."[43] Such an assumption is not unreasonable on its face. In a government of laws and not of men, people, including Supreme Court Justices, should be able to assume that decisions by government officials to terminate disability benefits are "the considered judgment[s] of an agency faithfully executing the laws of the United States."[44]

With nonacquiescence, that assumption is not true. An agency which practices nonacquiescence does not faithfully execute the law; it executes only its own policy, even when that policy is contrary to the law. Agency adjudicators who decide administrative hearings by applying agency policy instead of the law are making decisions which are contrary to the law, and

41. It is of course possible to argue, as SSA has done, that the federal judiciary too frequently oversteps its constitutional bounds when it decides Social Security cases, failing to accord appropriate deference to administrative agency decisions and thereby encroaching upon powers delegated by Congress to the agency. *See, e.g.*, Capitano v. Secretary of Health and Human Servs., 732 F.2d 1066, 1075 (2d Cir. 1984); Siedlecki v. Schweiker, 563 F. Supp. 43, 45 (W.D. Wash. 1983). It is also possible to argue that too many federal judges permit their sympathy for Social Security claimants to influence their decisions. *See, e.g.*, Frost v. Bowen, 596 F. Supp. 1132 (S.D.N.Y. 1984) (where the court seems to have bent over backwards to award benefits to a claimant who was not completely disabled).

Nevertheless, support for the conclusion that SSA determinations of disability are unreliable as a matter of fact is found in congressional studies, which conclude that the probability of two disability adjudicators agreeing as to the appropriate disposition of a case is only slightly more than one in four. To put it another way, almost three-quarters of the time two disability adjudicators, acting independently, will reach different conclusions on the same case. J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 17-18 (1985).

42. *Eldridge*, 424 U.S. at 339-47.

43. *Id.* at 349.

44. Bowen v. City of New York, 476 U.S. 467, 480 (1986).

consequently erroneous in all cases except those in which the policy of the agency fortuitously coincides with the law as interpreted by the courts. This pervades the entire administrative process: SSA practices nonacquiescence in initially deciding to terminate disability benefits, at the reconsideration stage, at the administrative hearing before the ALJ, and at the Appeals Council.[45]

One crucial element of the right to a hearing is the right to a hearing before a fair and impartial adjudicator.[46] Several courts and commentators have concluded that an impartial adjudicator is such a basic right that the lack of impartiality destroys the fundamental fairness which procedural due process requires, and therefore, in and of itself, constitutes a denial of due process.[47] Under such an analysis, SSA deprives recipients of due process even when it provides them with hearings before an ALJ prior to termination of benefits. Thus, the statute which permits recipients to continue receiving benefits until after their administrative hearings does not resolve the due process problems.

If that impediment to due process is nonetheless insufficient to void the procedure, then, at the very least, an ALJ who applies agency policy which is contrary to federal law will have erroneously deprived a deserving individual of benefits. And the claimant will not receive a hearing at which an impartial arbiter applies the law to the facts of the case until he exhausts all administrative processes and commences a lawsuit in federal court.

Undoubtedly, the Supreme Court was not aware of SSA's nonacquiescence policy at the time it decided *Eldridge*, because SSA then had only a limited nonacquiescence policy. It had refused to follow only three court of appeals decisions, and those were years before the *Eldridge* decision, one each in 1966, 1967, and 1968.[48]

Shortly after *Eldridge*, in 1976, the agency adopted a comprehensive nonacquiescence policy, directing its ALJ's not to follow *any* court of appeals decisions.[49] It reinforced that policy by subsequently issuing seven

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45. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1351, 1369 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986).

46. W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987); Salling v. Bowen, 641 F. Supp. 1046, 1053-57 (S.D. Va. 1986); Barry v. Heckler, 620 F. Supp. 779, 782 (N.D. Cal. 1985); Association of ALJ's v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

47. *See supra* note 46. *See also* J. Mashaw, *supra* note 41, at 41.

48. These nonacquiescence rulings are:

1. SSA Ruling 66-23c: Methods of evaluating an individual's ability to work, disagreeing with the court decisions in Massey v. Celebrezze, 345 F.2d 146 (6th Cir. 1965) and Cyrus v. Celebrezze, 341 F.2d 192 (4th Cir. 1965);
2. SSA Ruling 67-14c: Methods of evaluating an individual's ability to work, disagreeing with the court decision in Hodgson v. Celebrezze, 357 F.2d 750 (3d Cir. 1966);
3. SSA Ruling 68-48c: Methods of calculating income from a hotel operated jointly by a husband and wife, disagreeing with the court decision in Rasmussen v. Gardner, 374 F.2d 589 (10th Cir. 1967).

49. That policy is contained in section 1-161 of the handbook of SSA's Office of Hearings and Appeals: "[W]here a district or circuit court[']s decision contains interpretations of the law, regulations or rulings [that] are inconsistent with the Secretary's interpretations, the ALJs should not consider such decisions binding on future cases simply because the case was not appealed." OHA HANDBOOK (1975), *quoted in* Stieberger v. Heckler, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986).

SSA officials have echoed this policy. "[T]he general guidance which the SSA has provided its Administrative Law Judges is that they should follow agency regulations and guidelines, without regard to the law in a particular circuit in which a claimant's case will ultimately be appealed."

nonacquiescence rulings, directing the ALJ's to ignore specific courts of appeals decisions.[50]

Additionally, only a few months after the Supreme Court decision in *Eldridge*, SSA covertly adopted another illegal policy. This policy dealt with termination of disability benefits, the precise issue at stake in *Eldridge*. Prior to June, 1976, SSA, in deciding whether or not a disability benefits recipient remained disabled and consequently eligible for continued disability benefits, used a "medical improvement" test. This test barred termination of Social Security benefits absent medical evidence demonstrating an improvement of the claimant's medical condition subsequent to the original determination of disability.[51] In June, 1976, however, the agency quietly changed to a "current disability" standard, which shifted the burden of proving disability to the recipient and which required the recipient to establish disability *de novo* each time the agency reevaluated the claim.[52] Circuit after circuit invalidated that policy as contrary to the statute, finding that SSA's policy constituted nonacquiescence to the statute.[53]

Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 4 DET. C.L. REV. 913 (1984). Ms. Kuhl was a Deputy Assistant Attorney General in the Department of Justice.

" 'ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court. Court decisions can result in the changing of policies, but it is not the role of ALJs to independently institute those changes.' " Stieberger v. Heckler, 615 F. Supp. at 1351, *quoting* former SSA Associate Commissioner of Hearings and Appeals Louis V. Hays' January 7, 1982 memo to agency ALJ's.

50. These rulings are:

1. SSA Ruling 80-10c: Presumption of death from seven years' unexplained absence, disagreeing with the decision in Johnson v. Califano, 607 F.2d 1178 (8th Cir. 1979);
2. SSA Ruling 80-11c: Eligibility of inmates of public institutions for Supplemental Security Income, disagreeing with the decision in Leving v. Califano, 604 F.2d 591 (8th Cir. 1979);
3. SSA Ruling 81-28c: Defining stepchildren for the purpose of eligibility for children's insurance benefits, disagreeing with the decision in Hutcheson v. Califano, 638 F.2d 96 (9th Cir. 1980);
4. SSA Ruling 81-1c: Methods of determining which children born out of wedlock are entitled to Social Security benefits upon the death or disability of their fathers, disagreeing with the decision in Boyland v. Califano, 633 F.2d 430 (6th Cir. 1980);
5. SSA Ruling 82-10c: Method of evaluating whether a person receiving Supplemental Security Income disability benefits continues to be disabled, disagreeing with the decision in Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981);
6. SSA Ruling 82-33c: Validity of the Social Security Administration's Medical-Vocational Guidelines for determining ability to work, disagreeing with Campbell v. Secretary of Health and Human Servs., 665 F.2d 48 (2d Cir. 1981), *reversed sub nom.*, Heckler v. Campbell, 461 U.S. 458 (1983);
7. SSA Ruling 82-49c: Method of determining whether a person receiving Social Security disability benefits continues to be disabled, disagreeing with the decision in Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982).

51. *See* Schisler v. Heckler, 787 F.2d 76, 78 (2d Cir. 1986).

52. *Id.*

53. *See, e.g.*, DeLeon v. Secretary of Health and Human Servs., 734 F.2d 930 (2d Cir. 1984); Dotson v. Schweiker, 719 F.2d 80 (4th Cir. 1983); Kuzmin v. Schweiker, 714 F.2d 1233 (3d Cir. 1983); Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Cassiday v. Schweiker, 663 F.2d 745 (7th Cir. 1981); Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981); Weber v. Harris, 640 F.2d 176 (8th Cir. 1981); Van Natter v. Secretary of Health, Education and Welfare, No. 79-1439 (10th Cir. 1981), *cited in* Trujillo v. Heckler, 569 F. Supp. 631, 634-35 (D. Colo. 1983). Other circuits had previously upheld the medical improvement standard. *See, e.g.*, Miranda v. Secretary of Health, Education and Welfare, 514 F.2d 996, 998 (1st Cir. 1975); Rivas v. Weinberger, 475 F.2d 255 (5th Cir. 1973); Hall v. Celebrezze, 314 F.2d 686, 688 (6th Cir. 1963).

SSA, as part of its comprehensive nonacquiescence policy, refused to follow those decisions. It also issued two specific nonacquiescence rulings,[54] making explicit its nonacquiescence to the medical improvement standard. Social Security advocates filed class action lawsuits in thirty states, seeking to force SSA to apply the medical improvement standard to all disability benefits recipients in those states.[55] It was not until 1984, however, when Congress passed the Disability Benefits Reform Act,[56] that the medical improvement standard once again became the law of the land.[57]

The adoption of a comprehensive nonacquiescence policy and a specific policy dealing with the same subject matter as a Supreme Court decision, both a few months after that decision, raise serious questions about the agency's overall good faith in implementing the decision. One might conclude that SSA determined that the Supreme Court's assumption that the agency "assure[s] fair consideration of the entitlement claims of individuals"[58] guaranteed that agency policies would be subject to minimal judicial scrutiny and therefore afforded the agency the opportunity to ignore the law with impunity.[59]

Despite these questions and despite the all-pervasive character of nonacquiescence, the only time a court of appeals was asked to issue a blanket injunction barring nonacquiescence, it declined to do so, for lack of proof.[60] Thus, no court has yet taken action to prohibit SSA's comprehensive nonacquiescence policy.[61] When faced with SSA nonacquiescence on particular

54. SSA Ruling 82-10c and 82-49c; *see supra* note 40.

55. Those states were Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and West Virginia. 9 SOC. SEC. F. No. 3, at 7 (Mar. 1987) (*Social Security Forum* is the official, monthly publication of the National Organization of Social Security Claimants' Representatives.).

56. Pub. L. No. 98-460, 98 Stat. 1794 (1984).

57. Disability Benefits Reform Act §§ 2(a), 2(c); Pub. L. No. 98-460 §§ 2(a), 2(c), 98 Stat. 1794, 1796 (1984) (codified at 42 U.S.C. §§ 423(f), 1382c(a)(5) (1984)).

58. *Eldridge*, 424 U.S. at 349.

59. Support for this notion lies in the manner in which SSA has dealt with its nonacquiescence in general, at times denying that it practices nonacquiescence, while at other times admitting and defending that policy. For examples of the former, see Schisler v. Heckler, 787 F.2d 76, 82 (2d Cir. 1986) and Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (where SSA argued that the Court need not certify a nation-wide class because the agency would follow precedent). For examples of the latter, see *supra* note 4.

60. In 1984, in Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986), a class action suit challenged SSA's policy of nonacquiescence generally and specifically as it related to the Second Circuit's rule that the opinion of the claimant's treating physician is ordinarily entitled to more weight than other doctors' opinions. *See, e.g.*, Bluvband v. Heckler, 730 F.2d 886 (2d Cir. 1984). Judge Sand found that SSA's comprehensive nonacquiescence policy was illegal and ordered the Secretary of Health and Human Services to stop following that policy. He specifically found that the Secretary was not following the treating physician rule and specifically ordered the Secretary to implement that rule. *Stieberger*, 615 F. Supp. at 1400.

When *Stieberger* reached the Second Circuit on appeal, the court, which had already ordered SSA to direct all of its employees to stop nonacquiescence in the treating physician rule in Schisler v. Heckler, 787 F.2d 76, 85 (2d Cir. 1986), ruled that Ms. Stieberger had not shown that SSA actually was not acquiescing in any other legal rules. The court completely ignored the comprehensive nonacquiescence policy. Accordingly, the Second Circuit vacated the order directing the Secretary of Health and Human Services to stop nonacquiescing, on the ground that such an order was no longer necessary. Stieberger v. Bowen, 801 F.2d 29, 37 (2d Cir. 1986).

61. SSA claims to have replaced its comprehensive nonacquiescence policy with a new, limited nonacquiescence policy, adopted on June 3, 1985, while *Stieberger* was pending in District Court.

legal issues, however, the courts have been willing to enjoin the policy as it relates to those issues, including the medical improvement standard;[62] standards for evaluating claimants with multiple impairments;[63] standards for evaluating medical illness;[64] and standards for evaluating diabetes, hypertension, and pain.[65] The courts have thus recognized that the risk of erroneous deprivation is high when SSA does not follow the law with respect to these specific issues.

Congress has also recognized that the risk of erroneous termination of benefits is high when the agency refuses to follow the law in specific cases. For that reason, Congress reinstated benefits in 1984, to all Social Security recipients who lost their benefits and had lawsuits in court pending on September 19, 1984.[66] Requiring that the recipients' eligibility be reevaluated under a new legal standard, the medical improvement standard, Congress apparently concluded that the risk of erroneous deprivation was so great that all beneficiaries, including those who were not in fact disabled, should have their benefits restored pending a reassessment under the proper legal standard.

2. *Nature of the evidence*

Nonacquiescence is not the only reason that the risk of erroneous deprivation of benefits is high when SSA terminates disability benefits prior to a hearing. The Supreme Court was aware of other factors, which it erred in considering. For example, the Court concluded that the risk of erroneous deprivation was low in part because the decision will generally be based solely upon "routine, standard, and unbiased medical reports by physician

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SSA Interim Circular No. 185 (1985), *reprinted in* Stieberger v. Heckler, 615 F. Supp. at 1403-05. The policy, which was never published in the *Federal Register* and never made permanent and in which SSA reserves the right to withdraw at any time, set up a series of complicated mechanisms which SSA claims it will use to decide whether or not to follow each court of appeals decision.

Given the agency's history of covert nonacquiescence, there is reason to be skeptical of SSA claims that it has actually changed its policy. Moreover, given the agency's failure to notify its ALJ's explicitly that they must now follow courts of appeals decisions within their circuit (after twelve years of ignoring those decisions), it appears that the new policy, even if adopted in good faith, exists solely in the minds of high SSA officials, and not in the practice of adjudicators who decide individual claims for benefits.

One court agrees. The Second Circuit has chided SSA for paying lip service to its treating physician rule, described *supra* at note 60, while repeatedly ignoring that rule in practice, thus engaging in "Janus-faced [behavior] . . . by avow[ing] adherence to a rule that his actions contradict." Hidalgo v. Bowen, 822 F.2d 294, 299 (2d Cir. 1987). The court also criticized SSA's failure to require compliance with the treating physician rule from its ALJ's, who seem to live in "an administrative 'never-never' land because they appear never to have heard of the treating physician rule." *Id.* at 294.

The conclusion is inescapable that SSA continues to practice widespread nonacquiescence, but now does so covertly, and that the "new" nonacquiescence is merely the old nonacquiescence with window dressing.

62. *Lopez*, 572 F. Supp. at 26.

63. McDonald v. Secretary of Health and Human Servs., 795 F.2d 1118 (1st Cir. 1986).

64. Bowen v. City of New York, 476 U.S. 467 (1986); Mental Health Ass'n of Minn. v. Heckler, 720 F.2d 965 (8th Cir. 1983).

65. Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986).

66. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(d)2(c), 98 Stat. 1797 (1984) (codified at 42 U.S.C. § 423 (1984)); *see also* Rankin v. Heckler, 761 F.2d 936 (3d Cir. 1985).

specialists."[67] To the contrary, a determination of disability must be based upon additional considerations, including diagnoses of examining physicians; subjective factors such as pain; and the claimant's age, education, and work history.[68] Indeed, except in cases of extremely minor impairments,[69] the determination of disability cannot be based upon medical reports alone.[70] Instead, the decision maker must take into account both the effect that the claimant's medical problems have upon his or her ability to function in the world, a factor known as "residual functional capacity,"[71] and vocational factors,[72] which determine whether a claimant who retains some ability to work is capable of finding a job.[73] The ultimate issue is then individualized: whether the particular claimant[74] (and not merely a hypothetical claimant who suffers from the same impairments) is incapable of engaging in substantial gainful activity[75] and, therefore, is disabled.

Some impairments are easily quantifiable and consequently susceptible to a determination based upon "routine, standard" medical reports, for example visual acuity[76] and mental retardation.[77] Other impairments are much more subjective, especially those causing pain, such as arthritis, back injuries, heart disease, respiratory impairments, digestive problems, and neurological disease. Pain is a highly individualized factor that is difficult, if not impossible, to quantify or measure objectively. The same medical problem may cause varying degrees of pain, because individuals differ in the extent to which they can tolerate pain.[78] For these individuals, "routine" medical reports are insufficient. They need face-to-face meetings with fact finders so that they can present relevant evidence, not easily subject to quantification, as to the extent of their pain and its effect on their day-to-day activities and so that the fact finders can make the credibility assessments upon which the determinations of disability depend.

Courts have repeatedly stressed the importance of the fact finder's personal observations of the claimant's demeanor in coming to a decision on

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67. *Eldridge*, 424 U.S. at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).

68. *See* Tieniber v. Heckler, 720 F.2d 1251, 1253 (11th Cir. 1983); Heidig v. Heckler, 608 F. Supp. 135, 140 (S.D. Fla. 1985).

69. *See* Bowen v. Yuckert, 107 S. Ct. 2287 (1987).

70. Salmi v. Secretary of Health and Human Servs., 774 F.2d 686 (6th Cir. 1985); Farris v. Secretary of Health and Human Servs., 773 F.2d 85 (6th Cir. 1985); Garza v. Heckler, 771 F.2d 871 (5th Cir. 1985).

71. 20 C.F.R. §§ 404.1520(e), .1545, .1561 (1988).

72. 42 U.S.C. § 423(d)(2)(A) (1982); 20 C.F.R. § 404.1561 (1988).

73. 20 C.F.R. § 404.1545 (1988).

74. Heckler v. Campbell, 461 U.S. 458, 466 (1983); Cabral v. Heckler, 604 F. Supp. 831, 835 (N.D. Cal. 1984). *See also* Douglas v. Bowen, 836 F.2d 392, 396 (8th Cir. 1987) (The Secretary must determine whether a claimant has "the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people operate in the real world."). *Accord* Lanning v. Heckler, 777 F.2d 1316, 1318 (8th Cir. 1985).

75. 42 U.S.C. § 423(d)(1)(A) (1982); 20 C.F.R. § 404.1505(a) (1985).

76. If a person's vision is less than or equal to an easily measured, objective figure, that person is disabled. If not, there is no disability. Listing of Impairments, 20 C.F.R. Part 404, Subpart P, Appendix 1, § 2.02 (1988) [hereinafter Listings].

77. If a person's IQ is below 60, or between 60 and 69 with another impairment, she is disabled as a matter of law. If the IQ is 70 or more, with rare exceptions, the claimant is not disabled. *Id.* at § 12.05.

78. *See* Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987); Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir. 1986).

credibility.[79] Moreover, recognizing this phenomenon, Congress, in 1984, expressly required what a number of courts of appeals had already held—that the law required implicitly, in making a determination of disability, and specifically, in deciding the extent to which a claimant's pain interferes with his ability to work, SSA reasonably may require medical evidence of a condition which causes pain, but may not require objective medical evidence documenting the amount of pain which the claimant suffers.[80]

While all impairments are disabling or not disabling to the extent to which they interfere with the claimant's ability to function, some impairments are based almost entirely upon functional factors, rather than upon objective, quantifiable medical evidence. For example, disability caused by alcoholism is based upon the claimant's ability to control his drinking and the extent to which the claimant's drinking problem interferes with working.[81] The evidence needed to make this determination will not be found primarily in medical reports, although hospital records reflecting acute alcohol intoxication are relevant, but in the testimony of people who have observed the claimant's dependence upon alcohol, his inability to control that dependence, and the extent to which that dependence interferes with day-to-day functioning.[82] Indeed, such testimony may constitute all of the evidence because of the propensity of alcoholics to deny their drinking problems.[83]

Impairments which are episodic, subject to periods of acute exacerbation followed by relative stability, such as epilepsy, heart arrhythmias, and bipolar disorders, are also not easily documented by routine, standard, and unbiased medical reports by physician specialists.[84] Unless a physician fortuitously has been present during an acute attack of one of these illnesses, the physician will have no firsthand knowledge of the duration, severity, or frequency of the attacks, though this is the precise information necessary to establish disability.[85] Accordingly, this information can best be provided through the testimony of witnesses who have observed the acute attacks and can describe their firsthand observations.

3. *Purpose of the hearing*

The Supreme Court overlooked the fact that a Social Security administrative hearing has a fact-gathering component in addition to the truth-seeking function normally associated with trials and hearings. Social Security hearings are not intended to be adversary proceedings.[86] Instead, they are more inquisitorial in nature. The ALJ who decides the hearing must also act

79. Lovejoy v. Heckler, 790 F.2d 1114 (4th Cir. 1986); Millbrook v. Heckler, 780 F.2d 1371 (8th Cir. 1985); Ward v. Heckler, 622 F. Supp. 462 (N.D. Ill. 1985).

80. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 3, 98 Stat. 1797 (1984) (codified at 42 U.S.C. § 423 (1984)). *See also* Polaski v. Heckler, 804 F.2d 456 (8th Cir. 1986); Greene v. Schweiker, 749 F.2d 1066 (3d Cir. 1984).

81. *See* Wilkerson v. Bowen, 828 F.2d 117 (3d Cir. 1987).

82. *See* Cooper v. Bowen, 815 F.2d 557 (9th Cir. 1987); Migneault v. Heckler, 632 F. Supp. 153 (D.R.I. 1985); Burton v. Heckler, 622 F. Supp. 1140 (D. Utah 1985).

83. *See* Purter v. Heckler, 771 F.2d 682 (3d Cir. 1985).

84. *See supra* note 57.

85. *See, e.g.*, Listings, *supra* note 76, at §§ 4.05, 4.11D, 11.02, 12.04.

86. Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987); Broz v. Schweiker, 677 F.2d 1351, 1364 (11th Cir. 1982); Losco v. Heckler, 604 F. Supp. 1014, 1020 (S.D.N.Y. 1985).

as an investigator, especially where the claimant is not represented by counsel,[87] and must conduct a "full and fair inquiry" into the facts underlying the claim for benefits.[88] If the claimant's doctor has not submitted an adequate report, the ALJ must ask the doctor to elaborate,[89] or at least inform the claimant, so that the claimant obtains a more detailed report.[90] If the file does not contain all relevant hospital records, the ALJ must obtain them.[91] In sum, the law requires the ALJ to take an active role in assisting a *pro se* claimant to prove that she is disabled.

The ALJ's procedural obligations are consistent with the remedial intent of the Social Security program,[92] to provide financial assistance to people whose illnesses or injuries are so severe that they cannot support themselves. The law recognizes that if the government puts the entire burden upon the poor and the disabled to prove their disability in an adversary-like proceeding, many eligible people will be unable to do so. This group will include the most deserving of all claimants, those too poor to hire attorneys to investigate and collect the evidence necessary to prove their disabilities and those too ill or too severely injured to contact or retain attorneys.

The requirement that ALJ's actively search for relevant evidence implies that claimants frequently come to administrative hearings with claim files containing insufficient medical documentation, and that Social Security adjudicators have made initial decisions to terminate based upon incomplete documents, where complete documentation would demonstrate, prior to the decision to terminate benefits, the claimants' continued disability. In fact, the Supreme Court in *Eldridge* recognized this fact, observing that a recipient may always submit new evidence and that "fresh examinations were held in approximately 30% to 40% of the appealed cases . . . , either at the reconsideration or evidentiary hearing stage of the administrative process."[93] While the Supreme Court deemed this as evidence that the pretermination decisionmaking is not erroneous per se, but instead is accurate based upon the data available,[94] it also demonstrates that the decisions to terminate benefits are often based upon inadequate data and highlights the agency's frequent failure to gather sufficient information prior to terminating benefits.

SSA's nonacquiescence, its failure to consider individualized factors, and its incomplete investigation prior to termination demonstrate that the risk of erroneous deprivation is high when the agency fails to hold hearings prior to terminating benefits. The actual results are staggering: fully eighty-

87. In fiscal 1986, 65.2% of Social Security claimants were represented by counsel at administrative hearings. 9 SOC. SEC. F. No. 3, at 7 (Mar. 1987). In the entire administrative procedure, however, only 50.8% of claimants were represented by counsel. *Stieberger*, 615 F. Supp. 1364.

88. Heckler v. Campbell, 461 U.S. 458, 471 (1983) (Brennan, J., concurring); Carrillo Marin v. Secretary of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985); Dozier v. Heckler, 754 F.2d 274, 276 (8th Cir. 1985); Hankerson v. Harris, 636 F.2d 893 (2d Cir. 1980).

89. Lewis v. Schweiker, 720 F.2d 487, 489 (8th Cir. 1983).

90. Eiden v. Secretary of Health, Education and Welfare, 616 F.2d 63, 65 (2d Cir. 1980); Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976); *See also* 20 C.F.R. § 404.1517(b)(1) (1988).

91. Poulin v. Bowen, 817 F.2d 865 (D.C. Cir. 1987); Boyd v. Secretary of Health and Human Servs., 626 F. Supp. 1252 (S.D.N.Y. 1986).

92. *See infra* note 138.

93. *Eldridge*, 429 U.S. at 347.

94. *Id.*

five percent of all claimants, both new applicants and recipients challenging the termination of their benefits, are successful in court in obtaining either an outright reversal of the SSA decision and a judicial award of benefits, or a remand for a new administrative adjudication using the proper legal standard.[95] These extraordinarily high figures are made even more astonishing by the fact that courts normally afford considerable deference to administrative agency interpretations of the governing law.[96] Indeed, the entire process was established to take advantage of the expertise which the agencies have developed in the field.[97] Agency decisions must be affirmed, even if contrary to the weight of the evidence, if there is "substantial evidence," less than a preponderance, in their favor.[98] Despite this strong presumption in favor of the agency upon judicial review, the extraordinary rate of reversal reveals that, as a result of nonacquiescence, courts have felt obligated to reassert control over the agency, to stop giving deference to its legal interpretations, and to monitor carefully its decisions to terminate benefits in individual cases.

B. *The Private Interest Involved*

In deciding *Eldridge*, the Supreme Court concluded that the interest of the individual in continuing to receive Social Security benefits was minimal, because a person whose benefits were terminated might continue to be eligible for SSI, public assistance, food stamps, or other governmental financial assistance.[99] The Court characterized that interest too narrowly. Subsequent to 1976, the year *Eldridge* was decided, recipients of Social Security benefits have demonstrated a very strong interest in continuing to receive those benefits.

Prior to 1976, the data on termination of benefits were minimal. Indeed, it was not until 1965 that SSA conducted any evaluations of continuing disability.[100] Moreover, it was not until fiscal 1982 that SSA evaluated the continuing disability of large numbers of people.[101] The large number of terminations, and the recipients' reactions to the termination of their benefits, provided direct evidence of the importance of those benefits to the recip-

95. In fiscal 1984, federal courts decided 18,968 cases, reversing the Secretary in 4,299, affirming in 2,676, and remanding in 11,993. Social Security Administration, Operational Report of the Office of Hearings and Appeals 30-31 (Sept. 30, 1984). In fiscal 1985, federal courts issued 4,795 reversals, 17,711 remands, and 3,981 affirmances in 26,487 cases. *Id.* at 35-36.

96. *See* Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Hart v. Bowen, 799 F.2d 567, 569 (9th Cir. 1986); Motley v. Heckler, 800 F.2d 1253, 1254-55 (4th Cir. 1986).

97. *See* Snyder v. United States, 582 F. Supp. 196, 199 (D. Md. 1984); *see also* discussions in Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910 (3d Cir. 1981) and in Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201 (1970).

98. Richardson v. Perales, 402 U.S. 389 (1971).

99. *Eldridge*, 424 U.S. at 342.

100. Originally, only people with permanent disabilities were eligible for benefits. Social Security Amendments of 1956, Pub. L. No. 800, 70 Stat. 815 (codified at 42 U.S.C. §§ 416 and 423 (1956)). In 1965, Congress amended the law to include individuals whose disabilities, while not permanent, nevertheless could be expected to preclude them from working for at least twelve months. Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a), 79 Stat. 286 (amending 42 U.S.C. §§ 416(i)(1)(A) and 423(c)(2)(A) (1965)). The latter has since been renumbered § 423(d)(1)(A) (1968).

101. In that year, SSA reviewed 435,262 cases, while it had conducted only 185,639 reviews in calendar year 1980. SSA terminated benefits to 195,474 recipients. *Lopez*, 572 F. Supp. at 28.

ients and hence of the private interest involved. The data refuted the Supreme Court's conclusion that the private interest involved was "less than that of a welfare recipient" because of the possibility of access to private resources and other forms of government assistance."[102]

One of the most dramatic and best-publicized examples of the seriousness of the private interest was the case of Laurence Hooker.[103] Hooker had received disability benefits for a number of years because of mental illness. Despite reports from his treating physicians that Hooker continued to be unable to work because of derangement with suicidal tendencies, SSA terminated his benefits, asserting that Hooker was no longer disabled. Hooker appealed, and an ALJ eventually ruled in his favor, finding that the agency had incorrectly terminated his benefits. The ruling came too late for Hooker. Prior to the hearing, the mental illness that SSA claimed Hooker no longer suffered drove him to commit suicide. Only the surviving members of his family benefitted from the reinstatement of his Social Security benefits.

Hooker was not the only recipient to commit suicide after the termination of disability benefits. After her benefits were discontinued, another mentally ill recipient killed herself, leaving a suicide note, addressed to SSA, which said, "The message that I'm getting is either work or die."[104]

For other disabled people the termination of disability benefits has also been a matter of life and death. Richard Kage, a victim of heart disease, lost his disability benefits because SSA concluded that his illness no longer prevented him from working.[105] Ignoring the contrary conclusions of his own doctors, and being in dire need of money, Kage returned to work. Within weeks he was dead of a heart attack.

While most people whose disability benefits have been terminated do not die, large numbers of them suffer other extreme forms of economic and physical deprivation. This is in part due to their failure to pursue administrative and judicial remedies to secure the reinstatement of benefits for which they remain eligible. Large numbers of recipients do not request reconsideration or administrative hearings to challenge the termination of benefits. Although slightly fewer than half the claimants who request administrative hearings are successful,[106] the great majority of those claimants who lose their hearings do not appeal to federal court, where they will receive a decision based upon the law rather than upon agency policy.[107] The claimants

102. *Eldridge*, 424 U.S. at 342.

103. Hooker v. Secretary of Health and Human Servs., No. 85-2701 (C.D. Cal. 1986). For a discussion of the case see Stormer & Ferber, *Legal Responses to Unconstitutional Termination of Disability Benefits*, 22 IDAHO L. REV. 201, 211 (1986).

104. NEWSDAY, Mar. 22, 1983, R13, col. 1 (special reprint).

105. *Id.* at R5, col. 1.

106. In 1983, 51.9% of all hearings were decided in favor of the claimant. *Stieberger*, 615 F. Supp. at 1393. By 1986, the number of favorable hearing decisions had dropped to 49%. *Background Material and Data on Programs Within the Jurisdiction of the House of Representatives Comm. on Ways and Means*, 100th Cong., 1st Sess. 4 (1987), *reprinted in* 9 SOC. SEC. F. No. 3, at 4 (Mar. 1987) [hereinafter *Background Material*].

107. Of about 104,200 claimants who lost their administrative hearings, only 43%, or approximately 44,800, appealed to the Appeals Council. The Appeals Council decided only five percent of its cases in favor of the claimants, while remanding 16% to the Administrative Law Judge and

who do get to federal court are those who are best able to function, and, therefore, the least disabled, those who can afford to hire attorneys, or those who are sufficiently healthy to make their way to the courthouse and sufficiently intelligent and sane to file federal cases *pro se*.

Claimants who contest the termination of their benefits often face suffering which is not relieved by private charity or other forms of government assistance. For example, after William Leschniok lost his Social Security benefits of $900 a month, he and his family were forced to subsist solely on public assistance (Aid to Dependent Children) in the amount of only $244 per month.[108] That sum of money was not enough to cover basic expenses. Consequently, the Leschniok family lost their home and could not afford to pay for food or for Mr. Leschniok's transportation to and from his rehabilitation program.

Michael Calvin had received $475 per month in Social Security benefits. When those were terminated, the state gave him only $113 per month in public assistance. He, too, lost his residence, had to move in with relatives, and suffered deterioration of his psychological condition. Ultimately, the state stopped giving him public assistance, leaving him without any income at all.[109]

These hardships led Senator William Cohen to conclude that the massive numbers of terminations of benefits, later reversed on appeal, "have created chaos and inflicted pain that Congress neither envisioned nor desired," and which are "both absurd and cruel."[110] In fact, when Congress amended the Social Security Act to enable Social Security recipients to continue receiving benefits pending the outcome of administrative hearings on the proposed termination of those benefits,[111] Congress' primary reason for doing so was the magnitude of the private interest involved.[112]

The lower courts have regularly recognized that the private interest of the disabled individuals in retaining their Social Security benefits is so important that those individuals will be irreparably injured by the termination of their benefits. For example, in *Lopez v. Heckler*,[113] the Ninth Circuit observed that "the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government."[114] As found by the court, this "preventable human suffering" included "[the] deprivation of life's necessities, further illness, or even death from the very disabilities that

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denying benefits to 79% of the claimants. Only 28% of those claimants, about 8,600, appealed to federal court. Thus approximately 95,000 claimants who lost administrative hearings did not pursue their cases in federal court. *Background Material, supra* note 106.

108. Leschniok v. Heckler, 713 F.2d 520, 523 (9th Cir. 1983).

109. *Id.* at 523-24.

110. 128 CONG. REC. S7448-49 (daily ed. June 24, 1982).

111. Social Security Disability Benefit Appeals Act, Pub. L. No. 97-455, § 2, 96 Stat. 2498 (1983) (codified at 42 U.S.C. § 423(g)(1) (1984)).

112. "[P]roviding for continuation of payments during appeal helps considerably to ease the severe financial and emotional hardships that would otherwise be suffered by disabled persons." H.R. REP. 618, 98th Cong. 2d Sess. 1 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3055.

113. *Lopez*, 713 F.2d 1432.

114. *Id.* at 1437.

the Secretary deemed them not to have."[115]

Similarly, in *Wilderson v. Bowen*,[116] a lawsuit challenging SSA's nonacquiescence in the Third Circuit's standard for evaluating alcoholism as a basis of disability, the court found a serious and immediate private interest: "[Members of the class] have serious medical problems of a physical and emotional nature; they subsist on minimal payments from the Pennsylvania Department of Public Welfare; they lack many basic necessities, all of which exacerbates their impaired condition."[117] The court explicitly found that the loss of benefits would cause irreparable injury to the recipients. In *Mental Health Association of Minnesota v. Heckler*, the court found that mentally ill patients' loss of benefits had caused them to suffer "serious harms such as deterioration of their medical conditions, disruption of physician-patient relationships, inability to pay for essential medications, and agitation and extreme anxiety associated with attempting to pursue the administrative process."[118]

Ironically, in reaching the conclusion that Social Security benefits are of such crucial importance to the recipients that termination of those benefits would cause irreparable hardship to the beneficiaries, many courts have relied upon the Supreme Court's opinion in *Eldridge*, not that portion of the decision which concludes that the private interest in receiving disability benefits is minor, but that portion which concludes that the recipients need not exhaust post-termination remedies prior to suing in federal court to challenge the denial of a pretermination hearing.[119] In that part of the opinion the Court waived exhaustion of administrative remedies because recipients' "interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."[120] The Court found that the claimants' interest in an expeditious decision on the constitutional claim was great because the claimants' interest in continuing to receive their disability benefits was great. Indeed, the Court recognized as "colorable" Eldridge's assertion that "an erroneous termination of benefits would damage him in a way not recompensable through retroactive payments,"[121] and in a footnote the Court implied that the termination of disability benefits was a potentially irreparable injury.[122]

Thus, in one part of its opinion the Supreme Court concluded that the private interest involved was extremely strong, so strong that the recipients could be excused from exercising their right to post-termination hearings—which, if successful, would result in reinstatement of their benefits—prior to filing in federal court to challenge the timing of those hearings. This conclusion contradicts the Court's subsequent conclusion, in the same case, that

115. *Id.*
116. 828 F.2d 117 (3d Cir. 1987).
117. *Id.* at 122.
118. 720 F.2d 965, 970 (8th Cir. 1983).
119. *See, e.g.*, Bowen v. City of New York, 476 U.S. 467, 482 (1986); Wilkerson v. Bowen, 828 F.2d 117 (3d Cir. 1987); Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984); Jones v. Califano, 576 F.2d 12 (2d Cir. 1978).
120. *Eldridge*, 424 U.S. at 330.
121. *Id.* at 331.
122. *Id.* at 331 n.11.

the private interest in receiving Social Security benefits is not great. The data collected in the years after *Eldridge* demonstrate that the Court's initial conclusion as to the extent of the private interest involved was the correct one.

The Supreme Court also gave too little weight to the private interest in disability benefits because it too narrowly circumscribed that interest. The Court explicitly found the private interest to be limited to the uninterrupted receipt of benefits pending a final administrative decision.[123] The Court's reason for the limitation was that a recipient "is awarded full retroactive relief if he ultimately prevails."[124] Subsequent developments have revealed the falsity of that promise. Social Security recipients whose benefits are terminated are not made whole by the retroactive relief they obtain when their benefits are reinstated. In the first place, retroactive reinstatement does not include interest. For the many claimants who have waited for years in order to collect past due benefits,[125] with the retroactive benefits amounting to tens of thousands of dollars,[126] the lost accrued interest is significant.

Second, claimants faced with termination of benefits may need to hire attorneys to defend them, who are by law entitled to as much as twenty-five percent of the retroactive benefits.[127] They may also need to hire expert physicians to examine them or write reports on their behalf.[128] All of these expenses deplete the fund of retroactive benefits, resulting in the claimant not being made whole.

Finally, and most importantly, the claimants never will be compensated for the time they have spent waiting and worrying about their lack of funds. "For poor and disabled people, time is a precious commodity even when the amounts involved are small."[129] Unfortunately, the delay may be very long.[130]

The emotional trauma of the delay is exacerbated when the recipients are poor and mentally or physically impaired. The suffering caused by having to endure the administrative appeal process[131] cannot be fully recompensed simply by retroactive reinstatement of benefits at the end of the process. Even when benefits have only been reduced, rather than terminated

123. *Id.* at 340.

124. *Id.*

125. *See, e.g.*, Dennis v. Heckler, 756 F.2d 971 (3d Cir. 1985) (three years from termination of benefits to reinstatement); Douglas v. Bowen, 836 F.2d 392 (8th Cir. 1987) (six years and nine months from date of application to favorable decision); Matter v. Bowen, 675 F. Supp. 212 (M.D. Pa. 1987) (five years and nine months); *see also* Brooks v. Heckler, 605 F. Supp. 729 (E.D. Ky. 1985).

126. *See, e.g.*, *Matter*, 675 F. Supp. 212 ($19,000 retroactive); Glass v. Secretary of Health and Human Servs., 822 F.2d 19 (6th Cir. 1987) ($24,119.20); Roberts v. Schweiker, 655 F. Supp. 1105 (D. Del. 1987) ($31,152.52); Losco v. Bowen, 638 F. Supp. 1262 (S.D.N.Y. 1986) ("more than $31,000"); Russo v. Heckler, 625 F. Supp. 1513 (E.D.N.Y. 1986) ($23,684).

127. 42 U.S.C. § 406(b) (1982). *See also* Hyatt v. Heckler, 807 F.2d 376, 380 (4th Cir. 1986).

128. *See, e.g.*, Soper v. Heckler, 754 F.2d 222, 225 (7th Cir. 1985).

129. Jones v. Califano, 576 F.2d 12, 20 (2d Cir. 1978). Recognizing the problem of delays, the Second Circuit invalidated an SSA policy which withheld retroactive benefits from recipients until they appealed the withholding to the Appeals Council.

130. *See supra* note 125. Even after receiving a favorable decision, claimants may have to wait for an extended period of time before they receive their checks. *See* Holman v. Califano, 835 F.2d 1056 (3d Cir. 1987).

131. *See, e.g.*, Bowen v. City of New York, 476 U.S. 467, 485 (1986).

entirely, the trauma of "the specter of thousands of dollars of debt"[132] cannot be eliminated through retroactive payments.

In sum, time has shown that the Supreme Court greatly underestimated both the scope and the extent of the individual interest involved. It too severely narrowed the scope by assuming that retroactive awards of disability benefits would make whole the claimants whose benefits had been terminated prior to a hearing.[133] And it underestimated the extent of the individual interest by incorrectly evaluating the extent to which Social Security disability benefits recipients depend on their benefits to pay for the bare necessities of life and ignoring the nonfinancial burdens which result from the loss, even temporarily, of Social Security benefits.[134]

C. *Public Interest*

In *Eldridge*, the Supreme Court viewed the public interest as being contradictory to the individual interests of the disabled individuals seeking benefits. The only two governmental interests which the Supreme Court identified were (1) saving public funds by paying benefits to only those people who are actually disabled, and not those who are able to work; and (2) saving administrative resources by not holding hearings in all cases.[135] The Court recognized that what it had identified were actually the government's interests, but asserted, without any discussion, that the government's interests were by definition the public's interests.[136] The Supreme Court concluded that the government/public interest "in conserving scarce fiscal and administrative resources" had to be weighed against the benefit of an additional safeguard to the affected individuals.[137] This conclusion is unduly restrictive. The public has at least two other interests which militate in favor of pretermination hearings—ensuring that disabled people receive benefits and securing obedience to the law.

1. *Ensuring the provision of benefits*

Since the underlying purpose of the Social Security Act was remedial—to provide financial assistance to individuals who are too ill or too severely injured to work and support themselves[138]—the courts have consistently construed the law as broadly as possible, to ensure that *all* persons who may

132. Reed v. Heckler, 756 F.2d 779, 783 (10th Cir. 1985).

133. *See, e.g., Leschniok*, 713 F.2d at 524 ("We fail to comprehend the Secretary's argument that financial compensation at some future date, should the claimants survive and prevail, mitigates the hardship which is visited upon claimants and their families each and every day."); Caswell v. Califano, 583 F.2d 9, 14 (1st Cir. 1978) ("It is simply not true that a claimant for disability benefits, not infrequently in dire financial circumstances due to his disability, is truly made whole by retroactive payments which he has had to survive well over a year without.").

134. *See, e.g.*, Kuehner v. Schweiker, 717 F.2d 813, 825 & n.13 (3d Cir. 1983) (Becker, J., concurring).

135. *Eldridge*, 424 U.S. at 347.

136. *Id.* at 348.

137. *Id.*

138. Mathews v. de Castro, 429 U.S. 181, 185-86 (1976); Gordon v. Schweiker, 725 F.2d 231 (4th Cir. 1984); Martin v. Secretary of Health, Education and Welfare, 492 F. Supp. 459 (D. Wyo. 1980). For an example of a court using Congress' expressed purpose in passing a portion of the Social Security Act to define the public interest, see *Leschniok*, 713 F.2d at 524.

be entitled to benefits obtain them.[139] The public shares this interest in making sure that disabled people receive Social Security benefits. One way of reaching that result is to provide hearings for all recipients prior to the termination of their disability benefits. Indeed, the fact that Congress passed and subsequently extended legislation which provides for the continuation of Social Security benefits until after an administrative hearing[140] confirms that public interest.

Courts recognize this public interest:

> The government must be concerned not just with the public fisc but also with the public weal. . . . Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.[141]

Balanced against that interest, the public interest in saving funds is less substantial than the Supreme Court asserted in *Eldridge*. The amounts of money to be saved by holding hearings subsequent, rather than prior, to the termination of benefits are not as great as the Court implied because the great majority of Social Security recipients will continue to receive some type of public funds prior to their administrative hearings. The alternatives are either to work or to receive no income at all. Most recipients challenging the termination of their benefits are too disabled to work.[142] The remainder know that working renders them automatically ineligible for disability, regardless of their physical or mental conditions.[143] Consequently, virtually no recipients will return to work until after their administrative hearings.

Some former Social Security recipients challenging the termination of their benefits will thus continue to depend on public funds, in the form of Supplemental Security Income, public assistance, and food stamps to support them until the outcome of their administrative hearings, and longer if necessary. Even the Supreme Court recognized this fact in *Eldridge*.[144] The Court, however, drew from that fact the conclusion that the private interest in continuing to receive Social Security benefits pending a hearing was a limited interest, because persons whose Social Security benefits had been terminated could find public funds from other sources to sustain them until they could obtain due process of law.[145] The Court missed the concomitant conclusion that the public interest in saving money is not enhanced if the

139. *See, e.g.*, Dorsey v. Heckler, 702 F.2d 597 (5th Cir. 1983); Marcus v. Califano, 615 F.2d 23, 29 (2d Cir. 1979); Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975).

140. Social Security Disability Benefits Act, Pub. L. No. 97-455, § 2, 96 Stat. 2429 (1983); Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 7, 98 Stat. 1797 (1984); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9009, 101 Stat. 1330 (1987).

141. *Lopez*, 713 F.2d at 1437. *See also* Boettcher v. Secretary of Health and Human Servs., 759 F.2d 719, 722 (9th Cir. 1985).

142. A majority of them (69.2% in 1982 and 51.9% in 1983) win their administrative hearings and have their benefits restored immediately. *Stieberger*, 615 F. Supp. at 1393. An even greater majority (85%) of those who file in federal court succeed in either obtaining benefits or having their cases remanded for new administrative hearings. *See supra* note 87.

143. 20 C.F.R. § 404.1520(b) (1988).

144. *Eldridge*, 424 U.S. at 341.

145. *Id.* at 342.

public must continue to support former disability benefits recipients awaiting hearings. As the courts have found, there is no public interest in shifting financial responsibility for the disabled[146] from primarily federal to primarily state sources of funds,[147] thereby shifting the tax burden from federal to state and local governments.[148]

The government interest in saving money is admittedly promoted to a certain extent by not providing hearings prior to terminating disability benefits. In the first place, a few recipients do return to work, while others borrow from friends or family, or die, and thus do not turn to other sources of public funds after the termination of their disability benefits.[149] Second, those who do obtain public assistance or SSI will receive significantly lower benefits, thus saving the government money. However, to the extent that SSI or public assistance funds are less than the terminated disability benefits, the increased private interest in continuing to receive benefits counterbalances the corresponding decrease in the government's fiscal interest.

2. *Obedience to law*

The widespread use of nonacquiescence significantly affects the public interest. It is basic to the public interest that the law be obeyed by everyone, including the various branches of government. When the government defies the law, whether it be the law as passed by Congress or the law as interpreted by the courts, the public interest is contrary to the government interest. Moreover, the public has an interest in the "fair and accurate adjudication" of claims.[150] When an agency practices nonacquiescence, its adjudications are contrary to the law and hence contrary to at least one public interest.

SSA justifies nonacquiescence, both present and past,[151] primarily on the ground that it wishes to relitigate issues which have previously been decided against it by the courts, to try to persuade the courts to overrule those prior decisions.[152] Attempting to change the law through litigation is a laudable goal, clearly in the public interest. Denying Social Security benefits to needy and deserving individuals in defiance of the law, while trying to change that law, is not. And denying benefits to needy and deserving individuals, hoping that those individuals will have the foresight to sue in federal court so that the agency, in defense, can ask the courts to change the law, is blatantly contrary to the public interest. SSA must find a more just and more effective way of trying to change the law than by ignoring it.

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146. Mental Health Ass'n of Minn. v. Schweiker, 554 F. Supp. 157, 167 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983).

147. *Leschniok*, 713 F.2d at 524.

148. *Lopez*, 713 F.2d at 1436 n.6.

149. People who borrow money must be careful to document their loans carefully. If not, SSA may consider the money they have received to be gifts, which SSA counts as income. In such cases, SSA will subtract the amount of a gift from the retroactive benefits it pays to claimants who win administrative hearings. Ruppert v. Heckler, 671 F. Supp. 151, 157 (E.D.N.Y. 1987).

150. *See* Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

151. *See, e.g., Stieberger*, 615 F. Supp. at 1403-05.

152. Kuhl, *supra* note 49, at 915.

In addition, nonacquiescence puts an enormous strain on the public fisc through the increased administrative costs of mushrooming litigation in federal courts. If Social Security recipients know that they cannot receive a review of their claims by an impartial arbiter, one who will apply the law rather than an agency policy, unless they appeal to the federal courts, then they will appeal; and they have done so in record numbers.[153] Much of this increase is due to nonacquiescence.

The increase necessitates a corresponding increase in the number of judges who must decide the cases, court personnel who must process them, government attorneys who must defend them, and even attorneys who must bring those cases, many of whose fees are paid by the government.[154] All of these costs put a significant strain on the public fisc, and ultimately upon the taxpayers, a strain noticed by the judiciary.[155]

The increase has also put a tremendous burden upon the federal judiciary itself, which is already staggering under heavy caseloads.[156] One of the results of this pressure has been an increasing dissatisfaction among federal judges with SSA, whose nonacquiescence the judges view as a cause of their increased burden.[157] Risking the wrath of the federal judiciary[158] is a

153. In 1975, 5,846 Social Security cases were filed in federal district courts. In 1984, 29,985 cases were filed, and 19,771 were filed in 1985. 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 169 (United States Dep't of Commerce 1987).

154. *See* Equal Access of Justice Act, 28 U.S.C. § 2412 (1966); Trichilo v. Bowen, 823 F.2d 702 (2d Cir. 1987); Garcia v. Schweiker, 829 F.2d 396 (3d Cir. 1987).

155. *See* Goddman's Furniture Co. v. United States Postal Serv., 561 F.2d 462, 465-66 (3d Cir. 1977) (Weis, J., concurring).

156. *See* Rehnquist, Hon. William H., Report on the Judiciary, *quoted* and *summarized in* N.Y. Times, Jan. 2, 1988, at 7, col. 1.

157. *See, e.g., Hidalgo*, 822 F.2d at 297 ("[T]wo years ago we observed that the cases in which we have reversed the denial of benefits due to the ALJ's failure to apply properly the treating physician rule are 'almost legion'. . . . 'Legion' should no longer be modified by 'almost.' "); *see also* Ceglia v. Schweiker, 566 F. Supp. 118, 125 n.7 (E.D.N.Y. 1983) ("already overburdened courts"); Ramirez-Isalquez v. Heckler, 632 F. Supp. 100, 102 (S.D.N.Y. 1985) ("explosion of litigation").

158. *See, e.g.*, Barger v. Bowen, 666 F. Supp. 77, 78 (W.D. Pa. 1987) ("This case presents an excellent example of the ALJ's unconscionable manipulation of the grids and regulations to achieve findings of no disability."); *Hidalgo*, 822 F.2d at 297 (The court feels a "sense of frustration at how little, if any, impact our decisions have had on the Secretary and his administrative fact-finders."); Sanders v. Secretary of Health and Human Servs., 649 F. Supp. 71, 73 (N.D. Ala. 1986) (The Appeals Council appears to "rely on its own stupidity to work its will."); Kirksey v. Heckler, 808 F.2d 690, 693 (8th Cir. 1987) (a finding that the claimant did not have pain because he could visit with neighbors "borders on the ridiculous"); *Salling*, 641 F. Supp. at 1051 ("The hearing processes from the time a person applies for disability benefits through the Appeals Council procedures are geared to deny claims rather than pursue truth wherever it leads."); Holst v. Bowen, 637 F. Supp. 145, 147 (E.D. Wash. 1986) (The court refuses to condone the "anarchical situation wherein the ALJ has presumed to substitute his function for that of the Ninth Circuit Court of Appeals."); *Ramirez-Isalquez*, 632 F. Supp. at 102 ("The legal standards governing social security appeals have been reiterated time and time again in the recent years' explosion of litigation."); Darnell v. Bowen, 631 F. Supp. 96, 99 (W.D. Va. 1986) (The Secretary's "disregard for the purpose of the SSI Program and purported intent of the SSARP borders on outrage."); Cannon v. Heckler, 627 F. Supp. 1370, 1374 (D.N.J. 1986) (The Secretary sometimes treats claimants with extreme callousness.); Boyd v. Secretary of Health and Human Servs., 626 F. Supp. 1252, 1255 (W.D.N.Y. 1986) (Many Social Security cases are examples of "sheer bureaucratic dishonesty."); Spears v. Heckler, 625 F. Supp. 208, 218 (S.D.N.Y. 1985) (The Secretary "displays marked indifference to the limited economic resources of an indigent disability claimant."); Troyer v. Heckler, 613 F. Supp. 1219, 1221 (D. Kan. 1985) ("[T]he court's patience [is] exhausted" with the Secretary.); Hawkins v. Heckler, 600 F. Supp. 832, 838 (D. Kan. 1985) (The Secretary's behavior "indicates an arrogant administrative attitude that is either bent upon denying benefits no matter how meritorious the claim or a callousness and indifference that amounts to the same thing."); Merli v. Heckler, 600 F. Supp. 249, 250 (D.N.J. 1984) ("The

counterproductive tactic for an agency which claims that it wishes to relitigate in order to convince judges to overrule their prior decisions. The judges will not do so but will instead reiterate their prior interpretation of the law.[159] It also brings into question the agency's good faith, and will result in the agency losing close cases, cases it might have won had it enjoyed a better reputation, as a judge may conclude that the agency is acting in bad faith and thus feel it is incumbent upon the judiciary to police the agency.

The practice of nonacquiescence is thus contrary to both the public interest and the interests of the government. In the short term it does save the government money to deny benefits to needy and deserving individuals, but surely this is not what Congress intended when it established the Social Security program. In the long term it does not save money; it does not provide benefits to individuals who are entitled to them; and it causes additional difficulty for the agency as the judges become more and more openly hostile to SSA's practices.

III. CONCLUSION

A reexamination of the three factors which the Supreme Court used in *Eldridge* to determine whether due process of law required a hearing prior to termination of Social Security benefits leads to a conclusion opposite that reached by the Court. While the *Eldridge* Court found that the private interest involved was limited, subsequent experience suggests that Social Security benefits are extremely important; and the loss of those benefits, even temporarily, is irreparable.

The public interest, on the other hand, does not counterbalance the private interest, because the public interest is two-fold. The public has an interest not only in saving public funds, an interest not significantly advanced by denying pretermination hearings,[160] but also in ensuring that all those who are entitled to receive Social Security benefits continue to receive those benefits, and an interest in providing fair procedures to evaluate continued eligibility for benefits.[161]

Finally, the risk of erroneous deprivation of benefits is not low. Instead, the rate of error in decisions to terminate Social Security benefits has skyrocketed because nonacquiescence causes large numbers of erroneous terminations. Proper terminations are indeed merely fortuitous, occurring only when the agency's policy happens to be the same as the law as established by

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Department of Health and Human Services has apparently determined to affect economics by systematically denying disability benefits to those persons who are entitled to them."); Rivera v. Heckler, 598 F. Supp. 203, 208 (E.D. Pa. 1984) (The ALJ's finding that claimant was not disabled by back problems because he fathered a child was "a *tour de force* unequalled in this Court's experience reviewing social security appeals."); Deuter v. Schweiker, 568 F. Supp. 1414, 1421 n.7 (N.D. Ill. 1983) ("The ALJ's opinion appears to have been written to substantiate a preconceived conclusion, even to the extent of misstating the record on several basic findings . . . . [I]t is distressing to review opinions which are so closely erroneous in light of the record. This is not the way judicial responsibility should be discharged."); Ceglia v. Schweiker, 566 F. Supp. 118, 125 n.7 (E.D.N.Y. 1983) ("I have found numerous cases that the government will not confess error, but rather will defend the position of the Secretary no matter how egregious the administrative record may appear.").

159. *See, e.g., Hidalgo*, 822 F.2d 294; Talbott v. Bowen, 821 F.2d 511, 514 (8th Cir. 1987).

160. *See supra* text accompanying notes 142-48.

161. *See supra* text accompanying notes 138-41.

the courts. Reweighing the three factors leads to the conclusion that due process of law requires that Social Security recipients be afforded notice and an opportunity to be heard prior to the termination of their disability benefits, so that they can present their defenses to the proposed termination.

In particular instances in which courts have found that SSA failed to follow discrete requirements of law, they have afforded recipients such process. For example, in *Bowen v. City of New York*,[162] the United States Supreme Court upheld a district court decision which reinstated benefits to all mentally ill persons in the State of New York whose benefits had been terminated between April 1, 1980, and May 15, 1983. The district court had ordered such prophylactic relief because it had concluded that during that period of time, SSA had used a standard for evaluating disability based upon mental illness which was contrary to law. Undoubtedly, some of the New Yorkers whose benefits had been terminated during that nearly three year period had recovered sufficiently from their mental impairments to return to work. Because the private interest was so great and the risk of erroneous deprivation of benefits so high, as a result of SSA's use of an incorrect legal standard in evaluating eligibility for benefits, the Court concluded that it was better to err on behalf of the individuals, by reinstating benefits to those who might not be entitled, than on the side of the agency, by denying benefits to those who would ultimately be found to be entitled.

Similarly, in *McDonald v. Secretary of Health and Human Services*,[163] the court ordered SSA to re-evaluate all persons who claimed disability because of more than one impairment, retroactive to December, 1984. And in *Hyatt v. Heckler*,[164] the court directed the reinstatement of disability benefits to all persons suffering from diabetes, hypertension, and pain, whose benefits had been terminated, and granted new administrative hearings, regardless of whether those persons would ultimately be found disabled.

Because SSA practices nonacquiescence across the board, such a piecemeal approach is inadequate. The courts should afford hearings to all recipients prior to termination of benefits. Simply offering a pretermination hearing, however, is not enough. One basic element of due process of law is a hearing before a neutral and impartial arbitrator. Such hearings do not exist within SSA at the present time. Because of nonacquiescence, the hearing officers are neither fair nor neutral. They will continue to be unfair so long as SSA practices nonacquiescence. Since due process requires that Social Security recipients have the right to an impartial hearing prior to the termination of their benefits, and the agency is unwilling or incapable of providing fair hearings, the sole remedy consonant with due process is for the courts to require that Social Security recipients faced with termination of their benefits continue to receive those benefits until the federal courts decide their cases.

Such a requirement could be costly for SSA, at least as long as it continues to practice nonacquiescence, because if recipients can continue to receive

162. 476 U.S. 467 (1986).
163. 795 F.2d 1118 (1st Cir. 1986).
164. 807 F.2d 376 (4th Cir. 1986).

their benefits until they exhaust both administrative and judicial remedies, more recipients will avail themselves of those remedies than at present. The remedy lies within the control of the SSA. As soon as it terminates its nonacquiescence policy and begins to provide administrative hearings which are fair and impartial, the agency will provide due process at the administrative level and can be relieved of the burden of having to pay benefits until recipients exhaust their judicial remedies.

Moreover, permitting recipients to continue receiving benefits until the federal courts decide their cases reduces the imbalance created by SSA's nonacquiescence policy, which requires the recipients to shoulder the responsibility and expense of instituting lawsuits in federal court to challenge the termination of their benefits, even when it is the *agency* which wishes to relitigate the underlying legal issues.

If SSA wishes to relitigate a legal issue which it has previously lost in court, that is its prerogative. However, in such a case, fundamental fairness requires that the agency, and not the claimant, bear the financial burden of litigation. The agency should continue to pay benefits to the claimant until a federal court decides the case. If the court decides that the law should be changed, then the court should change the law prospectively, so that the claimant will not be penalized financially for receiving benefits which the law allowed her to receive. Moreover, the fact that the claimants will continue to receive benefits if they file lawsuits in federal court, but will have their benefits terminated if they fail to do so, encourages claimants to file cases in court and not to give up after the agency has decided against them. This fact benefits SSA by giving the agency a forum in which to relitigate legal issues, since the agency's nonacquiescence policy precludes it from instituting lawsuits on issues it formerly lost in court.

Nonacquiescence puts extreme burdens upon the poor, mentally and physically incapacitated individuals who are the least able of all persons in our society to shoulder those burdens. With this policy, the agency seizes for itself the authority to terminate disability benefits at any time it chooses, even when prohibited by law, simply because the agency disagrees with the law. Though SSA claims that it wishes to relitigate issues, the agency recognizes neither the responsibility for instituting a lawsuit to bring the disputed issue before the court nor the obligation to pay benefits to the admittedly disabled and deserving individual, until or unless the court orders it to do so. Thus, the disabled individual, deprived of funds by agency fiat, is expected to retain an attorney to commence a lawsuit in federal court, an expensive proposition made even more so by the agency's challenge to the law. Alternatively, the disabled individual must summon the physical strength and mental acuity to file his or her own lawsuit in federal court without an attorney, a daunting task to even an intelligent, sane, able-bodied individual. Requiring the agency to continue paying benefits until the federal court decides the case partially restores the balance and gives the individual the benefits which the law mandates.