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NOTES

NONACQUIESCENCE: HEALTH AND HUMAN SERVICES' REFUSAL TO FOLLOW FEDERAL COURT PRECEDENT

Nonacquiescence is an administrative agency's refusal to follow federal court decisions in subsequent cases.¹ For several years, the Secretary of Health and Human Services² (the "Secretary") followed a policy of nonacquiescence similar to the nonacquiescence practices of a number of other federal agencies.³ In 1980, however, Congress passed the Social Security Act of 1980, which required review of all current disability benefit recipients.⁴ The resulting burden on the judiciary contributed largely to the federal courts' rejection of the practice of nonacquiescence.⁵ This Note examines the legitimacy of the federal courts' response to nonacquiescence.

Part I of this Note reviews agency rationales for nonacquiescence. Part II examines the constitutional underpinnings of nonacquiescence and the impact of *United States v. Mendoza* on the related issue of the use of collateral estoppel against the government. Part III of this Note examines the Supreme Court's consideration of nonacquiescence in cases involving the Internal Revenue Service (the "IRS") and the National Labor Relations Board (the "NLRB"). Part IV examines the Secretary's use of nonacquiescence and the resulting reaction of the federal courts. Part V of this Note analyzes the propriety of the federal courts' response

1. A memorandum to all administrative law judges ("ALJs") in the Department of Health and Human Services provides in pertinent part: "ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court." Memorandum from Louis B. Hays, Associate Commissioner of the Office of Hearings and Appeals, to all ALJs (Jan. 7, 1981), reprinted in *Social Security Disability Reviews: The Role of the Administrative Law Judge, Hearings Before the Subcomm. on the Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 216-17 (1983) [hereinafter cited as *Social Security Disability Reviews*].

2. The Social Security Act authorizes the Secretary to set forth regulations for the determination of disability. 42 U.S.C. § 405 (1982). The Social Security Administration is a branch of the Department of Health and Human Services. SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY HANDBOOK 6 (8th ed. 1983) [hereinafter cited as HANDBOOK].

3. See *infra* notes 36-51 and accompanying text.

4. See *infra* notes 55-56 and accompanying text.

5. See *infra* notes 57-58 and accompanying text.

to the Secretary's use of nonacquiescence. In Part VI, this Note reviews possible limitations on nonacquiescence. This Note concludes that the courts' cursory treatment of nonacquiescence is unwarranted.

I. THE RATIONALE BEHIND NONACQUIESCENCE

Administrative agencies rationalize the policy⁶ of nonacquiescence in a number of ways. First, agencies insist that nonacquiescence provides uniform application of nationwide programs.⁷ Second, agencies claim that nonacquiescence is necessary to fulfill their responsibility to manage federal programs.⁸ Third, agencies assert that nonacquiescence promotes equal treatment of litigants throughout the country.⁹ Fourth, agencies allege that nonacquiescence and relitigation create intercourt conflict, prompting Supreme Court review.¹⁰ Finally, as a tactical matter, agencies argue that nonacquiescence and relitigation are necessary when the case at bar presents a factual or procedural posture unfavorable for Supreme Court review.¹¹

6. Nonacquiescence is a governmental policy. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 139-40 (1975) [hereinafter cited as COMMISSION ON REVISION]. President Lincoln, in one of the earliest examples of nonacquiescence, refused to adhere to the *Dred Scott* decision beyond the case. Commenting on nonacquiescence, he noted:

[I]f the policy of the Government upon vital questions affecting the whole of the people is to be irrevocably fixed by the Supreme Court, the instant they are made . . . the people will have ceased to be their own rulers, having to the extent practically resigned their Government into the hands of that eminent tribunal.

7 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 3206, 3210 (1897).

7. *Disability Amendments of 1982, Hearings Before the Subcomm. on Social Security of the Comm. of Ways and Means, House of Representatives, 97th Cong., 2d Sess. 15* (1982) (testimony of Louis B. Hays, Associate Commissioner) [hereinafter cited as *Disability Amendments of 1982*].

8. *See Disability Amendments of 1982, supra* note 7, at 15.

9. *Id.*

10. COMMISSION ON REVISION, *supra* note 6, at 143.

11. *See, e.g.,* Memorandum from Sandy Crane, Associate Commissioner for Operational Policy and Procedure, Department of Health and Human Services, to Donald A. Conya, Assistant General Counsel, reprinted in *Disability Amendments of 1982, supra* note 7, at 228-29. The memorandum cites a number of legitimate reasons for the Secretary's nonacquiescence in *Finnegan v. Mathews*, 641 F.2d 1340 (9th Cir. 1981). *Finnegan* required medical improvement prior to disability benefit termination. The memorandum notes that the "SSA would face problems in complying with the court's order because in many . . . cases the evidence with which [disability was] allowed is either incomplete, unavailable, or no longer in existence." *Disability Amendments of 1982, supra* note 7, at 229. The memorandum also argues that the Department should not seek Supreme Court review because the claimant met current disability requirements even under the Secretary's regulations.

II. CONSTITUTIONAL UNDERPINNINGS OF NONACQUIESCENCE

The concept of judicial review, stare decisis, and nonmutual offensive collateral estoppel comprise the constitutional underpinnings of nonacquiescence.

A. *Judicial Review and Stare Decisis*

The true scope of judicial review is unclear. In *Marbury v. Madison*,¹² Chief Justice Marshall established the principle of judicial review,¹³ holding that the Court has power to declare an act of Congress unconstitutional.¹⁴ *Marbury* implicitly suggested that the power of judicial review affects only the judiciary and the parties to a case.¹⁵ In *United States v. Nixon*,¹⁶ however, the Supreme Court expanded the scope of judicial review, holding that the Court's interpretation of the Constitution prevails over a contrary reading by the executive branch.¹⁷ *Nixon* suggested that the power to interpret the Constitution rests exclusively with the Supreme Court.¹⁸

Although *Marbury* and *Nixon* explored the power of judicial review, *Cooper v. Aaron*¹⁹ addressed the *effect* of the Court's power to interpret the Constitution. In *Cooper*, the Governor and the Legislature of Arkan-

12. 5 U.S. 137 (1803).

13. Marshall asserted that "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177. This statement, however, does not speak to the effect of adjudication beyond the case. For a general discussion of the scope of judicial review, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 25-35 (10th ed. 1980).

14. Marshall interpreted § 13 of the Judiciary Act of 1789 as impermissibly enlarging the scope of the Court's original jurisdiction. 5 U.S. at 137.

15. "Under *Marbury*, the Court decides a *case*; it does not pass a statute calling for obedience by all within the purview of the rule that is declared." Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (emphasis added). Accord Hart, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456, 1457 (1954); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 n.33 (1983).

16. 418 U.S. 683 (1974).

17. President Nixon argued that the executive privilege protected certain tapes and documents from disclosure. *Id.* at 686.

18. In *Nixon*, the Court relied on *Marbury* for the proposition that the Court determines the scope of the executive privilege. *Id.* at 705. Professor Gunther argues that this reliance conveys "a misleading broad view of judicial competence, exclusivity and supremacy." Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 33 (1974). Gunther objects to the notion that *Marbury* "precludes a constitutional interpretation that grants final authority to another branch." *Id.* at 34.

19. 358 U.S. 1 (1958).

sas argued that the Court's opinion in *Brown v. Board of Education*²⁰ did not bind nonparties.²¹ In a unanimous decision, the Court stated that its interpretation of the Constitution binds the states and their subdivisions, even though they may not be parties to the action.²²

Similarly, under the doctrine of stare decisis, a court that establishes a rule of law in a particular decision must adhere to that rule in subsequent cases.²³ In addition, the rule binds lower courts of that jurisdiction.²⁴ Stare decisis is a rule of the courts rather than a rule of litigants.²⁵ Although a court's decision binds the parties to the case, nonparties often adhere to the decision as a matter of prudence and respect rather than command.²⁶ One commentator argues that congressional and executive adherence to an earlier opinion of the judicial branch is discretionary, subject only to electoral review and reconsideration by the Court.²⁷

20. 347 U.S. 483 (1954). *Brown* rejected the "separate but equal" doctrine for public school education.

21. The Governor and the Legislature of Arkansas opposed desegregation of the City of Little Rock's schools. 358 U.S. at 1. Petitioners' amicus curiae asserted that *Brown* did not displace an act of Congress that supported the "separate but equal" doctrine. Amicus Curiae for Petitioners at 16-19, *Cooper v. Aaron*, 358 U.S. 1 (1958).

22. The Court interpreted *Marbury* to state:
the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support his Constitution."
358 U.S. at 18.

23. Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, 20 TEMP. L.Q. 503, 503-04 (1947).

24. Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941).

25. Defendant's Brief, *Lopez v. Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983), reprinted in *Social Security Disability Reviews*, *supra* note 1, at 407.

26. Hart, *supra* note 15, at 1456, 1457-59; Wechsler, *supra* note 15, at 1008. Justice Jackson stated that "[t]he judicial decree, however broadly worded, actually binds, in most instances, only the parties to the case. As to others, it is merely a weather vane showing which way the judicial wind is blowing." R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 13 (1955).

27. Hart, *supra* note 15, at 1458.

B. *The Doctrine of Nonmutual Offensive Collateral Estoppel: United States v. Mendoza*

Collateral estoppel limits relitigation of settled issues.²⁸ Nonmutual offensive collateral estoppel enables a plaintiff to preclude relitigation of an issue decided against the defendant in a prior action with the same or a different party.²⁹

In *United States v. Mendoza*,³⁰ the Supreme Court held that nonmutual offensive collateral estoppel does not apply against the United States Government.³¹ The Court rejected the Ninth Circuit's argument that the Government must adhere to or appeal decisions that it considers erroneous.³² The Court noted that a governmental decision not to appeal contemplates policy choices to which a court should defer.³³ In addition, the Court noted that nonmutual offensive collateral estoppel's concern with limiting wasteful use of judicial resources would be ill-served if applied to the Government.³⁴ The Court reasoned that applying the doctrine to the Government would force the Solicitor General to appeal every adverse decision, regardless of court and governmental cost.³⁵ The *Mendoza* Court did not address the effect of stare decisis on administrative agencies in subsequent litigation. The Court's emphasis on deferring

28. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971).

29. *Parklane Hosiery*, 439 U.S. at 326 n.4.

30. 104 S. Ct. 568 (1984).

31. *Id.* at 574. The Court stated "that nonmutual offensive collateral estoppel does not apply against the government . . . to preclude relitigation of issues such as those *in this case*." *Id.* (emphasis added). See generally Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 121 (1984).

The Court noted that the Government's unique position in litigation outweighs traditional collateral estoppel concerns. 104 S. Ct. at 574. Most courts interpret *Mendoza* to bar absolutely application of nonmutual offensive collateral estoppel against the Government. See *Sun Towers v. Heckler*, 725 F.2d 315, 323 n.8 (5th Cir. 1984) (noting potential ambiguity in *Mendoza*, but applying it to prohibit issue preclusion against the Secretary when certain policy concerns exist). See also *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (mechanical application of *Mendoza*); *Sohio Transp. Co. v. United States*, 5 Ct. Cl. 620, 637 (1984) (same).

32. 104 S. Ct. at 573.

33. In *Mendoza*, the government's decision not to appeal an earlier federal district court decision related to the Carter administration's "amnesty" policy. *Id.*

34. *Id.* at 573-74.

35. *Id.* at 573. The Court also noted that precluding the use of nonmutual offensive collateral estoppel against the Government would permit circuit courts to "explore" an issue and develop various interpretations prior to Supreme Court review. *Id.* at 572. See Levin & Leeson, *supra* note 31, at 119 (asserting that *Mendoza* increases the burden on trial courts and conserves appellate court resources).

to governmental policy choices in litigation suggests, however, that courts should apply a degree of restraint prior to extending the doctrine of stare decisis to include administrative agencies within its purview.

III. JUDICIAL CONSIDERATION OF NONACQUIESCENCE

Although the Supreme Court has not directly addressed the constitutionality of nonacquiescence, it has recognized some of the positive features of the policy in a series of cases involving the IRS and the NLRB.

In *United States v. Estate of Donnelly*,³⁶ the Supreme Court noted the IRS's policy of nonacquiescing in the Sixth Circuit's interpretation of an Internal Revenue Code provision.³⁷ In upholding the IRS's position, Justice Marshall noted that governmental adherence to its belief of proper statutory construction is not only legitimate but also necessary for the uniform application of acts of Congress.³⁸

In *Helvering v. Hallock*,³⁹ the IRS included the value of a decedent's remainder interest in a trust for estate tax purposes, despite contrary Supreme Court authority.⁴⁰ The Sixth Circuit, bound by precedent, disallowed the inclusion.⁴¹ The Supreme Court reversed, overruling its prior decision.⁴²

36. 397 U.S. 286 (1970).

37. In *Youngblood v. United States*, 141 F.2d 912 (6th Cir. 1944), the Sixth Circuit held that § 3672 of the Internal Revenue Code, which determines the validity of a government tax lien against a subsequent purchase of land, invalidates a government tax lien not filed with the county register of deeds. The government refused to follow *Youngblood*. The Supreme Court upheld the Government's position in *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291 (1961). In *Estate of Donnelly*, the Court retroactively applied its *Union Central* decision. 397 U.S. 286.

The IRS frequently nonacquiesces in federal court decisions. See Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 124 (1977). Although the IRS frequently nonacquiesces, the tax court considers itself bound by circuit court decisions. *Golson v. Commissioner*, 54 T.C. 742 (1970). For an overview of the IRS's litigation and nonacquiescence policies, see Rogovin, *The Four R's: Regulation, Rulings, Reliance and Retroactivity. A View from Within*, 43 TAXES 756 (1965). See also *Davant v. Commissioner*, 366 F.2d 874 (5th Cir. 1966) (issue relitigated in the Fifth Circuit in *Home Constr. Corp. v. United States*, 439 F.2d 1165 (5th Cir. 1971)), *cert. denied*, 386 U.S. 1022 (1967).

38. 397 U.S. at 294. Justice Douglas, in an opinion joined by Justices Brennan and Stewart, dissented from the retroactive application of *Union Central*. *Id.* at 297-300.

39. 309 U.S. 106 (1939).

40. See *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935).

41. *Commissioner v. Hallock*, 102 F.2d 1 (6th Cir.), *rev'd*, 309 U.S. 106 (1939).

42. 309 U.S. at 122. *Hallock* supports the argument that even Supreme Court review binds only the courts and the parties, and not an executive agency. Chief Justice Stone concurred without overruling *St. Louis Trust Co.* Justice Roberts, dissenting, objected to the overruling of *St. Louis*

In *Armco Steel Corp. v. NLRB*,⁴³ the Sixth Circuit held that a union representative may waive the rights of union members to distribute union literature. The NLRB relitigated the issue eight years later in the Sixth Circuit.⁴⁴ Following *Armco Steel Corp.*, the court rejected the NLRB's claim.⁴⁵ On appeal, the Supreme Court reversed, holding that a bargaining representative may not waive the rights of union members to distribute union literature.⁴⁶

In *Yellow Taxi Co. of Minneapolis v. NLRB*,⁴⁷ Judge Wright of the District of Columbia Circuit in his concurring opinion relied on the Supreme Court's implicit recognition of nonacquiescence. Judge Wright rejected the argument that a court decision binds an agency beyond a particular case.⁴⁸ Noting a history of intracircuit relitigation by the NLRB, Judge Wright found it "unwise" to suggest that the NLRB must adhere to a court of appeals decision.⁴⁹ He noted that Supreme Court vindication of the NLRB's position after intracircuit relitigation provided legitimate authority for nonacquiescence.⁵⁰

Estate of Donnelly and Judge Wright's opinion in *Yellow Taxi* expressly approved of administrative agency nonacquiescence. *Hallock* and *Armco Steel* implicitly suggested Supreme Court approval of nonacquiescence, recognizing that strict agency acquiescence within a circuit

Trust Co. He stressed that the Court must adhere to precedent. Chief Justice Burger, dissenting, objected to the NLRB's failure to explain its present position.

43. 344 F.2d 621 (6th Cir. 1965).

44. See *Magnavox Co. v. NLRB*, 474 F.2d 1269 (6th Cir.), *rev'd*, 415 U.S. 322 (1974).

45. 474 F.2d at 1270.

46. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). Justice Stewart, in an opinion joined by Justices Powell and Rehnquist, concurred in part and dissented in part. Stewart opined that a union representative may not waive the rights of union members who seek to displace the existing union. A union, however, may waive the rights of union members who seek to distribute "self-serving" union literature. *Id.* at 327-32.

47. 721 F.2d 366 (D.C. Cir. 1983) (NLRB relitigated issue whether taxicab lessees are employees within the context of the National Labor Relations Act).

48. *Id.* at 384-85. Judge MacKinnon, in a separate opinion, argued that the NLRB must defer to a prior decision of the circuit. *Id.* at 383.

49. "[A]n agency charged with formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. courts of appeals." *Id.* at 384 (quoting *S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1278-79 (5th Cir. 1981)).

50. Judge Wright noted two decisions, *Charles D. Bonnanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982), and *NLRB v. Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507 (1977), in which the Supreme Court upheld NLRB positions that a number of circuit courts had previously rejected. 721 F.2d at 385.

would prevent relitigation and correction by the Supreme Court.⁵¹

IV. NONACQUIESCENCE BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

The Secretary, like the IRS and the NLRB, nonacquiesces in federal court decisions. The Secretary engages in formal nonacquiescence⁵² by issuing a written statement evidencing the agency's refusal to follow the court's opinion. The Secretary distributes this statement to the Social Security Administration for its use in the benefit review process.⁵³ The Secretary also engages in informal nonacquiescence by failing to disclose recent federal court interpretations of the law to the individuals who administer the benefit review process.⁵⁴

In 1980, Congress passed a Social Security Act of 1980⁵⁵ requiring review of all current disability benefit recipients. This Act resulted in a dramatic increase in the number of appeals brought in the federal courts.⁵⁶ Recognizing that nonacquiescence and intracircuit relitigation burden the court system, the federal courts began to question the Secretary's use of these policies.⁵⁷

51. For examples of additional cases in which the Supreme Court adopted an agency's nonacquiescence position, see, e.g., *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981) (IRS relitigated the proper depletion deduction for an integrated miner manufacturer in the cement business); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (NLRB relitigated the issue whether the National Labor Relations Act mandates union representation at an employee investigative interview); *Burnet v. Harmel*, 287 U.S. 103 (1932) (IRS relitigated the proper tax treatment of income received from oil and gas leases).

52. The Associate Commissioner of the Office of Hearings and Appeals noted the agency's longstanding policy of "formal nonacquiescence" to court decisions. See *Disability Amendments of 1982*, *supra* note 7, at 15. See, e.g., 1982 SOC. SEC. R. 82-94(c) (nonacquiescing in *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982)); 1982 SOC. SEC. R. 82-10(c) (nonacquiescing in *Finnegan v. Mathews*, 641 F.2d 134 (9th Cir. 1981)).

53. For a discussion of the disability claim review process, see Note, *Disability Claims and the Social Security Administration: Application of the New Vocational Regulations*, 18 NEW ENG. 919 (1983); Note, *Judicial Review of Social Security Disability Decisions: A Proposal for Change*, 11 TEX. TECH. L. REV. 215 (1980).

54. See *Polaski v. Heckler*, 585 F. Supp. 997, 1011 n.5 (D. Minn. 1984) (noting and rejecting Secretary's policy of informal nonacquiescence in Eighth Circuit's disability standard for pain).

55. Social Security Disability Act of 1980, Pub. L. No. 96-265, 94 Stat. 441, 460 (codified as amended at 42 U.S.C. § 421(h) (Supp. V 1981)).

56. The New York Times reported that the Social Security Administration's confidential study located 48,000 Social Security cases pending review in federal courts. N.Y. Times, Sept. 9, 1984, at 1, col. 3. In February of 1983, approximately 27,000 Social Security cases were pending in federal courts. See Arner, *The Social Security Court Proposal: An Answer to a Critique*, 10 J. LEGIS. 324, 325 (1983).

57. See, e.g., *Murray v. Heckler*, 722 F.2d 499 (9th Cir. 1983) (rejecting the Secretary's nonac-

In *Lopez v. Heckler*,⁵⁸ the plaintiffs brought a class action suit to compel the Secretary to follow the Ninth Circuit's medical improvement standard in disability cases.⁵⁹ The United States District Court for the Central District of California granted the plaintiffs' motion for a preliminary injunction.⁶⁰ The court stated that the Secretary's nonacquiescence resulted in unequal treatment of claimants under the disability benefit system.⁶¹ The court also concluded that nonacquiescence violates the due process clause⁶² and the doctrine of separation of powers.⁶³ The court reasoned that *Marbury v. Madison* limits governmental relitigation of issues previously decided by the circuit.⁶⁴

quiescence in Ninth Circuit decisions requiring medical improvement prior to disability benefit termination); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983) (rejecting the Secretary's nonacquiescence in Eighth Circuit decisions requiring consideration of subjective complaints of pain in disability determination); *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983) (rejecting the Secretary's nonacquiescence in Eighth Circuit decisions concerning subjective pain standard); *Polaski v. Heckler*, 585 F. Supp. 997 (D. Minn. 1984) (rejecting the Secretary's nonacquiescence in Eighth Circuit decisions concerning standards for evaluation of pain and medical improvement); *Holden v. Heckler*, 584 F. Supp. 463 (N.D. Ohio 1984) (rejecting the Secretary's nonacquiescence in Sixth Circuit decisions concerning disability improvement standard); *Buckner v. Heckler*, 580 F. Supp. 1536 (W.D. Mo. 1984) (rejecting the Secretary's nonacquiescence in Eighth Circuit decisions concerning standard for evaluation of pain); *Rivera v. Heckler*, 568 F. Supp. 235 (D.N.J. 1983) (rejecting the Secretary's nonacquiescence in Third Circuit decisions requiring the agency to give substantial weight to the uncontradicted testimony of claimant's treating physician). See also *Steiberger v. Heckler*, No. 84 CIV 1302 (S.D.N.Y. Aug. 19, 1985) (enjoining the Secretary's nonacquiescence policy).

58. 572 F. Supp. 26 (C.D. Cal. 1983), *stay denied*, 713 F.2d 1432 (9th Cir.), *stay granted*, 104 S. Ct. 10 (1983), *aff'd*, 725 F.2d 1489 (9th Cir. 1984) (Ninth Circuit affirms preliminary injunction).

59. *Id.* at 27. The Ninth Circuit established this standard in *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), and *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).

60. 572 F. Supp. at 29-30.

61. *Id.* at 30. The court stated that nonacquiescence creates a "dual system of law" in cases involving the termination of disability benefits. The court explained that:

[i]f . . . a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law [announced by the Ninth Circuit]. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand.

Id.

62. The court stated that claimant's procedural due process argument raised sufficiently "serious legal questions" for preliminary injunction. *Id.* at 30. *But cf.* *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that procedural due process does not require an evidentiary hearing prior to termination of disability benefits).

63. The court asserted that the Secretary's policy of nonacquiescence "operate[s] outside the law." 572 F. Supp. at 30.

64. The court cited *Marbury* for the proposition that "governmental agencies, like all individuals and other entities, are obliged to follow and apply the law as it is interpreted by the courts." *Id.* at 29. *Accord* *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351 (6th Cir. 1983) (NLRB must follow Sixth

On appeal, the Ninth Circuit affirmed, rejecting the Secretary's claim that the preliminary injunction was improper.⁶⁵ The court noted that the Secretary's use of nonacquiescence undermines the doctrine of separation of powers.⁶⁶ The court also noted that *Mendoza* did not control the result because the plaintiffs sought to bind the Secretary by stare decisis rather than by nonmutual offensive collateral estoppel.⁶⁷

The Eighth Circuit addressed the constitutionality of the Secretary's nonacquiescence policy in *Hillhouse v. Harris*.⁶⁸ Prior to *Hillhouse*, the Eighth Circuit required the Secretary to consider subjective complaints of pain in making disability benefit determinations.⁶⁹ Commenting on the Secretary's policy of nonacquiescence, the court stressed that an Eighth Circuit decision binds litigants and administrative agencies, as well as lower courts within the circuit.⁷⁰ In a concurring opinion, Judge McMillian added that failure to follow the court's decisions in future cases would lead to contempt proceedings against the Secretary.⁷¹

In *Holden v. Heckler*,⁷² plaintiffs brought a class action suit challeng-

Circuit rule requiring consideration of entire administrative record); *Ithaca College v. NLRB*, 623 F.2d 244 (2d Cir. 1980) (rejecting the NLRB's nonacquiescence in Second Circuit opinion that was affirmed by the Supreme Court); *Mary Thompson Hosp. v. NLRB*, 621 F.2d 858 (7th Cir. 1980) (NLRB obligated under principles of stare decisis to follow Seventh Circuit decision requiring NLRB to consider proliferation of bargaining units in the health care industry before ordering labor bargaining); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965 (3d Cir. 1979) (rejecting the NLRB's nonacquiescence in Third Circuit decisions that establish bargaining standards).

65. 725 F.2d 1489 (9th Cir. 1984). The court, however, reversed the trial court's injunction to the extent it reached claimants who were terminated prior to the Ninth Circuit's decisions requiring medical improvement before disability benefit termination. *Id.* at 1510.

The Secretary sought a stay of the district court's preliminary injunction in the United States Court of Appeals for the Ninth Circuit. 713 F.2d 1432 (9th Cir. 1983). The Ninth Circuit denied the motion. Judge Pregerson, commenting on the Secretary's policy of nonacquiescence, added that "[t]he Secretary's ill-advised policy of refusing to obey the decisional law of the circuit is akin to the repudiated pre-Civil War doctrine of nullification." *Id.* at 1441.

66. *Id.* at 1497. The court stated that "this case presents . . . the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law." *Id.*

67. *Id.* at 1497 n.5. For a discussion of *United States v. Mendoza*, see *infra* notes 28-35 and accompanying text.

68. 715 F.2d 428 (1983).

69. See, e.g., *Brand v. Secretary of Dept. of Health, Educ. & Welfare*, 623 F.2d 523, 526 (8th Cir. 1980); *Northcutt v. Califano*, 581 F.2d 164, 166 (8th Cir. 1978).

70. 715 F.2d at 430. The court cited *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), for its proposition.

71. 715 F.2d at 430.

72. 584 F. Supp. 463 (N.D. Ohio 1984).

ing the Secretary's use of nonacquiescence.⁷³ Plaintiffs sought to enjoin the Secretary from implementing a disability standard that the Sixth Circuit had previously rejected.⁷⁴ In granting the claimants' motion for a preliminary injunction, the *Holden* court asserted that *Marbury v. Madison* and the principle of stare decisis compelled the Secretary to apply the decisions of the Sixth Circuit in all subsequent cases.⁷⁵ The court rejected the Secretary's argument that *Mendoza* sanctioned an agency's use of nonacquiescence.⁷⁶

Although Congress subsequently resolved many of the substantive areas of dispute between the litigants and the Secretary,⁷⁷ the unresolved issue remains regarding the extent to which a federal court decision binds the Department of Health and Human Services in subsequent cases.⁷⁸

V. ANALYSIS OF THE FEDERAL COURTS' REJECTION OF THE SECRETARY'S POLICY OF NONACQUIESCENCE

The federal courts rejected the Secretary's use of nonacquiescence, reasoning that the power of judicial review and stare decisis mandated agency adherence to judicial precedent.⁷⁹ This response to nonacquies-

73. *Id.* at 466. Claimants brought a class action suit challenging the Secretary's nonacquiescence in Sixth Circuit decisions requiring medical improvement prior to disability benefit termination. *Id.*

74. *See Hayes v. Secretary of H.E.W.*, 656 F.2d 201 (6th Cir. 1981) (placing burden of proof on Secretary to introduce evidence that claimant's condition has not improved). In *Holden*, the Secretary placed the burden of proof on the disability benefit recipient. 584 F. Supp. at 470-71.

75. 584 F. Supp. at 490-91. The court cited *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351 (6th Cir. 1983), for the proposition that *Marbury* binds nonparties. *Id.*

76. *Id.* at 491. For other examples of the federal courts' rejection of the Secretary's nonacquiescence policy, see *supra* note 57.

77. By enacting the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (codified as amended in scattered sections of 42 U.S.C.), Congress resolved many of the substantive areas of dispute between the litigants and the Secretary. The Act adopts the circuit courts' view requiring medical improvement prior to disability benefit termination. *Id.* § 1. The Act also adopts the *Hillhouse* approach requiring the Secretary to consider subjective complaints of pain in determining disability benefits. *Id.* § 3(a).

78. In response to criticism, the Secretary recently promulgated a modified nonacquiescence policy. *See* DEPT. OF HEALTH AND HUMAN SERVICES INTERIM CIRCULAR NO. 185 (1985). Under the modified policy, administrative law judges may recommend a decision that favors a claimant in accordance with applicable circuit court precedent, despite contrary Social Security Administration policy. The Appeals Council automatically reviews such decisions. The Council may accept an administrative law judge's recommendation or it may deny the recommendation if it believes that the issue merits relitigation in the circuit.

Although this policy represents a significant retreat from the Secretary's prior position on nonacquiescence, the policy still enables the agency to nonacquiesce in certain circumstances.

79. *See supra* notes 58-78 and accompanying text.

cence, however, represents a significant expansion of the scope of judicial review, meriting more than the courts' cursory explanations.

First, the power of judicial review should not preclude nonacquiescence. *Marbury* implicitly suggested that the power of judicial review affects only the judiciary and the parties to a case.⁸⁰ Therefore, judicial power should not extend to or bind a governmental agency. Although *Cooper v. Aaron* provides support for the federal courts' position, *Cooper* is distinguishable. *Cooper* held that a Supreme Court interpretation of the Constitution binds nonparty states and municipalities.⁸¹ Unlike *Cooper*, however, the federal courts purport to bind a coequal branch of the federal government with lower court precedent.⁸² Moreover, stare decisis should not preclude nonacquiescence. Stare decisis affects only the judiciary and the parties to a case.⁸³ If stare decisis and notions of judicial review bound all agencies and litigants to the Supreme Court's interpretation of the law, the Court might never overrule itself.⁸⁴

Second, *Mendoza* suggests that the tenets that preclude the use of non-mutual offensive collateral estoppel against the Government are equally applicable to preclude an expansion of judicial review and stare decisis. *Mendoza* recognized that a Government's decision to appeal or relitigate involves a variety of practical and policy considerations to which a court should defer.⁸⁵ Similarly, the Secretary's decision whether to appeal or relitigate contemplates an assessment of numerous practical and policy choices. Therefore, *Mendoza* supports the conclusion that judicial review and stare decisis should not preclude the Secretary's policy of non-acquiescence and relitigation.

Finally, the Supreme Court's consideration of nonacquiescence indicates that the federal courts incorrectly rejected the Secretary's policy of nonacquiescence. The Supreme Court has expressly and impliedly ap-

80. See *supra* note 15 and accompanying text.

81. See *supra* notes 19-22 and accompanying text.

82. The House Report to the Social Security Disability Benefits Reform Act of 1984 notes: [t]he application of Supreme Court decisions to executive branch policies is virtually undisputed: if a particular policy is found unconstitutional, or contrary to the statute, that decision is binding on the agency. The appropriate application of circuit and district court decisions to agency policies is not . . . clear cut.

H.R. REP. NO. 98-618, 98th Cong., 2d Sess. 22 (1984).

83. See *supra* notes 25-27 and accompanying text.

84. Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion in Opposition to Plaintiff's Motion for a Preliminary Injunction at 14, *Lopez v. Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983).

85. See *supra* note 33 and accompanying text.

proved of administrative agency nonacquiescence.⁸⁶ In short, because traditional notions of the power of judicial review and *stare decisis* do not preclude nonacquiescence, and because the tenets that underlie *Mendoza* implicitly approved of the policy, the Secretary's use of nonacquiescence appears constitutionally legitimate.

VI. LIMITATIONS ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' NONACQUIESCENCE POLICY

A. *Efficiency and Fairness*

Although nonacquiescence may be constitutionally justified, concerns of efficiency and fairness support its limited use.⁸⁷ Once a circuit court firmly establishes its policy, relitigation of that question within the circuit wastes governmental resources.⁸⁸ Moreover, although nonacquiescence promotes equal treatment of claimants throughout the entire Social Security system, it produces gross inequality among claimants within a circuit.⁸⁹ Claimants who appeal an administrative agency's adverse decision to federal court receive the benefit of the federal court's rule.⁹⁰ Claimants who lack the resources and perseverance to appeal, however, are bound by the Secretary's interpretation.⁹¹ These considerations suggest that the Secretary should exercise restraint in her use of nonacquiescence.

B. *Proposed Limitations*

Professor Wechsler argues that the government should acquiesce only after repeated litigation without court reversal.⁹² This approach would recognize concerns of judicial efficiency and would permit a degree of administrative agency relitigation.⁹³ In addition, Wechsler's framework

86. See *supra* notes 36-51 and accompanying text.

87. See THE NATIONAL CENTER FOR ADMINISTRATIVE JUSTICE, SOCIAL SECURITY HEARINGS AND APPEALS, A STUDY OF THE SOCIAL SECURITY ADMINISTRATIVE HEARING SYSTEM 112 (1978) [hereinafter cited as NATIONAL CENTER STUDY]. See also Vestal, *supra* note 37, at 175.

88. Vestal, *supra* note 37, at 175.

89. Lopez v. Heckler, 572 F. Supp. 26, 30 (C.D. Cal. 1983).

90. See, e.g., Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981) (Ninth Circuit imposing requirement for medical improvement prior to terminating disability benefits).

91. See *supra* note 1.

92. See Wechsler, *supra* note 15, at 1008-09.

93. A study conducted by the National Center for Administrative Justice criticizes the Secretary's policy of nonacquiescence. The study, however, asserts that legitimate reasons to nonacquiescence exist. It recommends a flexible approach, stressing formal published nonacquiescence. The

would be compatible with *Mendoza's* concern for judicial deference to governmental decisions to appeal.⁹⁴ This approach would also be reconcilable with past Supreme Court approval of nonacquiescence.⁹⁵ Unlike the lower federal courts' absolute bar, an adoption of Wechsler's formulation would be consistent with traditional notions of the power of judicial review and stare decisis.⁹⁶ Although ad hoc, it would provide the flexibility to curb abusive relitigation tactics.

The House of Representatives has also proposed a plan to limit the use of nonacquiescence.⁹⁷ The proposal would force agency adherence to court of appeals decisions within a circuit.⁹⁸ Although Congress did not adopt the proposal, it remains a possibility for future use. Under the proposed plan, the Department of Health and Human Services would be required to acquiesce or petition for Supreme Court review.⁹⁹ The proposal would require adherence if the Supreme Court denied the agency's petition.¹⁰⁰

The adherence requirement proposal, however, would invade the Executive's power to administer the Social Security Act. In addition, it would prevent uniform application of the Social Security Act at the administrative level.¹⁰¹ Moreover, the proposal would preclude nonacquiescence when the agency had legitimate reasons for not seeking Supreme

study argues that this procedure would inform those implementing the benefit review process how to treat federal court opinions. By explaining the reason for nonacquiescence, the Secretary would reassure the judiciary that judicial authority is not ignored arbitrarily. Also, formal nonacquiescence compels the Secretary to confront and evaluate the courts' holdings. See NATIONAL CENTER STUDY, *supra* note 87, at 114.

This flexible procedure would be consistent with the Wechsler framework. It would, however, place an additional duty on the Secretary. This duty would not be unreasonably burdensome given the Secretary's current formal nonacquiescence policy.

In *Lopez*, the Secretary formally nonacquiesced in Ninth Circuit decisions. Under the Wechsler formula, relitigation by the Secretary would not be justified despite formal nonacquiescence if the relitigated Ninth Circuit decisions were firmly established in the circuit. Both *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), and *Finnegan v. Mathews*, 641 F.2d 1340 (9th Cir. 1981), however, were relatively recent decisions at the time of *Lopez*. Absent continued reaffirmation of those decisions within the Ninth Circuit, the Secretary's relitigation in *Lopez* would appear to satisfy the Wechsler formulation, particularly in light of the number of other circuits that did not require a showing of medical improvement prior to terminating disability benefits.

94. See *supra* notes 30-35 and accompanying text.

95. See *supra* notes 36-51 and accompanying text.

96. See *supra* notes 12-22 and accompanying text.

97. See H.R. 3755, 98th Cong., 1st Sess. § 302 (1984).

98. *Id.*

99. *Id.*

100. *Id.*

101. See *supra* note 7 and accompanying text.

Court review.¹⁰²

Nevertheless, the proposal possesses several positive features. Although the adherence requirement proposal would result in inter-circuit differentiation, the plan would further intracircuit equality among claimants.¹⁰³ Moreover, the proposal would not preclude the Secretary from obtaining congressional clarification of the statute in issue.¹⁰⁴

Congress' proposal to create a federal Social Security Court would also limit the Secretary's use of nonacquiescence.¹⁰⁵ Under the proposal, all appeals from the administrative agency would go directly to the Social Security Court.¹⁰⁶ This court would be staffed by twenty presidentially-appointed judges with ten-year judicial terms.¹⁰⁷ The United States Court of Appeals for the District of Columbia would have exclusive jurisdiction to review Social Security Court decisions.¹⁰⁸

The single court system would create uniform nationwide precedent, thereby allaying agency concern for uniform application of the Social Security Act.¹⁰⁹ By eliminating a primary rationale for nonacquiescence, the proposal would reduce intracircuit relitigation and its burden on federal district courts.¹¹⁰ Finally, the Social Security Act would permit statutory interpretation by judges possessing developed expertise in the area.¹¹¹

Opponents of the proposal dispute the need for a Social Security Court. They claim that the burden on federal courts is decreasing.¹¹² In addition, opponents argue that social security litigation is noncomplex and well-suited to local solutions.¹¹³ Opponents argue that creating a new federal court would entail unwanted expense.¹¹⁴ Moreover, oppo-

102. *See supra* notes 7-11 and accompanying text.

103. *See supra* notes 89-91 and accompanying text.

104. H.R. REP. NO. 98-618, 98th Cong., 2d Sess. 23 (1984).

105. H.R. 3865, 97th Cong., 1st Sess., 127 CONG. REC. 2815 (1981). Other specialized federal courts include the Tax Court, 26 U.S.C. § 7441 (1982), and the United States Court of Military Appeals, 10 U.S.C. § 867 (1982).

106. H.R. 3865, 97th Cong., 1st Sess. (1981).

107. H.R. 3865, 97th Cong., 1st Sess., § 1130(c)(1) (1981).

108. H.R. 3865, 97th Cong., 1st Sess., § 1130(g) (1981). The Supreme Court would have the power to review constitutional and statutory issues.

109. NATIONAL COMMISSION ON SOCIAL SECURITY, SOCIAL SECURITY IN AMERICA'S FUTURE 222-23 (1981).

110. *See id.* at 223.

111. *Id.*

112. *See Ogilvy, The Social Security Court Proposal: A Critique*, 9 J. LEGIS. 229, 237-39 (1982).

113. *Id.* at 239.

114. *Id.* at 240-41. Professor Ogilvy estimates that the proposed court would cost \$10,000,000

nents favor generalist federal district court judges over specialists, claiming that the possibility of institutional bias by specialist judges would necessitate substantial judicial independence.¹¹⁵

The proposal's creation of ten-year judicial terms, however, would ensure this independence.¹¹⁶ Congress could provide even greater independence by providing a fifteen-year term.¹¹⁷ In addition, recent data indicate that social security litigation in federal courts is increasing and is burdensome.¹¹⁸ Moreover, the Social Security Act does not suggest congressional intent to provide local solutions to perceived problems.¹¹⁹ The Social Security Court would provide a means to alleviate the serious burdens placed on the federal court system.

CONCLUSION

The federal courts must reassess the constitutionality of the Health and Human Services' use of nonacquiescence. The courts' assertion that *Marbury v. Madison* and stare decisis control the constitutionality issue is inconsistent with a traditional view of the power of judicial review, stare decisis, Supreme Court approval of agency nonacquiescence, and *Mendoza*. The Wechsler proposal would permit a degree of agency nonacquiescence and relitigation and would address judicial efficiency concerns. The Social Security Court proposal would provide uniformity among the circuits and would relieve the federal courts of the burden of social security litigation. In addition, the Social Security Court proposal would correct the disparate treatment of disability claimants. Both proposals would effectively limit the undesirable effects of nonacquiescence, while retaining the benefits that underlie its use.

W. Gordon Dobie

per year. *Id.* For an opposing perspective, see Arner, *The Social Security Court Proposal: An Answer to a Critique*, 10 J. LEGIS. 324 (1983).

115. The House Subcommittee on Social Security reports that this opposition arises from legal aid attorneys. STAFF OF SUBCOMM. ON SOCIAL SECURITY OF THE COMM. ON WAYS AND MEANS, 97th Cong., 1st Sess., SOCIAL SECURITY HEARINGS AND APPEALS: PENDING PROBLEM AND PROPOSED SOLUTIONS 12, 14 (Comm. Print 1981).

116. H.R. 3865, 97th Cong., 1st Sess. 7 (1981).

117. See Arner, *supra* note 114, at 342.

118. See *supra* note 56 and accompanying text.

119. See Arner, *supra* note 114, at 330-31.