



Fall 9-1-1985

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Recommended Citation

Agency Nonacquiescence: Implementation, Justification and Acceptability, 42 Wash. & Lee L. Rev. 1233 (1985).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol42/iss4/6>

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AGENCY NONACQUIESCENCE: IMPLEMENTATION, JUSTIFICATION, AND ACCEPTABILITY

Nonacquiescence is the practice of some administrative agencies of neglecting to appeal, but refusing to follow, federal district and circuit court decisions that interpret the agency's authorization statute inconsistently with an agency interpretation of the statute.¹ Agency nonacquiescence may be intercircuit or intracircuit in nature.² Intercircuit nonacquiescence, or "relitigation," is agency disregard for the authoritative influence of a circuit court's ruling on a point of law when the agency is deciding an identical point of law in a similar factual situation within another circuit.³ Intracircuit nonacquiescence involves an agency's limitation of a court's ruling or interpretation to the parties before the court and subsequent refusal to apply the

1. See *Lopez v. Heckler*, 725 F.2d 1489, 1493-94 (9th Cir. 1984) (Secretary of Health and Human Services (Secretary) disagreed with Ninth Circuit's holdings and announced that agency did not acquiesce in and would not follow holdings), *vacated as moot*, 53 U.S.L.W. 3435 (U.S. Dec. 10, 1984); *Fincke v. Heckler*, 596 F. Supp. 125, 128 (D. Nev. 1984) (Secretary disagreed with Ninth Circuit's holding and issued nonacquiescence order that all administrative law judges should follow Social Security Administration (SSA) policy and disobey Circuit's standard for termination of disability benefits); see also *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672-73 (D.C. Cir. 1981) (Internal Revenue Service (IRS) acts on basis of legal memorandum supplied by attorneys in Tax Litigation Division in determining whether to follow rule that federal court decision supplies); *NLRB v. Eastern Smelting & Ref. Corp.*, 598 F.2d 666, 669, 671 (1st Cir. 1979) (NLRB's consistent disregard of First Circuit case law resulted in First Circuit's hearing within one week four cases involving single principle over which court and NLRB had disagreed for more than ten years); *Snyder v. United States*, 582 F. Supp. 196, 199 (D. Md. 1984) (nonacquiescence means that IRS will not follow decisions of Tax Court in disposing of similar cases); SSR 82-10c (1982) (stating Social Security Administration's nonacquiescence to Ninth Circuit's interpretation of disability benefits provisions of Social Security Act); *Mattson, The United States Circuit Courts and the NLRB: Stare Decisis Only Applies If the Agency Wins*, 53 OKLA. B.J. 2561, 2561 (1982) (NLRB has utilized policy called "doctrine of nonacquiescence" to justify disregarding circuit courts' established rules of law with which Board disagrees); Note, *The Commissioner's Nonacquiescence*, 40 S. CAL. L. REV. 550, 550 (1967) (Commissioner of IRS has acted under his interpretation of revenue laws despite decisions of courts of appeals against that interpretation). See generally *Ferguson, The NLRB vs. the Courts: The Board's Refusal to Acquiesce in the Law of the Federal Circuit Courts of Appeals*, 35 N.Y.U. ANN. CONF. ON LAB. 195, 195-203 (1983) (stating NLRB's belief that agency can acquiesce or not acquiesce in rule of law that circuit court articulates and providing examples of NLRB's practice).

2. See *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) (distinguishing policy of Secretary of Health and Human Services (Secretary) of refusing to follow Ninth Circuit's decisions within circuit from agencies' policies of refusing to follow circuit court's decisions within other circuits).

3. See *Goodman's Furniture v. United States*, 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring) (federal government will continue to litigate in other circuits question that only one circuit has resolved); *id.* (ordinary effect of agency nonacquiescence is that agency adheres to court ruling in circuit of origin but disregards ruling in other circuits); see also *Vestal, Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 123 (1977) (all federal agencies engage in relitigation).

ruling as binding precedent in factually similar cases arising within the same circuit.⁴ Often federal agencies will continue to follow a judicially rejected agency position within the court of decision's circuit while presenting the position to other courts in an attempt to justify use of the position or simply to create conflict among the circuits.⁵ Most agency nonacquiescence, therefore, contains intercircuit as well as intracircuit characteristics.⁶ In general, then, nonacquiescence is essentially agency refusal to acknowledge the general precedent the judiciary has established.⁷

An agency may announce or internally develop a policy of nonacquiescence in many ways.⁸ A statement of nonacquiescence may appear in an agency case opinion,⁹ ruling,¹⁰ memorandum,¹¹ or formal policy state-

4. See *Polaski v. Heckler*, 585 F. Supp. 1004, 1011 (D. Minn.) (Secretary follows court's ruling regarding individual claimant whose case was before court but ignores general precedential effect of ruling), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984); see also *Mattson*, *supra* note 1, at 2561 (NLRB employs policy of nonacquiescence even within circuit court that has repeatedly settled point of law).

5. See *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 357, 358 (6th Cir. 1983) (five circuits condemned NLRB practice and yet NLRB continued to adhere to practice in all circuits); *Vestal*, *supra* note 3, at 123, 126 (as matter of general policy many agencies will continue to adhere to position courts have rejected and present same position to other courts). Compare *May Dep't Stores Co. v. Williamson*, 549 F.2d 1147, 1150 (8th Cir. 1977) (tremendous burden and costs that government relitigation strategy of forum shopping places on federal courts grossly outweigh benefits of strategy) and *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980) (NLRB owes deference to other courts of appeals that have ruled on issue before agency) with *United Steelworkers of Am. v. NLRB*, 377 F.2d 140, 141 (D.C. Cir. 1966) (agency's attempt to seek conflict in circuits on point of law is acceptable course of action in view of Supreme Court policy of granting writs of certiorari to resolve circuit conflicts).

6. See H.R. REP. NO. 618, 98th Cong., 2d Sess. 23 (1976) (SSA does not follow court of appeals decisions with which agency disagrees, either nationwide or within circuit rendering decision); *Vestal*, *supra* note 3, at 126 (in two instances, NLRB relitigated question of law until five circuits had rejected NLRB position and yet agency still persisted in adhering to position in all circuits).

7. See *Hill v. Heckler*, 592 F. Supp. 1198, 1210 (W.D. Okla. 1985) (agency nonacquiesced by issuing formal ruling instructing agency personnel not to consider court's ruling as binding precedent); H.R. REP. NO. 466, 98th Cong., 2d Sess. 21 (1984) (SSA follows all final judgments of federal courts with respect to individuals in particular suits but does not consider policy approach embodied in courts' decisions binding on agency with respect to nonlitigants).

8. See *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672-73 (D.C. Cir. 1981) (detailing internal IRS nonacquiescence procedures and development); *Polaski v. Heckler*, 585 F. Supp. 1004, 1011 n.5 (D. Minn.) (agency nonacquiescence policy can exist even without formal declaration), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated in part as moot and remanded*, 751 F.2d 943 (8th Cir., 1984); see also J. QUIGGLE & L. REDMAN, *PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE* § 2.02(c), at 43-44 (1984) (discussing internal and confidential nonacquiescences as well as formal announcements); *Mattson*, *supra* note 1, at 2563, 2565 (NLRB nonacquiesces by labeling court's remanded compliance order "law of the case" and offers no guidelines or explanation for limiting court's decision).

9. See *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (SSA's Appeals Council stated agency's general nonacquiescence policy in Council's findings in case).

10. SSR 82-10c (1982) (SSA's ruling of nonacquiescence to Ninth Circuit's interpretation of provisions of Social Security Act).

11. H.R. REP. NO. 618, 98th Cong., 2d Sess. 24 (1984) (quoting memorandum from

ment.¹² In some instances an agency may profess to follow the law established by a circuit court but may employ tacit nonacquiescence by de-emphasizing that law, by attempting to distinguish the fact patterns in subsequent and analogous agency cases, or by misapplying the established circuit law to the facts of subsequent cases.¹³ Three important federal agencies, the Social Security Administration (SSA), as directed by the Secretary of Health and Human Services (Secretary), the National Labor Relations Board (NLRB), and the Internal Revenue Service (IRS), have maintained nonacquiescence policies.¹⁴ The three agencies have developed different means of implementing nonacquiescence, have offered different reasons for utilizing the policy, and have faced varying degrees of judicial opposition.¹⁵ The propriety of utilizing nonacquiescence varies with the differing nature of each agency and the nonacquiescence policy the agency employs.¹⁶

Until October 1984, when Congress passed the Social Security Disability Benefits Reform Act, the Secretary and the SSA had disagreed openly with the federal courts of appeal over two issues concerning benefits disbursement not specifically addressed in the Social Security Act.¹⁷ One of the judicial

Associate Commissioner for Hearings and Appeals issued to Social Security administrative law judges stating SSA's nonacquiescence policy).

12. *Ithaca College v. NLRB*, 623 F.2d 224, 226-27 (2d Cir. 1980) (NLRB nonacquiescence expressed in policy statement letter from Regional Director and in footnote in Board case decision).

13. *See, e.g., NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 128 (2d Cir. 1984) (although NLRB attempted to distinguish controlling Third Circuit case, court determined that NLRB actually had adhered to previously rejected agency decision); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983) (NLRB does not profess to disagree with courts of appeals' decisions on principles of law but instead disingenuously misapplies law to facts); *Polaski v. Heckler*, 585 F. Supp. 997, 1001 (D. Minn.) (SSA administrative law judge gave only lip service to applicable Eighth Circuit rulings), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated in part as moot and remanded*, 751 F.2d 943 (8th Cir. 1984).

14. *See, e.g., Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 383 (D.C. Cir. 1983) (admonishing NLRB to cease wilful defiance of settled, controlling judicial precedent); *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672-73 (D.C. Cir. 1981) (detailing IRS nonacquiescence policy); SSR 82-49c (1982) (Secretary's nonacquiescence to Ninth Circuit ruling); SSR 82-10c (1982) (SSA's nonacquiescence in Sixth Circuit's interpretation of Social Security Act provision); *see also* Ferguson, *supra* note 1, at 196-206 (providing definition, examples, and history of NLRB nonacquiescence); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 768, 771-73 (1965) (detailing history of IRS nonacquiescence policy regarding Tax Court opinions).

15. *See infra* notes 17-90 and 100-74 and accompanying text (discussing IRS, NLRB, and SSA nonacquiescence and judicial reaction to policies).

16. *See infra* notes 182-200 and accompanying text (discussing varying acceptability of nonacquiescence practices of IRS, NLRB and SSA).

17. *See Polaski v. Heckler*, 751 F.2d 943, 944 (8th Cir. 1984) (circuit courts and Secretary have disputed proper construction of Social Security Act with respect to standards for subjective pain evidence and benefits termination); H.R. REP. NO. 618, 98th Cong., 2d Sess. 9, 11 (1984) (Social Security Act contained no guidelines or criteria for termination of benefits); *see also* Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

interpretations of the Social Security Act in which the Secretary nonacquiesced required the SSA to show significant improvement in a claimant's medical condition before terminating the claimant's disability benefits.¹⁸ The second ruling in which the Secretary nonacquiesced required the SSA to give serious consideration to claimants' subjective complaints of pain when determining whether claimants were sufficiently medically disabled to receive disability benefits.¹⁹

The disagreement over the proper standard for evaluating a claimant's medical condition originated in 1976 when the SSA abandoned the judicially accepted "medical improvement" standard and adopted instead a "current disability" standard.²⁰ The medical improvement standard required the SSA to show that a claimant's medical condition actually had improved to the point of recovery before the SSA could terminate the claimant's benefits.²¹ Some courts have referred to the medical improvement standard as the "presumption of continuing disability" standard.²² The Secretary first published the current disability standard in August 1980 by promulgating regulations interpreting the Social Security Act as not requiring that medical improvement occur in a claimant's disability before termination of benefits.²³ The current disability standard allows the Secretary to terminate benefits when evidence shows that the claimant is able to engage in gainful activity.²⁴

18. See *Fincke v. Heckler*, 596 F. Supp. 125, 128 (D. Nev. 1984) (Secretary ordered administrative law judges to disregard two Ninth Circuit rulings and instead follow overruled SSA benefits termination standards); see also *Finnegan v. Matthews*, 641 F.2d 1340, 1345 (9th Cir. 1981) (Secretary may not terminate benefits unless SSA shows medical improvement such that claimant is no longer continuously disabled).

19. See H.R. REP. No. 618, 98th Cong., 2d Sess. 24 (1984) (Secretary has refused to apply standard for evaluation of subjective complaints of pain as enunciated by several circuit courts); see also *Polaski v. Heckler*, 585 F. Supp. 997, 1001 & n.1 (D. Minn.) (listing 19 cases in which Eighth Circuit ruled that Secretary had to give serious consideration to claimant's subjective complaints of pain even in absence of corroborating medical evidence), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated in part as moot and remanded*, 751 F.2d 943 (8th Cir. 1984).

20. See *Holden v. Heckler*, 584 F. Supp. 463, 470 (N.D. Ohio 1984) (parties stipulated that since June 1, 1976 Secretary had applied standard of current disability). The legislative history accompanying Congress' passage of the Social Security Disability Insurance program in 1956 provided little indication of congressional intent regarding the proper standard for terminating an individual's disability benefits. *Id.* at 469.

21. *Id.* at 469

22. *Id.* at 472-73 (courts have imposed standard labeled either "medical improvement standard" or "presumption of continuing disability" and both standards are substantively identical); see *Dotson v. Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983) (agreeing with Ninth Circuit that SSA's initial determination of plaintiff's disability gave rise to presumption that plaintiff was still disabled and Secretary was required to rebut presumption); *Edwards v. Secretary of Dep't of Health and Human Serv.*, 572 F. Supp. 1235, 1239-40 (E.D.N.Y. 1983) (presumption of continuing disability is consistent with statutory scheme of Social Security Act).

23. See *Holden v. Heckler*, 584 F. Supp. 463, 470 (N.D. Ohio 1984) (in August 1980, Secretary formally promulgated regulations interpreting Social Security Act as not requiring that claimant's medical disability improve before termination of benefits); see also 20 C.F.R. §§ 404.1594, 416.994(e) (1984) (expressing current disability standard).

24. See SSR 81-6 (Jan. 1981) (outlining disability standard); 45 Fed. Reg. 55,583 (1980)

In opposition to the SSA's current disability standard, the Ninth Circuit, in a 1981 decision, adopted the medical improvement standard for determining the propriety of benefits termination.²⁵ In January 1982, the Secretary issued a Social Security Ruling of nonacquiescence in the Ninth Circuit's decision, directing administrative law judges to continue to follow the current disability standard as codified in the Code of Federal Regulations.²⁶ The Ninth Circuit in February 1982 again overruled an SSA benefit termination decision and reaffirmed the position that the Secretary should use the court's medical improvement standard.²⁷ The Secretary again issued a nonacquiescence ruling.²⁸ Later in February, the Associate Commissioner of the SSA's Office of Hearings and Appeals sent a memorandum to all administrative law judges, reminding the judges of the Secretary's nonacquiescence directive and the binding effect of the directive.²⁹ The Associate Commissioner's memorandum stated that administrative law judges must apply the SSA's policy even in cases involving claimants residing within the jurisdiction of the Ninth Circuit Court of Appeals.³⁰

The Secretary's continuing refusal to follow Ninth Circuit precedent induced individuals whose benefits were terminated under the SSA's standard to file a class action and seek a preliminary injunction in the United States District Court for the Central District of California.³¹ In *Lopez v. Heckler*,³² the plaintiff class challenged the constitutionality of the Secretary's intracir-

(Secretary stating that recodified disability regulations meant disability ends when current evidence shows that an individual is able to engage in gainful activity); 45 Fed. Reg. 55,568 (1980) (new regulations embody 1976 SSA abandonment of medical improvement standard in favor of findings of lack of disability based on new evidence). When evidence obtained at the time of continuing disability investigation establishes that a claimant is not currently disabled, a cessation of disability support is appropriate irrespective of whether or how much the claimant's condition has medically improved since a prior favorable determination. SSR 81-6 (Jan. 1981).

25. See *Finnegan v. Matthews*, 641 F.2d 1340, 1345 (9th Cir. 1981) (Secretary may not terminate benefits unless SSA shows medical improvement such that claimant is no longer continuously disabled).

26. SSR 82-10c (1982); see 20 C.F.R. § 416.994(e) (1984) (expressing current disability standard).

27. See *Patti v. Schweiker*, 669 F.2d 582, 587 (9th Cir. 1982) (Secretary has burden of presenting evidence that claimant's medical condition has improved).

28. SSR 82-49c (1982).

29. See *Kuehner v. Schweiker*, 717 F.2d 813, 824 (3d Cir. 1983) (quoting portions of Hays memorandum to administrative law judges); H.R. REP. No. 618, 98th Cong., 2d Sess. 24 (1984) (quoting portion of memorandum to administrative law judges).

30. See *Kuehner v. Schweiker*, 717 F.2d 813, 824 (3d Cir. 1983) (quoting portion of Hays memorandum).

31. See *Lopez v. Heckler*, 572 F. Supp. 26, 27-28 (C.D. Cal.) (Social Security claimants filed class action challenging Secretary's use of nonacquiescence policy), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

32. *Id.*

cuit nonacquiescence policy on the grounds that the policy violated constitutional principles of separation of powers and due process and the jurisprudential principle of stare decisis.³³ The California district court granted a preliminary injunction restraining the Secretary from implementing the nonacquiescence policy.³⁴

The United States Court of Appeals for the Ninth Circuit subsequently denied the Secretary's request for a stay of the *Lopez* injunction.³⁵ The Ninth Circuit noted that the district court had emphasized the negative due process and equal protection implications of the Secretary's policy and favorably quoted from the district court's opinion.³⁶ The Ninth Circuit in *Lopez* stated that even if the Secretary's policy did not violate the Constitution, the courts would reject the policy summarily whenever challenged in the Ninth Circuit.³⁷ After the Supreme Court granted the Secretary's request for a partial stay of the injunction,³⁸ the Ninth Circuit again considered the constitutionality of the Secretary's nonacquiescence policy.³⁹ The *Lopez* court acknowledged that the federal judicial interpretation of the Constitution is the supreme law of the land and is binding on state officers.⁴⁰ The Ninth Circuit reasoned that the federal courts' interpretation of federal statutory law also binds federal executive officers.⁴¹ The *Lopez* court, therefore, concluded that the Ninth Circuit's interpretation of the Social Security Act was binding on the Secretary.⁴² Eventually ten circuits adopted the medical improvement or presumption of continuing disability standard, yet the Secretary continued to nonacquiesce in all ten circuits.⁴³

33. *Id.* at 28.

34. *Id.* at 32.

35. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

36. *Id.* at 1439-40 (quoting *Lopez* district court's statement that Secretary's nonacquiescence policy creates dual standard by subjecting poorer claimants to agency nonacquiescence position while claimants with more resources could reach courts and benefit from more favorable judicial position).

37. *Id.* at 1438.

38. *Lopez v. Heckler*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983).

39. *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

40. *Id.* at 1497 n.5; *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (Supreme Court's construction of fourteenth amendment is supreme law of land and is binding on all state government officials); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (judiciary has special duty to interpret federal law).

41. *Lopez*, 725 F.2d at 1497 n.5; *see U.S. CONST.* art. VI, cl. 2 (laws made pursuant to Constitution are supreme law of land); *U.S. CONST.* art. II, § 3 (President shall take care to see that laws are faithfully executed).

42. *See Lopez*, 725 F.2d at 1503 (as member of executive branch, Secretary is required to apply federal courts' interpretation of federal law).

43. *See Holden v. Heckler*, 584 F. Supp. 463, 472 (N.D. Ohio 1984) (ten circuit courts have held that Secretary may not terminate claimants' disability benefits without showing that

A second issue concerning benefits disbursement over which several circuits and the SSA came to disagree involved the proper standard to apply in analyzing a claimant's subjective complaints of disabling pain.⁴⁴ In a series of nineteen cases dating back to 1974, the Eighth Circuit established that the Secretary was required to give serious consideration to claimants' subjective complaints of pain even when no objective medical evidence existed to corroborate the complaints.⁴⁵ The Secretary's nonacquiescence in the Eighth Circuit's pain standard was less open than the nonacquiescence to the Ninth Circuit's benefit termination standard.⁴⁶ In *Polaski v. Heckler*,⁴⁷ the Secretary contended to the United States District Court for the District of Minnesota that the SSA was following Eighth Circuit law.⁴⁸ In granting the plaintiff class' motion for a preliminary injunction, the district court found that a systemwide policy of ignoring Eighth Circuit precedent existed.⁴⁹ Specifically, the district court cited an SSA regulation and a Social Security Ruling, both of which required a claimant to present objective medical evidence of a medical condition that reasonably could be expected to produce the symptoms of which the claimant complained.⁵⁰ The district court concluded that by requiring the claimant to show a direct cause and effect relationship between

previous determination of disability is no longer valid). *But see* Hill v. Heckler, 592 F. Supp. 1198, 1212 (W.D. Okla. 1984) (Tenth Circuit never has held expressly that Secretary's standard of review is illegal nor has Secretary nonacquiesced in Tenth Circuit case as SSA has done in every other circuit imposing "medical improvement" standard). Many circuits have held that before finding that a beneficiary under the Social Security Act is no longer disabled, the SSA must show medical improvement in the beneficiary's condition. H.R. REP. No. 618, 98th Cong., 2d Sess. 24 (1984). The Secretary nonacquiesced in all decisions either formally or by refusing to apply the courts' rulings as precedent. *Id.*

44. *See* Polaski v. Heckler, 751 F.2d 943, 944 (8th Cir. 1984) (noting conflict between circuit courts and Secretary over proper standard for analyzing claimant's subjective complaints of pain); Polaski v. Heckler, 585 F. Supp. 997, 1008 (D. Minn. 1984) (claimant need not show direct cause and effect relationship between his condition and level of pain he suffers); *see also* Green v. Schweiker, 749 F.2d 1066, 1067 (3d Cir. 1984) (SSA administrative law judge refused to apply Third Circuit's subjective pain standard in discounting claimant's complaints of disabling pain); Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981) (SSA must consider seriously subjective complaints of pain even where complaints are not fully confirmed by objective medical evidence). With the exception of the District of Columbia Circuit, every circuit court has ruled that the SSA must allow claimants to present subjective evidence of pain when adjudicating claimants' eligibility for disability benefits. H.R. REP. No. 618, 98th Cong., 2d Sess. 24 (1984). In each circuit, the SSA has not applied the court of appeals' pain standard as precedent. *Id.*

45. Polaski v. Heckler, 585 F. Supp. 997, 1001 & n.1 (D. Minn. 1984), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984).

46. *Compare id.* at 1008, 1009 (Secretary contended that SSA was following Eighth Circuit's pain standard) with SSR 82-10c (1982) (SSA specifically nonacquiescing to benefits termination standard set forth in Ninth Circuit opinion).

47. 585 F. Supp. 1004 (D. Minn.), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984).

48. *Id.* at 1008, 1009.

49. *Id.* at 1008.

50. *Id.* at 1009-10; *see* 20 C.F.R. § 404.1529 (1984) (SSA stating that agency would never

the disabling condition and the level of pain suffered, the Secretary was acting contrary to Eighth Circuit law.⁵¹ The Minnesota district court found that the Secretary need not issue a formal ruling of nonacquiescence for a practice of nonacquiescence actually to exist.⁵²

On appeal to the Eighth Circuit, the Secretary and the plaintiff class reached an out-of-court settlement regarding the proper pain standard after the court had deferred its decision at the close of oral argument.⁵³ The Eighth Circuit adopted the agreement as a correct restatement of the Circuit's case law because under the agreement claimants did not have to present direct medical evidence of a cause and effect relationship between the impairment and the degree of the claimants' subjective complaints.⁵⁴ The agreement, however, apparently left unresolved the Secretary's intracircuit nonacquiescence in the Eighth Circuit's medical improvement standard.⁵⁵

Perhaps the Secretary's persistent adherence to the rejected current disability and subjective pain standards has been in response to congressional pressure to reduce the number of disability claimants receiving benefits.⁵⁶ In enacting the Social Security Disability Act of 1980,⁵⁷ Congress expressed concern about reports that as many as twenty percent of all disability recipients were not qualified to receive benefits and instructed the Secretary to conduct periodic reviews of the qualifications of many beneficiaries.⁵⁸ Consequently, in March 1981, the Secretary accelerated the rate of disability status reviews.⁵⁹ Coupled with an application of pressure on administrative

find claimant disabled based on pain symptoms unless medical findings demonstrated that medical condition existed that reasonably could be expected to produce claimant's pain); SSR 82-58 (1982) (claimant must present objective medical basis to support overall evaluation of impairment severity). In arguing that the Secretary indeed was pursuing an unstated policy of nonacquiescence, the district court in *Polaski v. Heckler* noted two recent decisions in which the Secretary's Appeals Council had instructed the administrative law judge on remand to follow SSA regulations and rulings rather than the Eighth Circuit pain standard the district court had mandated. 585 F. Supp. at 1010.

51. *Id.* at 1008, 1009.

52. *Id.* at 1011 n.5.

53. *Polaski v. Heckler*, 739 F.2d 1320, 1321-22 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984).

54. *Id.* at 1322.

55. *Id.* at 1321-22.

56. *See infra* notes 57-64 and accompanying text (postulating congressional pressure to reduce number of claimants caused SSA nonacquiescence).

57. Pub. L. No. 96-265, 94 Stat. 441, 460 (codified as amended at 42 U.S.C. § 421(h) (1982)).

58. *See Holden v. Heckler*, 584 F. Supp. 463, 471 (N.D. Ohio 1984) (as consequence of congressional concern that 20% of all supposedly disabled benefits recipients reportedly were ineligible, Social Security Disability Act of 1980 provided for periodic SSA reviews of many beneficiaries).

59. *See Lopez v. Heckler*, 572 F. Supp. 26, 28 (C.D. Cal.) (beginning in March 1981, SSA accelerated rate at which agency reviewed disability status of those receiving disability benefits), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated as moot*, 53 U.S.L.W. 3435 (1984).

law judges to trim the disability rolls⁶⁰ as part of a SSA cost-cutting program,⁶¹ the increased review rate resulted in a large increase in terminations.⁶² Given the high reversal rate of SSA cases in the federal courts,⁶³ if the Secretary had adhered to the courts' less stringent standards for benefits review, the government would not have saved as much money as it actually did save through the cessation of benefits payments to so many claimants.⁶⁴

The Secretary has offered several justifications for use of nonacquiescence policies.⁶⁵ In a Social Security Ruling of nonacquiescence to the Ninth Circuit's medical improvement standard, the Secretary suggested that the court's standard would be impossible for the SSA administer because evidence on the basis of which state agencies originally conferred benefits might not be available or no longer may exist.⁶⁶ The *Lopez* district court countered this argument by stating that the agency should proceed in harmony with the Ninth Circuit rule and could infer an exception to the rule only if the facts in a particular case so required.⁶⁷ The district court noted that the judiciary has the particular duty to interpret the law and that this province of the court serves as the cornerstone of the doctrine of separation of powers.⁶⁸ The court stated that governmental agencies, therefore, like all other individuals and entities, must follow and apply the courts' interpreta-

60. See *Association of Admin. Law Judges, Inc. v. Heckler*, No. 84-0124 (D.D.C. Sept. 10, 1984) (available Feb. 10, 1985, on LEXIS, Genfed library, Dist file) (administrative law judges employed by Department of Health and Human Services and assigned to Office of Hearings and Appeals of SSA brought suit to challenge Secretary's review program and nonacquiescence policy as coercively restrictive of decisional independence).

61. See *Edwards v. Secretary of Dept. of Health and Human Serv.*, 572 F. Supp. 1235, 1238 (E.D.N.Y. 1983) (SSA apparently predicated termination of plaintiff claimant's benefits on Secretary's cost-cutting program).

62. See *Lopez v. Heckler*, 572 F. Supp. 26, 28 (C.D. Cal.) (acceleration of SSA's review process resulted in dramatic increase in benefits terminations), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated as moot*, 53 U.S.L.W. 3435 (1984).

63. See Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 *HAMLIN L. REV.* 1, 8 (1984) (Eighth Circuit reversed about 60% of all disability cases claimants appealed to court); see also *Holden v. Heckler*, 584 F. Supp. 463, 471 (E.D. Ohio 1984) (of approximately 350,000 disability terminations administrative law judges left undisturbed, federal courts ordered re-examination of 100,000 cases).

64. See *Polaski v. Heckler*, 585 F. Supp. 1004, 1012 (D. Minn.) (Secretary adopted nonacquiescence policies with intention of reducing number of people receiving benefits), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated in part as moot and remanded*, 751 F.2d 943 (8th Cir. 1984).

65. See *infra* notes 66-84 and accompanying text (SSA support for nonacquiescence policy).

66. SSR 82-10c (1982).

67. *Lopez v. Heckler*, 572 F. Supp. 26, 30 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

68. *Id.* at 29.

tion of the law.⁶⁹ Consequently, the *Lopez* district court reasoned that for the Secretary to completely refute courts of appeal precedent was to operate outside the law.⁷⁰ The Secretary also has asserted that only Supreme Court opinions bind the SSA and that district or circuit court opinions are binding only in the specific cases decided.⁷¹ The federal courts have countered the Secretary's argument by noting that, although the Secretary has professed to obey only Supreme Court rulings, the Secretary has refused to appeal many adverse decisions to the Supreme Court.⁷² Consequently, the courts have stated that the Secretary is seeking to eliminate the risk of being bound by an unfavorable decision by depriving the Supreme Court of the opportunity to issue opinions settling conflicts.⁷³

In addition to claiming that the SSA was circumventing the proper appeals process, federal courts have countered the SSA's assertion that only Supreme Court precedent binds the agency by referring to the doctrine of separation of powers.⁷⁴ The doctrine of separation of powers acknowledges that each of the three branches of the federal government retains a sphere of influence free of undue encroachment from the other branches into constitutionally mandated functions.⁷⁵ As the Ninth Circuit noted in *Lopez*, the judiciary has the exclusive duty to interpret the laws.⁷⁶ One court specifically stated that interpretation of the Social Security Act is a judicial function.⁷⁷ The courts have reasoned, therefore, that when the Secretary, a member of the executive branch, nonacquiesces, the Secretary usurps the

69. *Id.*

70. *Id.* at 30.

71. See *Hillhouse v. Harris*, 547 F. Supp. 88, 92 (W.D. Ark. 1982) (quoting Secretary's Appeals Council's findings), *aff'd*, 715 F.2d 428 (8th Cir. 1983).

72. See *Polaski v. Heckler*, 585 F. Supp. 1004, 1011 (D. Minn.) (Secretary will obey only edicts of Supreme Court, yet refuses to appeal adverse rulings to Court), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984).

73. *Id.*; see H.R. REP. No. 618, 98th Cong., 2d Sess. 23 (1984) (SSA practice of declining to appeal to Supreme Court ensures that Court will not have opportunity to review issue and render binding decision).

74. See *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir.) (Secretary's nonacquiescence undermines separation of powers precept), *vacated*, 53 U.S.L.W. 3435 (1984); *Polaski v. Heckler*, 585 F. Supp. 997, 1002 (D. Minn. 1984) (by refusing to follow Eighth Circuit's interpretation of law within circuit Secretary is acting in violation of constitutional doctrine of separation of powers), *aff'd*, 739 F.2d 1320 (8th Cir.), *vacated as moot in part and remanded*, 751 F.2d 943 (8th Cir. 1984).

75. See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (actions of any of three branches of federal government may not constitute an assumption of constitutional field of action of another branch); *United States v. Brainer*, 515 F. Supp. 627, 631 (D. Md. 1981) (executive and legislative branches cannot compromise institutional independence of judicial branch).

76. *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (judiciary has special duty to interpret meaning of federal law).

77. *Mayburg v. Heckler*, 574 F. Supp. 922, 929 (D. Mass. 1983), *aff'd sub nom.*, *Mayburg v. Secretary of Health and Human Serv.*, 740 F.2d 100 (1st Cir. 1984).

lawful authority of the judiciary in violation of the separation of powers.⁷⁸ The separation of powers principle, the courts assert, precludes the executive from overruling the judgments not only of the Supreme Court but also of the circuit and district courts.⁷⁹

The Secretary further sought to justify the nonacquiescence policy as a means of ensuring that claimants throughout the country are governed by uniform laws, rules, and regulations.⁸⁰ The courts have noted, however, that implementation of an intracircuit nonacquiescence policy actually leads to less uniformity, rather than more uniformity, in the application of law by creating a dual standard governing claimants.⁸¹ The *Lopez* district court noted that those claimants with the financial and physical ability to pursue appeals through the administrative process to the courts could expect the courts to apply the more favorable standard of benefits review.⁸² Conversely, the SSA would subject poorer claimants, who exhausted their resources and never reached the courts, to the agency's nonacquiescence policy and termination of benefits.⁸³

In addition to stating a need for uniformity, the Secretary has pointed to the courts' acceptance of the IRS' nonacquiescence policy as justification for the nonacquiescence policy of the SSA.⁸⁴ The Ninth Circuit in *Lopez*, however, noted that IRS nonacquiescence rulings are not applicable within the circuit that rendered the opinion to which the agency nonacquiesced.⁸⁵ The courts have stated that the material difference between IRS and SSA nonacquiescence is that IRS nonacquiescence is intercircuit in nature while the SSA's policy operates on an intracircuit basis.⁸⁶ The *Lopez* court recognized that because circuit conflict is inevitable, courts could not always expect agencies to give nationwide effect to the rulings of a court of appeals.⁸⁷

78. *Valdez v. Schweiker*, 575 F. Supp. 1203, 1205 (D. Colo. 1983).

79. *Id.*

80. *Association of Admin. Law Judges v. Heckler*, No. 84-0124 (D.C.C. Sept. 10, 1984) (available Feb. 10, 1985, on LEXIS, Genfed library, Dist file).

81. *See Lopez v. Heckler*, 572 F. Supp. 26, 30 (C.D. Cal.) (Secretary's policy of nonacquiescence creates two standards governing claimants whose disability benefits are terminated as result of nonacquiescence), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

82. *Id.*

83. *Id.*

84. *See Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir.) (in defense of nonacquiescence policy Secretary pointed out that IRS issues nonacquiescence rulings frequently), *vacated*, 53 U.S.L.W. 3435 (1984); *Fincke v. Heckler*, 596 F. Supp. 125, 129 (D. Nev. 1984) (Secretary analogizes IRS nonacquiescence practice to practice of HHS).

85. *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

86. *See id.*; *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) (Secretary's argument citing IRS nonacquiescence ignores ordinary effect of agency's nonacquiescence, which is adherence to court ruling in circuit of origin but disregard for ruling in other circuits).

87. *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984).

The *Lopez* court reasoned that instead of supporting the Secretary's nonacquiescence policy, the IRS policy recognizes that agencies must follow the holdings of a court of appeals within that circuit.⁸⁸

As the decisions of the Ninth Circuit in *Lopez* and the Eighth Circuit in *Polaski* indicate, judicial reaction to SSA nonacquiescence has been predominantly negative.⁸⁹ Courts critical of the SSA's nonacquiescence policy have analogized the policy to certain portions of the novels *Alice in Wonderland* and *Catch-22* and even have compared the policy with the pre-Civil War doctrine of nullification.⁹⁰ Congress, however, has not been as unequivocal

88. *Id.*

89. *See, e.g.,* *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring specially) (if Secretary persisted in pursuing nonacquiescence policy judge would seek to bring contempt proceedings against Secretary); *Holden v. Heckler*, 584 F. Supp. 463, 493 (N.D. Ohio 1984) (public interest requires that court condemn Secretary's policy); *Valdez v. Schweiker*, 575 F. Supp. 1203, 1205 (D. Colo. 1983) (if Secretary again refuses to follow district court order to adhere to Ninth Circuit precedent, court will invoke contempt powers); *see also supra* notes 62-83 (judicial counter arguments to Secretary's justifications for nonacquiescence). *But see* *Hill v. Heckler*, 592 F. Supp. 1198, 1210 (W.D. Okla. 1984) (Circuit courts' protestations over Secretary's nonacquiescence policy are contrary to will of Congress and dictates of Supreme Court).

Unlike most federal courts addressing the issue, the United States District Court for the Western District of Oklahoma in *Hill v. Heckler* did not condemn the SSA's nonacquiescence policy. *Id.* The *Hill* district court stated that although circuit after circuit had succumbed to the unsound reasoning and sympathetic claims of Social Security plaintiffs, the Tenth Circuit had not committed that error. *Id.* at 1200-01. The district court decided that the other circuits had contradicted congressional discretion vested in the SSA and had contravened a specific Supreme Court ruling when the circuits imposed a medical improvement standard on the SSA. *Id.* at 1210; *see* *Matthews v. Eldridge*, 424 U.S. 319, 336 (1976) (worker bears continuing burden of showing by medical diagnostic techniques that worker has physical or mental impairment in order to establish continued entitlement to disability benefits). The Oklahoma district court decided that the other circuits were accusing the Secretary of unconstitutionally refusing to acquiesce in the circuits' disobedience toward the Supreme Court and usurpation of legislative prerogatives and were thereby thwarting the Secretary's attempt to administer the Social Security Act in the congressionally prescribed uniform, nationwide manner. *Hill*, 592 F. Supp. at 1211. The *Hill* court determined that the origin of the medical improvement standard might have been merely a judicial description of then-current SSA policy rather than a judicial prescription for future SSA policy. *Id.* at 1212. The district court, therefore, refused to grant the claimants' motion for injunctive relief and instead granted the Secretary's motion to dismiss the plaintiff's claim. *Id.* at 1214.

90. *See* *Lopez v. Heckler*, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring) (Secretary's ill-advised policy of nonacquiescence is similar to repudiated pre-Civil War doctrine of nullification whereby rebellious states refused to recognize certain federal laws), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *emergency application to vacate stay denied*, 104 S. Ct. 221 (1983), *modified*, 725 F.2d 1489 (9th Cir.), *vacated*, 53 U.S.L.W. 3435 (1984); *Finnegan v. Matthews*, 641 F.2d 1340, 1344 n.5 (9th Cir. 1981) (analogizing Secretary's pronouncements of nonacquiescence to certain statements by Humpty Dumpty in novel *Alice in Wonderland*); *Holden v. Heckler*, 584 F. Supp. 463, 493 n.22 (N.D. Ohio 1984) (comparing Secretary's disability reviews conducted under overruled SSA standard with diagnosis in novel *Catch-22*).

in condemning SSA nonacquiescence as the courts have been.⁹¹ In drafting the Social Security Disability Benefits Reform Act of 1984 (Benefits Reform Act), the two houses of Congress adopted in their reports different views regarding SSA nonacquiescence.⁹² The House of Representatives' version of the Benefits Reform Act, in keeping with the thrust of the House report, would have required the Secretary to acquiesce in interpretive circuit court decisions and follow those decisions as precedent within the circuit of decision.⁹³ The Senate's bill, however, merely provided that Congress should not be understood as sanctioning any decision of the Secretary not to acquiesce.⁹⁴

The Benefits Reform Act, as enacted, adopted the Secretary's standards for benefits termination and for analyzing claimants' subjective complaints of pain.⁹⁵ The Benefits Reform Act, therefore, rendered the controversy between the Secretary and the courts moot without specifically addressing the nonacquiescence dispute.⁹⁶ The House-Senate committee of conference, however, did urge that the Secretary follow a policy of nonacquiescence only when the SSA has initiated or expects to initiate steps necessary to receive review in the Supreme Court.⁹⁷ If Supreme Court review proved unavailable or impractical, the committee members expected that the Secretary would propose appropriate remedial legislation for congressional resolution of a

91. See S. REP. NO. 466, 98th Cong., 2d Sess. 45-46 (1984) (statement of Sen. Long) (condemning result in cases where courts emphasize their interpretation of Social Security Act over SSA's statutory construction).

92. Compare H.R. REP. No. 618, 98th Cong., 2d Sess. 24, 25 (1984) (House Committee on Ways and Means expressing concern over duality SSA's nonacquiescence policy creates and improper agency confrontations with courts resulting from SSA's refusal to apply circuit courts' opinions), with S. REP. No. 446, 98th Cong., 2d Sess. 21 (1984) (Senate Committee on Finance stating that policy of mandatory acquiescence would interfere with long standing congressional importance attached to national uniformity).

93. See H.R. 3755, 98th Cong., 2d Sess. § 302 (1984).

94. See S. 476, 98th Cong., 2d Sess. § 7 (1984).

95. See Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, §§ 2(a), 3(a)(1), 98 Stat. 1794, 1794-96, 1799 (1984) (discounting previous determinations of disability in setting standard of review for benefits termination and requiring claimant to establish connection between demonstrable medical impairment and subjective complaints of pain); see also *Polaski v. Heckler*, 751 F.2d 943, 950 (8th Cir. 1984) (intent of Congress was to write Secretary's pain standard into Benefits Reform Act); *Green v. Schweiker*, 749 F.2d 1066, 1069 (3d Cir. 1984) (in enacting Benefits Reform Act Congress affirmed Secretary's stated position on evaluation of pain). In addition to codifying the Secretary's standards for evaluation of pain and benefits termination, the Benefits Reform Act requires the courts to remand to the Secretary the cases of persons whose benefits SSA had terminated. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(d)(3)-(5), 98 Stat. 1794, 1798 (1984).

96. See H.R. REP. No. 1039, 98th Cong., 2d Sess. 37-38 (1984) (although conference committee deleted House and Senate nonacquiescence provisions, committee members felt that statutory clarification adopted in Benefits Reform Act would remove obstacles to resolution by Secretary and courts of agency's and courts' disagreements over correct statutory interpretation); see also *Green v. Schweiker*, 749 F.2d 1066 (3d Cir., 1984) (Benefits Reform Act supports Secretary's stated pain standard and therefore defeats claimants' nonacquiescence argument).

97. H.R. REP. No. 1039, 98th Cong., 2d Sess. 37 (1984).

controverted issue.⁹⁸ The committee members noted, however, that ultimate resolution of the legal and constitutional issues nonacquiescence raises rests with the Supreme Court.⁹⁹

As have the Secretary and the SSA, the NLRB has utilized a policy of nonacquiescence, often within circuits in which the circuit courts repeatedly have determined a particular point of law.¹⁰⁰ In addition to intracircuit nonacquiescence, the NLRB practices intercircuit nonacquiescence, or relitigation.¹⁰¹ Unlike the SSA, the NLRB rarely has provided explicit statements of nonacquiescence or a basis for ignoring circuit precedent.¹⁰² The earliest and most extensive statement of NLRB nonacquiescence occurred in *Insurance Agents International Union*.¹⁰³ In *Insurance Agents* the NLRB stated that the agency's consistent policy had been to determine whether to acquiesce in the contrary views of a circuit court or whether to nonacquiesce by adhering to the agency's rejected position unless or until the Supreme Court affirmed the circuit court's decision.¹⁰⁴ The agency trial examiner's duty, the NLRB continued, is always to apply established Board precedent that the agency or the Supreme Court has not reversed.¹⁰⁵ Utilizing an argument that the SSA has recently adopted, the NLRB then asserted that only by adhering to agency precedent could the agency achieve uniform and orderly administration of a national act.¹⁰⁶

In a case decided four years before *Insurance Agents*, the Seventh Circuit criticized the NLRB for refusing to adopt the Seventh Circuit's ruling upholding an employer's right to lock out employees after bargaining to impasse.¹⁰⁷ At the time the Seventh Circuit decided *Morand Brothers Beverage Co. v. NLRB*, the NLRB had not yet developed a nonacquiescence policy but rather, in *Morand*, was refusing to follow on remand the Seventh Circuit's decision.¹⁰⁸ In subsequent cases addressing the NLRB's current

98. *Id.* at 38.

99. *Id.*

100. See Mattson, *supra* note 1, at 2562; see also *NLRB v. Eastern Smelting & Ref. Corp.*, 598 F.2d 666, 669 (1st Cir. 1979) (court still hearing cases involving single principle over which court and NLRB had disagreed for over ten years).

101. See Vestal, *supra* note 3, at 126 (in two separate instances five circuit courts eventually heard and rejected NLRB's position but agency continued to adhere to rejected view); see also *Bonanno Linen Serv., Inc.*, 243 N.L.R.B. No. 140 (1979) (Board refusing to follow decisions of Second, Third, Fifth, Eighth, and Ninth Circuits in case originating in First Circuit).

102. See Ferguson, *supra* note 1, at 204 (NLRB has not set forth its views on nonacquiescence or rationale for adhering to doctrine); Mattson, *supra* note 1, at 2563 (NLRB's rules and decisions do not provide any agency rule or criteria explaining when, how, or why NLRB will determine to nonacquiesce).

103. 119 N.L.R.B. 768, 773 (1957).

104. *Id.*

105. *Id.*

106. *Id.*; see H.R. REP. NO. 618, 98th Cong., 2d Sess. 24 (1984) (SSA defends nonacquiescence policy on grounds that agency should administer federal benefits program uniformly on national basis).

107. *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 531-32 (7th Cir. 1953).

108. *Id.*

nonacquiescence policy, however, courts have adopted the *Morand* court's reasoning that the position of an administrative tribunal is similar to that of a district court in that the lower tribunal is bound to follow the law as interpreted by a court of appeals.¹⁰⁹

The NLRB implements its current nonacquiescence policy by labeling a remanded compliance order "law of the case."¹¹⁰ This label means that the NLRB is limiting the court's ruling to the particular litigants involved in the case before the court.¹¹¹ The NLRB then will ignore the court's ruling and adhere instead to the agency decision rejected by the court.¹¹² In so circumscribing a judicial decision to affect only the immediate parties, the NLRB policy resembles SSA nonacquiescence.¹¹³ Unlike the SSA, however, the NLRB provides no explanation for the nonacquiescence and publishes no agency policy statement that would give litigants some indication of when the litigants could expect the agency to nonacquiesce to a court decision which is contrary to the agency's stated position.¹¹⁴ The SSA usually bases its nonacquiescence policy on adherence to already existing and published rulings or regulations interpreting the Social Security Act and the agency provides at least some explanation for using the policy in each case.¹¹⁵ The NLRB, however, proceeds through case by case adjudication and never has based agency nonacquiescence on a published rule.¹¹⁶

One recent example of NLRB nonacquiescence occurred in *Allegheny General Hospital v. NLRB*.¹¹⁷ In *Allegheny*, the Third Circuit had rendered two prior opinions which held that traditional standards for determining appropriate bargaining units were inapplicable to hospital bargaining units.¹¹⁸

109. *Id.*; see *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (NLRB's nonacquiescence policy is intolerable because position of administrative tribunal is similar to that of district court and, like district court, agency must follow law of circuit); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (nonacquiescence has no authoritative effect because agency is bound to adhere to circuit precedent).

110. See *Mattson*, *supra* note 1, at 2563 (only notice to parties potentially affected by NLRB nonacquiescence is agency's labeling remanded court order "law of the case").

111. *Id.*

112. *Id.*

113. See *Polaski v. Heckler*, 585 F. Supp. 1004, 1011 (D. Minn. 1984) (Secretary follows court's ruling only as to claimant whose case was before court and ignores general precedential effect of holdings).

114. See *Mattson*, *supra* note 1, at 2563, 2565 (NLRB provides no guidelines or explanations concerning when or why agency decides to nonacquiesce); see also SSR 82-10c (1982) (SSA stating that Ninth Circuit's interpretation would be too difficult for agency to administer and therefore agency would continue to follow standard set forth in regulation).

115. See SSR 82-10c (1982) (SSA will continue to adhere to agency regulation set forth in 20 C.F.R. § 416.994(e)).

116. See *Mattson*, *supra* note 1, at 2564, 2565 (NLRB develops law through case by case adjudication and agency's actions are governed by unpublished rules of law).

117. 608 F.2d 965 (3d Cir. 1975).

118. *Id.* at 966; see *St. Vincent's Hosp. v. NLRB*, 567 F.2d 588, 592 (3d Cir. 1977)

The NLRB "respectfully disagreed" with the results in both decisions and adhered to traditional community-of-interest criteria for making unit determinations in the health care industry.¹¹⁹ The NLRB argued before the Third Circuit that the court should enforce the agency's order if the agency's legal theory was reasonably defensible.¹²⁰ The NLRB also requested that the court reconsider the two previous decisions.¹²¹ Finally, the NLRB contended that the agency had in fact satisfied the requirements that the Third Circuit had set forth in one of the court's earlier decisions.¹²²

The Third Circuit rejected all three agency arguments.¹²³ The *Allegheny* court cited a Supreme Court case which stated that courts have a responsibility to review administrative decisions fully and not merely rubber-stamp judicial affirmance.¹²⁴ In that Supreme Court case, the Court also noted that the National Labor Relations Act (NLRA) specifically empowers the courts to enforce, modify, or set aside NLRB orders.¹²⁵ The *Allegheny* court concluded, therefore, that the court need not uphold an NLRB order merely because the order constituted a reasonably defensible construction of the NLRA.¹²⁶

In addition to deciding that the court should limit the amount of deference granted the NLRB determination, the Third Circuit recognized that the agency merely was repeating earlier arguments for the rejected agency position.¹²⁷ In the Third Circuit's view, the NLRB simply was refusing to apply the law the federal judiciary previously had announced.¹²⁸ The *Allegheny* court stated that the doctrine of stare decisis and the power of federal courts to interpret statutes rendered reconsideration of earlier relevant

(legislative history of health care amendments evinces that Congress directed NLRB to apply nontraditional bargaining unit standard in health care field); *Memorial Hosp. v. NLRB*, 545 F.2d 351, 361 (3d Cir. 1976) (in accepting bargaining unit determination of Pennsylvania Labor Relations Board, NLRB neglected to exercise congressionally mandated discretion and therefore failed to regard congressional admonition against proliferation of units in health care facilities).

119. 608 F.2d at 966-67; see *Allegheny Gen. Hosp.*, 239 N.L.R.B. 872, 872-73 (1978) (NLRB disagreeing with *Memorial Hospital* and *St. Vincent's Hospital* decisions).

120. 608 F.2d at 967.

121. *Id.* at 967, 968.

122. *Id.* at 967.

123. *Id.* at 967-70.

124. *Id.* at 967-68; see *NLRB v. Brown*, 380 U.S. 278, 290-92 (1964) (courts would abdicate judicial responsibility if they did not review administrative decisions fully).

125. See *NLRB v. Brown*, 380 U.S. 278, 291 (1964) (Congress expressly authorized courts to dispose of NLRB orders in whole or in part); see also 29 U.S.C. § 160(e) (1982) (court of appeals may grant such relief as court determines is proper, and may enforce, modify or set aside in whole or in part order of NLRB); *id.* § 160(f) (upon petition of aggrieved party court may dispose of NLRB order as provided in § 160(e)).

126. 608 F.2d at 968 (court cannot permit deference that court owes expert tribunal to slip into judicial inertia that allows agency to supplant Congress as maker of major policy decisions).

127. *Id.*

128. *Id.*

decisions of the court unnecessary.¹²⁹ As the Third Circuit noted, under the common-law doctrine of precedent or stare decisis, specific legal consequences attach to a set of facts in an adjudicated case, which then furnish the rule for determining subsequent cases involving identical or similar material facts.¹³⁰ The rule applies for cases arising in the same court or in a lower court in the judicial hierarchy.¹³¹ The Third Circuit reasoned that a decision of a court of appeals that the Supreme Court has not overruled is a decision of the court of last resort.¹³² The court of appeals' ruling, therefore, is binding on all inferior courts and litigants within the circuit as well as on administrative agencies.¹³³ Coupled with the Third Circuit's assertion that the NLRB is not the equal of the court in matters of statutory interpretation, the court reasoned that the doctrine of stare decisis renders a NLRB nonacquiescence simply an academic exercise possessing no authoritative effect.¹³⁴ The Third Circuit in *Allegheny* also noted that Congress had vested the exclusive and final authority to enforce NLRB orders with the courts of appeals and not with the agency.¹³⁵ The *Allegheny* court concluded that the NLRB was operating outside the law in failing to acquiesce to a circuit court's statutory interpretation because Congress had not given the agency the express authority to nonacquiesce.¹³⁶

In the manner of the *Allegheny* court, other courts confronted with NLRB nonacquiescence have provided several reasons why the agency should not utilize the policy.¹³⁷ Courts facing intercircuit NLRB nonacquiescence have labeled the policy "circuit shopping" and have suggested that the practice wastes overtaxed appellate court resources as well as agency re-

129. *Id.* at 969.

130. *Id.*; see *Helvering v. Hallock*, 309 U.S. 106, 119 (1939) (stare decisis represents element of continuity in law and is rooted in psychological need to satisfy reasonable expectations).

131. *Allegheny*, 608 F.2d at 970.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The Third Circuit in *Allegheny General Hospital v. NLRB*, in addition to noting the specific NLRA enforcement authority of the courts, cited *Marbury v. Madison* for the general proposition that the judiciary emphatically has the province and duty to say what the law is. *Id.*; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

136. 608 F.2d at 970. After dispensing with the NLRB's first two arguments supporting the agency's nonacquiescence, the Third Circuit in *Allegheny* refuted the agency's contention that the NLRB in fact had adhered to the court's previous relevant decision. *Id.* at 970-71. The *Allegheny* court found that in purportedly relying on a discretionary standard set forth in one earlier Third Circuit decision, the NLRB had acted in direct conflict with another Third Circuit decision. *Id.* at 971.

137. See *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382 n.37 (D.D.C. 1983) (NLRB exceeds its authority in refusing to apply controlling circuit law to cases that are not materially distinguishable); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (position of administrative tribunal whose findings and conclusions are subject to direct judicial review is similar to that of district court and as with a district court, agency is bound to follow law of circuit).

sources.¹³⁸ The Seventh Circuit has suggested that the NLRB owes deference to other courts of appeals which have ruled on an issue under the agency's consideration.¹³⁹

In addition to criticizing the NLRB's intercircuit nonacquiescence, courts have reproved intracircuit NLRB nonacquiescence.¹⁴⁰ Courts addressing NLRB nonacquiescence, like courts considering SSA nonacquiescence, have asserted that intracircuit nonacquiescence violates the doctrine of separation of powers.¹⁴¹ The courts have stated that the doctrine applies equally to the Supreme Court and inferior federal courts.¹⁴² The courts argue, therefore, that agencies, as members of the executive branch, must respect the province of the judiciary to interpret the law.¹⁴³

In addition to the NLRB and the SSA, the IRS has utilized a policy of nonacquiescence.¹⁴⁴ Unlike the SSA and the NLRB, however, the IRS has developed a practice of indicating both acquiescences and nonacquiescences in judicial decisions.¹⁴⁵ The origin of the IRS policy is not as ambiguous as

138. *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 128 (3d Cir. 1984) (unnecessary and repetitious litigation by administrative agencies places increasing burden on federal courts, incurs additional costs for government and citizens, and is appropriate area for congressional scrutiny); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981) (agency "circuit shopping" wastes judicial and agency resources).

139. *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980).

140. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (stating that court could not acquiesce to NLRB's policy of refusing to follow court of appeals precedent where case will come up for review before same court with which agency disagrees); *see also Cerro Metal Prod. v. Marshall*, 467 F. Supp. 869, 878 (E.D. Pa. 1979) (Secretary of Labor may appeal district court judgment if he does not agree with decision, but Secretary of Labor may not prevail in his insistence that his interpretation is binding on court).

141. *See NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 128 (3d Cir. 1984) (court refused to abdicate to NLRB power and authority to conduct judicial review).

142. *See Cerro Metal Prod. v. Marshall*, 467 F. Supp. 869, 878 (E.D. Pa. 1979) (separation of powers principles, which preclude Congress or executive from overruling judgments of Supreme Court, have equal applicability for judgments of lowliest of article III courts).

143. *See Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (since *Marbury v. Madison*, judicial department has emphatically had province and duty to say what law is and NLRB does not have authority to disagree with court decisions).

144. *See Dixon v. United States*, 381 U.S. 68, 75 n.8, 79-80 (1965) (recognizing IRS practice of publishing acquiescences and nonacquiescences and upholding Commissioner's retroactive withdrawal of an acquiescence); B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* 110.5.6, at 50 (1981) (in addition to announcing formal acquiescences and nonacquiescences to Tax Court decisions, IRS also announces whether agency will accept particular decisions of federal district and circuit courts as precedents for disposition of similar cases); Note, *supra* note 1, at 550 (Commissioner acquiesces and nonacquiesces in decisions of Tax Court, Court of Claims, and federal district court and court of appeals decisions).

145. *See Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672-73 (D.C. Cir. 1981) (detailing IRS's policy of acquiescing or nonacquiescing in court opinions); Note, *supra* note 1, at 550 (Commissioner states acquiescence or nonacquiescence in federal court decisions); *see also* A. SANTA BARBARA, *INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE* 94 (1977) (IRS announces Commissioner's decisions whether agency acquiesces or does not acquiesce in regular Tax Court decision).

the sources of SSA or NLRB nonacquiescence.¹⁴⁶ The present IRS policy of stating acquiescences and nonacquiescences is to a large extent an historical accident.¹⁴⁷ The Revenue Act of 1924 provided that the Commissioner of the IRS (Commissioner) had one year to appeal from an adverse decision of the Board of Tax Appeals, the forerunner of today's Tax Court.¹⁴⁸ Until the expiration of the one year appeal period, taxpayers and IRS field agents could not be certain whether the court's opinion was final and in conformity with the current IRS policy.¹⁴⁹ To enlighten the field agents and aid taxpayers, the IRS began to issue acquiescences and nonacquiescences in Board of Tax Appeals cases shortly after the decision in each case.¹⁵⁰ The need for the acquiescence program decreased when Congress in 1932 changed the appeal period to three months.¹⁵¹ The IRS, however, did not abandon the acquiescence program because the program served as a guide for prospective transactions and aided taxpayers in understanding the Commissioner's current view of the law.¹⁵²

146. Compare Rogovin, *supra* note 14, at 771-72 (detailing history of IRS acquiescence program) and J. QUIGGLE & L. REDMAN, *supra* note 8, § 2.02(c), at 44 (briefly noting probable basis of IRS's announcing acquiescences and nonacquiescences) with Ferguson, *supra* note 1, at 203-04 (tracing origins of NLRB nonacquiescence policy is difficult task) and H.R. REP. NO. 618, 98th Cong., 2d Sess. 22-26 (1984) (discussing SSA's nonacquiescence policy in depth but not providing history or origin of policy).

147. See *Quinn v. Commissioner*, 524 F.2d 617, 620 (7th Cir. 1975) (present IRS practice of determining whether to acquiesce is largely result of historical accident).

148. Revenue Act of 1924, ch. 234, § 274(b), 43 Stat. 253, 297 (1924) (amended 1926).

149. See J. QUIGGLE & L. REDMAN, *supra* note 8, § 2.02(c), at 44 (in early days of tax law IRS did not inform field agents of agency policy during pendency of one year period for appeal); Rogovin, *supra* note 14, at 771 (taxpayer receiving favorable opinion from Board of Tax Appeals could not be sure of opinion's finality until one year appeal period had run).

150. See J. QUIGGLE & L. REDMAN, *supra* note 8, § 2.02(c), at 44 (IRS began practice of acquiescing and nonacquiescing to enlighten field agents as to current agency policy); Rogovin, *supra* note 14, at 771 (IRS began to issue acquiescences and nonacquiescences to aid taxpayers).

151. See *Quinn v. Commissioner*, 524 F.2d 617, 621 (7th Cir. 1975) (purpose for acquiescence program was lost when in 1932 Congress reduced time for appeal from decision of Board of Tax Appeals to three months); Rogovin, *supra* note 14, at 721 (after 1932, need for acquiescence procedure as indicator of IRS's appeal plans disappeared).

152. See Rogovin, *supra* note 14, at 722 (IRS retained acquiescence program as means of keeping public and agency informed of Commissioner's current litigation position). As courts and commentators have noted, the IRS does not intend to substitute the acquiescence program for the agency's ruling or regulation program. *Quinn v. Commissioner*, 524 F.2d 617, 621 (7th Cir. 1975); Rogovin, *supra* note 14, at 773. Many IRS bulletins have indicated that taxpayers should exercise caution in relying on the acquiescence program. See 1964 1 C.B. 3 (taxpayers should exercise caution in applying to similar cases adverse decision acquiesced in unless facts and circumstances of two cases are substantially identical); see also 1975 STAND. FED. TAX REP. (CCH) ¶ 5980A.018 (Commissioner's nonacquiescences are reliable conclusions of IRS only so far as they concern application of law to facts in particular case); *id.* (acquiescence means IRS accepts conclusion court reached and does not constitute acceptance of any or all reasons court assigned for ultimate decision). The Supreme Court has decided that the Commissioner has complete power to modify, amend, or revoke IRS acquiescences and nonacquiescences and to make such changes retroactive. *Dixon v. United States*, 381 U.S. 68, 71 & n.2, 72-73 (1965).

Determining that the acquiescence program was helpful to taxpayers and to the IRS, the agency later extended the practice to federal district court and courts of appeals cases.¹⁵³ The modern acquiescence policy begins with the preparation of "actions on decisions" by attorneys in the Tax Litigation Division whenever the IRS loses a case in any federal court.¹⁵⁴ An IRS attorney prepares the action on decision at the same time that the attorney drafts a formal recommendation to the Department of Justice as to whether the Department should appeal a particular case.¹⁵⁵ An action on decision sets forth the issue decided against the IRS and provides a brief synopsis of the facts and reasoning supporting the attorney's suggestion that the Commissioner either acquiesce or nonacquiesce.¹⁵⁶ If the action on decision is accepted upon further agency review, the IRS publishes and distributes the document to IRS field personnel.¹⁵⁷ The IRS publishes the bases for actions on decisions regarding Tax Court cases in the Internal Revenue Bulletin as formal acquiescences or nonacquiescences.¹⁵⁸ The IRS, however, never publishes as acquiescences or nonacquiescences actions on decisions concerning district court, court of appeals, or Court of Claims decisions.¹⁵⁹ The IRS acquiescence program, therefore, resembles the NLRB's nonacquiescence practice because agency decisions whether to follow district court and court of appeals rulings

153. See J. QUIGGLE & L. REDMAN, *supra* note 8, at 44 (practice of reacting to tax decisions started with Tax Court and IRS did not extend practice to other federal court cases until some time later).

154. See *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672 (D.C. Cir. 1981) (actions on decisions are legal memoranda prepared by attorneys in IRS Tax Litigation Division and directed to Chief Counsel whenever IRS loses case in Tax Court, federal district court, Court of Claims, or United States court of appeals); M. SALTZMAN, *INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE* ¶ 3.04[4], at 77 (1981) (whenever IRS loses issue in tax cases, either in Tax Court or in federal district court, lawyer in Chief Counsel's Tax Litigation Division prepares action on decision).

155. See *Taxation With Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 672 (D.C. Cir. 1981) (IRS attorneys prepare actions on decisions along with recommendation regarding appeal).

156. *Id.*

157. *Id.*

158. *Id.* at 672; see Note, *supra* note 1, at 550 (IRS periodically publishes acquiescences and nonacquiescences to Tax Court decisions in Internal Revenue Bulletin); see also M. SALTZMAN, *supra* note 154, 304(4), at 68 (frequently there is delay in issuance of acquiescence or nonacquiescence after actions on decisions concerning Tax Court rulings).

159. See B. BITTKER, *supra* note 144, ¶ 110.5.6, at 50 (formal acquiescence/nonacquiescence policy applies only to Tax Court decisions but IRS also announces whether agency accepts decisions of federal district courts, courts of appeals, or Court of Claims as precedents for disposition of similar cases); Note, *supra* note 1, at 550 (Commissioner never publishes acquiescence or nonacquiescence in district court, court of appeals, or Court of Claims decisions); see also J. QUIGGLE & L. REDMAN, *supra* note 8, at 44 (distinguishing between acquiescences and nonacquiescences regarding Tax Court decisions published in Internal Revenue Bulletins and unpublished actions on decisions issued for guidance of IRS personnel with regard to decisions of other courts).

are not labeled "nonacquiescence" and are not published.¹⁶⁰ The IRS program, however, also resembles the SSA's nonacquiescence policy insofar as the IRS publishes acquiescences to most Tax Court opinions and the reasons therefor much as the SSA publishes rulings of nonacquiescence regarding federal court opinions.¹⁶¹ Unlike the SSA, however, the IRS does not encourage reliance on the published nonacquiescences.¹⁶²

As have the SSA and the NLRB, the IRS has sought to justify its nonacquiescence policy by emphasizing the nationwide applicability of the act the agency must administer.¹⁶³ The IRS also has argued that the agency must administer the act in a uniform manner.¹⁶⁴ More uniquely, the IRS has presented the argument that the need for certainty in the body of law administered by the agency justifies nonacquiescence.¹⁶⁵ The IRS has stated that certainty in tax law is highly desirable because consistent rules facilitate the large amounts of business and tax planning normally predicated on IRS interpretations of the tax acts.¹⁶⁶ Certainty, as it relates to parties' reliance on agency actions, is not as important to the SSA as it is to the IRS, because SSA claimants, unlike taxpayers, do not predicate future actions upon agency nonacquiescences or interpretations.¹⁶⁷ Unlike the IRS, neither the SSA nor

160. Compare *supra* note 159 and accompanying text (in declining to accept federal court decisions as precedent, IRS does not publish declination or formally label policy "nonacquiescence") with *Mattson, supra* note 1, at 2563, 2565 (NLRB stamps judicial decision with which agency disagrees "law of the case" and not "nonacquiescence" and publishes no guidelines or rules regarding agency's decision).

161. Compare *supra* note 158 and accompanying text (IRS publishes bases for actions taken on Tax Court opinions as "acquiescence" or "nonacquiescence") with SSR 82-49c (1982); SSR 82-10c (1982); SSR 81-12c (1981); SSR 81-28c (1981) (SSA rulings that agency labeled "nonacquiescence" and which state bases for agency's disagreement with federal court).

162. Compare *supra* note 152 (IRS limits extent to which taxpayers should rely on acquiescence program) with SSR 82-49c (1982) and SSR 82-10c (1982) (stating SSA position that will govern all future cases dealing with relevant section of Social Security Act). One commentator has noted that the IRS does not invite taxpayer reliance on notices of acquiescence or nonacquiescence in the same manner that the agency encourages reliance on published revenue rulings. B. BITTKER, *supra* note 144, at ¶ 110.5.6, at 50. Rarely does an acquiescence prevent the IRS from collecting a tax otherwise due or from litigating the issue decided on the issue's merits in a later and similar case. *Id.*

163. See Note, *supra* note 1, at 555 & n.24 (IRS spokesmen have argued consistently that nationwide uniformity of tax structure is essential and justifies acquiescence program and continued litigation).

164. *Id.*

165. See *id.* at 556 & n.28 (IRS argues that need for certainty in tax law justifies nonacquiescence and relitigation).

166. See *id.* (certainty is very important in tax law because consistent rules facilitate business and tax planning).

167. See *Association of Admin. Law Judges v. Heckler*, No. 84-0124 (D.D.C. Sept. 10, 1984) (available Feb. 10, 1985, on LEXIS, Genfed library, Dist file) (SSA naming uniformity as reason for nonacquiescence policy but not citing certainty as justification); H.R. REP. NO. 618, 98th Cong., 2d Sess. 24 (1984) (noting that SSA defends nonacquiescence policy on grounds of need for uniformity but does not mention certainty).

the NLRB has stressed the need for certainty in a body of law as a justification for nonacquiescence.¹⁶⁸

Judicial reaction to IRS nonacquiescence has been far less adverse than the courts' response to NLRB and SSA nonacquiescence policies.¹⁶⁹ The courts have recognized that the Commissioner either may acquiesce or nonacquiesce in Tax Court opinions and that Tax Court decisions do not bind the agency.¹⁷⁰ Moreover, the Supreme Court has acknowledged that the IRS can withdraw a published acquiescence in a Tax Court decision and substitute a nonacquiescence having retroactive effect.¹⁷¹ Because the IRS nonacquiesces to federal district and circuit court opinions much more rarely than the SSA and the NLRB¹⁷² and because the nonacquiescence is apparently only intercircuit in nature,¹⁷³ judicial statements regarding the policy are scarce. Courts facing the IRS relitigation policy appear unconcerned with the practice, as evidenced by the courts' failure to address the propriety of the relitigation in case opinions.¹⁷⁴

Although the courts have criticized only SSA and NLRB nonacquiescence, other authorities have disparaged the practices of all three agencies.¹⁷⁵

168. See *Insurance Agents Int'l Union*, 119 N.L.R.B. 768, 773 (1957) (stressing need for uniform interpretation of National Labor Relations Act but not giving need for certainty as justification for nonacquiescence); *Ferguson*, *supra* note 1, at 206-11 (noting NLRB's reliance on theories of uniformity and agency expertise to support nonacquiescence but that agency has not mentioned certainty as ground for NLRB justification of policy).

169. See *infra* notes 170-74 and accompanying text (judicial reaction to IRS nonacquiescence).

170. See *Snyder v. United States*, 582 F. Supp. 196, 198-99 (D. Md. 1984) (Commissioner may either acquiesce or nonacquiesce in Tax Court decision); *id.* at 199 (Tax Court rulings are not binding precedent that IRS must follow blindly in handling every later similar case); see also *Dixon v. United States*, 381 U.S. 68, 75 n.8 (acknowledging IRS practice of publishing acquiescences and nonacquiescences and not commenting adversely on practice).

171. *Dixon v. United States*, 381 U.S. 68, 73 (1964); see *Quinn v. Commissioner*, 524 F.2d 617, 623 (7th Cir. 1975) (holding that Commissioner's acquiescence in case does not prevent government from collecting tax in contravention of rule stated in case).

172. See B. BITTKER, *supra* note 144, ¶ 110.5.6, at 50 (IRS announces acceptances or rejections of federal district and circuit court decisions much more rarely than agency states acquiescences and nonacquiescences to Tax Court decisions).

173. See *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (distinguishing SSA nonacquiescence policy from IRS practice on basis that IRS nonacquiescence rulings are inapplicable within circuit that rendered opinion in which agency nonacquiesced); *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) (refuting SSA's reliance on IRS nonacquiescence for support of SSA's policy by finding that ordinary effect of agency's nonacquiescence is intercircuit).

174. See *Hardee v. United States*, 708 F.2d 661, 664 (Fed. Cir. 1983) (considering issue on which five other circuit courts had rejected IRS's position but not commenting adversely on IRS practice); *Foster Lumber Co. v. United States*, 500 F.2d 1230, 1232 (8th Cir. 1974) (addressing IRS contention that many federal court opinions ruling against IRS position were "ill-considered," but not criticizing IRS relitigation); *cf. May Dep't Stores Co. v. Williamson*, 549 F.2d 1147, 1150 (8th Cir. 1977) (Lay, J., concurring) (criticizing Postal Service's relitigation strategy of forum shopping).

175. See H.R. REP. NO. 618, 98th Cong., 2nd Sess. 26 (1984) (House committee recognizes

Commentators discussing each of the agencies' policies have stated that nonacquiescence undermines the structure of federal law and improperly places the agency above the federal courts.¹⁷⁶ Additionally, commentators, courts, and Congress have rejected the agencies' arguments that nonacquiescence promotes uniform interpretation of national acts.¹⁷⁷ These authorities have countered the agencies' uniformity arguments by asserting that nonacquiescence creates a prejudicial duality whereby poorer litigants who are unable to afford the steps necessary to exhaust administrative remedies never receive review under the standard articulated by the federal courts.¹⁷⁸ Authorities addressing NLRB and SSA policies also have assailed the agencies' arguments that agency expertise mandates judicial deference to agency statutory interpretations.¹⁷⁹ One commentator has suggested that once a court

no reason for allowing SSA to ignore circuit courts' determinations of law simply because agency believes courts' view is incorrect); Ferguson, *supra* note 1, at 216-18 (refuting NLRB's rationale for using nonacquiescence policy); Heaney, *supra* note 63, at 9 (SSA's policy of nonacquiescence is unacceptable); Mattson, *supra* note 1, at 2562-67 (NLRB's use of nonacquiescence policy is arbitrary, prejudicial, wasteful of resources, has no basis in law and is outside grant of agency's statutory authority); Note, *Treasury Department's Practice of Nonacquiescence to Court Decisions*, 28 ALB. L. REV. 274, 280 (1964) (Commissioner of IRS abuses administrative discretion in applying nonacquiescence policy) [hereinafter cited as *Treasury Department's Practice*]; Note, *supra* note 1, at 553 (IRS nonacquiescence destroys uniformity and makes taxation regressive). *But see* Zimmerman, *Restoring Stability in the Implementation of the National Labor Relations Act*, 1 LAB. LAW. 1, 2-6 (1985) (defending NLRB's nonacquiescence policy).

176. See H.R. REP. NO. 618, 98th Cong., 2d Sess. 23 (1984) (outside experts have criticized SSA's nonacquiescence on grounds that policy undermines structure of federal law and essentially allows agency to overrule federal courts' judgments by administrative inaction); Mattson, *supra* note 1, at 2561 (by nonacquiescing NLRB places itself above circuit courts appointed by statute to review NLRB decisions); *Treasury Department's Practice*, *supra* note 17, at 278 (IRS nonacquiescence actually places Commissioner above any court in land).

177. See H.R. REP. NO. 618, 98th Cong., 2d Sess. 24 (1984) (rather than promoting uniformity, nonacquiescence creates prejudicial duality between claimants who can afford to litigate up to courts and poorer claimants whose benefits SSA revokes under agency standard); Ferguson, *supra* note 1, at 216-17 (nonacquiescence creates and encourages national labor policy that establishes one set of rules for litigants with sufficient resources to reach courts for review of NLRB order and different rules for litigants who cannot afford review); Note, *supra* note 1, at 553 (nonacquiescence destroys uniformity because similarly situated taxpayers are treated differently based on dollar amount of tax claim). One commentator has stated that in addition to creating nonuniformity, NLRB nonacquiescence creates a special hardship for parties charging commission of an unfair labor practice because courts cannot review an NLRB decision not to issue a complaint. Mattson, *supra* note 1, at 2562.

178. See *supra* note 177 (authorities stating nonacquiescence destroys uniformity).

179. See, e.g., *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914 (3d Cir. 1981) (reviewing courts need not rubber-stamp affirmance of agency decisions that courts determine are inconsistent with statutory mandate); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (although courts should grant some deference to agency's interpretation of statute agency administrators, courts retain final authority on matters of statutory interpretation); *Mayburg v. Heckler*, 574 F. Supp. 922, 929 (D. Mass. 1983) (interpretation of Social Security Act is judicial function and courts need not defer to agency position), *aff'd sub nom.*, *Mayburg v. Secretary of HHS*, 740 F.2d 100 (1st Cir. 1984); H.R. REP. NO. 618, 98th Cong., 2d Sess. 25 (1984)

disagrees with an agency's interpretation of the relevant statute, expertise can not justify agency refusal to adhere to the court's decision.¹⁸⁰ The writer commented further that agency expertise does not divest the reviewing court of the authority to pronounce a binding rule of law.¹⁸¹

If nonacquiescence is justified at all, of the three major agencies utilizing the policy, the IRS' use of the practice is the most acceptable.¹⁸² Unlike the NLRB and the SSA, which practice intracircuit nonacquiescence, the IRS utilizes only intercircuit nonacquiescence or relitigation.¹⁸³ Regardless of which agency utilizes the practice, intercircuit nonacquiescence is probably an acceptable process despite the litigational costs involved.¹⁸⁴ Relitigation creates circuit conflict that helps define controverted issues for the Supreme Court and acts as the catalyst for Supreme Court review.¹⁸⁵ Moreover, because one circuit's opinion is not binding within other circuits, intercircuit nonacquiescence does not violate the doctrine of stare decisis as intracircuit nonacquiescence does.¹⁸⁶

In addition to utilizing only intercircuit nonacquiescence, the IRS differs from the NLRB and the SSA in the IRS' relation to the public.¹⁸⁷ To a greater degree than the NLRB and the SSA, the IRS receives constant requests for private rulings that shape the future actions of significantly

(there is no reason why Congress should consider SSA's statutory interpretation superior to court's construction, especially when statute is vague or silent on issue concerned).

180. Ferguson, *supra* note 1, at 217.

181. *Id.*

182. See *supra* notes 169-74 and accompanying text (courts are not as opposed to IRS nonacquiescence as to NLRB and SSA nonacquiescence); *infra* notes 183-200 and accompanying text (discussing relative acceptability of nonacquiescence policies of SSA, NLRB, and IRS).

183. See Lopez v. Heckler, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (distinguishing SSA intracircuit nonacquiescence policy from IRS policy on ground that IRS practices only intercircuit nonacquiescence); *vacated*, 53 U.S.L.W. 3435 (1984); Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) (implying IRS nonacquiescence policy is only intercircuit).

184. See Zimmerman, *supra* note 175, at 4-5 (NLRB intercircuit nonacquiescence is necessary and beneficial); *infra* notes 185-87 and accompanying text (discussing benefits of intercircuit nonacquiescence). *But see* Vestal, *supra* note 3, at 127, 178 (relitigation wastes legal resources and causes inequality in application of law to extent that outweighs benefits policy achieves).

185. See *United Steelworkers of America v. NLRB*, 377 F.2d 140, 141 (D.C. Cir. 1966) (agency's attempt to seek conflict in circuits on point of law is acceptable course of action in view of Supreme Court policy of granting writs of certiorari to resolve circuit conflicts).

186. See *Mast, Foos & Co. v. Stover*, 177 U.S. 485, 488 (1900) (one circuit court's opinion is not binding on another circuit court); Lopez v. Heckler, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (agencies can not be expected always to give nationwide effect to holdings of court of appeals because conflicts among circuits are inevitable), *vacated* 53 U.S.L.W. 3435 (1984); *Frock v. United States R.R. Retirement Bd.*, 685 F.2d 1041, 1046 (7th Cir. 1982) (unappealed circuit court decision does not have effect of setting nationwide standard).

187. See *infra* notes 188-90 and accompanying text (greater number of persons rely on IRS nonacquiescences and acquiescences to plan future actions than rely on NLRB or SSA nonacquiescences).

more members of the public.¹⁸⁸ Because of the ability of taxpayers to rely on over ninety percent of IRS acquiescences,¹⁸⁹ the program has served as an additional planning aid that helps to alleviate the burden of private rulings.¹⁹⁰ The practice has survived since 1932 as an indicator of IRS litigation plans and aid to prospective transactions.¹⁹¹ Furthermore, the courts have not criticized the policy as they have disparaged NLRB and SSA nonacquiescence.¹⁹²

Although the lower federal courts have not responded favorably to NLRB nonacquiescence, neither the Supreme Court nor Congress has commented adversely on the NLRB's practice.¹⁹³ The House of Representatives, however, has criticized the SSA's nonacquiescence.¹⁹⁴ Moreover, the NLRB has more reason to utilize intracircuit nonacquiescence than the SSA.¹⁹⁵ Under the NLRA, a litigant can petition for review of a NLRB order and the NLRB can petition for enforcement of an agency order in as many as four circuits.¹⁹⁶ When deciding a case, therefore, the NLRB may not know which circuit's legal interpretation to apply when there is a conflict in the circuits' law.¹⁹⁷ Even commentators who are adverse to the NLRB's nonacquiescence policy admit that legislative action would be necessary to eliminate the dilemma of multiple circuits of review.¹⁹⁸ Conversely, the Social Security

188. See *Treasury Department's Practice*, *supra* note 175, at 279 (IRS is in unique position of agency with tremendous impact upon public); see also A. SANTA BARBARA, *supra* note 145, at 44-61 (detailing IRS's private ruling program).

189. See Note, *supra* note 1, at 552 & n.13 (IRS has withdrawn acquiescences at only 6.5% of rate of issuance and nonacquiescences at 29% of rate of issuance).

190. See Rogovin, *supra* note 14, at 772 (IRS acquiescence/nonacquiescence program serves as additional aid to taxpayers in planning prospective transactions); see also A. SANTA BARBARA, *supra* note 145, at 96 (Commissioner's acquiescence or nonacquiescence provides guide in predicting IRS's actions in similar cases).

191. See Rogovin, *supra* note 14, at 77-72.

192. See *supra* notes 169-74 and accompanying text (courts' response to IRS nonacquiescence has not been as negative as courts' reaction to NLRB and SSA nonacquiescence).

193. See Zimmerman, *supra* note 175, at 3 (in nearly 50 years, neither Congress nor Supreme Court has commented adversely on NLRB's justification for nonacquiescence).

194. See H.R. REP. No. 618, 98th Cong., 2d Sess. 24-26 (1984) (SSA nonacquiescence creates duality and SSA should cease use of policy).

195. See *infra* notes 196-99 and accompanying text (potential for uncertainty as to which circuits' law to apply in deciding issue distinguishes NLRB nonacquiescence from SSA nonacquiescence).

196. See 29 U.S.C. § 160(e) (1982) (NLRB may petition court of appeals for enforcement of agency order in circuit where unfair labor practice in question occurred, where person resides, or where person transacts business); *id.* § 160(f) (any person aggrieved by final NLRB order may obtain judicial review of order in circuit where unfair labor practice allegedly occurred, where person resides, where person transacts business, or in United States Court of Appeals for District of Columbia).

197. See Ferguson, *supra* note 1, at 218-19 (NLRB can not know in advance of agency's decision which circuit might later review particular case).

198. *Id.* at 218-20.

Act provides for only one possible circuit to which a litigant may appeal.¹⁹⁹ The SSA, therefore, is not as justified as the NLRB in utilizing intracircuit nonacquiescence.²⁰⁰

The SSA, the NLRB, and the IRS all employ policies of disregarding judicial decisions that fall within the definition of agency nonacquiescence.²⁰¹ Each agency's policy, however, has a different genesis and each agency implements nonacquiescence in a different manner.²⁰² Moreover, each agency stands in a different relation to the public and to the courts and each agency employs different types of nonacquiescence.²⁰³ All agency actions termed nonacquiescence, therefore, cannot be dismissed automatically as improper, unlawful, or unjustified. Consequently, any solutions proposed to solve problems that agency nonacquiescence might create should address each agency independently.²⁰⁴

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199. See 42 U.S.C. § 408(g) (1982 & Supp. 1984) (any party may obtain judicial review of final decision of Secretary in district court within district where party resides or does business).

200. See *supra* notes 196-99 and accompanying text (appeal from NLRB decision lies in as many as four judicial circuits whereas party may appeal from SSA decision usually in only one circuit); see also *Frock v. United States R.R. Retirement Bd.*, 685 F.2d 1041, 1046 (7th Cir. 1982) (noting that because petitioners could appeal Board decisions in any of three circuits Board had no way of determining which circuit would ultimately review agency's decision in particular case); *id.* (nature of Board's jurisdictional grant distinguishes Board from SSA).

201. See *supra* notes 17-30 and 43-52 and accompanying text (discussing implementation of SSA nonacquiescence policy); *supra* notes 110-22 and accompanying text (discussing present usage of NLRB nonacquiescence); *supra* notes 153-61 (detailing operation of current IRS nonacquiescence program).

202. See *supra* notes 17-30 and 43-52 and accompanying text (providing examples of implementation of SSA nonacquiescence through Social Security Rulings, memoranda to agency administrative law judges, and unstated practice of nonadherence to precedent); *supra* notes 100-08 and 110-16 and accompanying text (demonstrating that origin of NLRB nonacquiescence is somewhat unclear and discussing agency's rather tacit nonacquiescence policy); *supra* notes 147-62 and accompanying text (discussing history of IRS acquiescence program and current IRS practice of publishing nonacquiescences to Tax Court decisions but not to district and circuit court decisions).

203. See *supra* notes 85-87, 167, and 199 and accompanying text (stating that SSA nonacquiescence differs from IRS nonacquiescence in that SSA policy is intracircuit, SSA has less impact on public than IRS, and SSA knows which circuit law will apply if claimant appeals particular case currently under SSA consideration); *supra* notes 101, 188, and 196-98 and accompanying text (noting that NLRB has less impact on public than IRS, practices intercircuit as well as intracircuit nonacquiescence, and can encounter judicial review of NLRB decisions in any one of as many as four circuits); *supra* notes 169-74, 183, 188-91 and accompanying text (stating that judicial reaction to IRS nonacquiescence has been far less adverse than courts' response to SSA and NLRB policies, IRS practices only intercircuit nonacquiescence, and IRS has greater impact upon public than SSA or NLRB).

204. See H.R. REP. No. 1039, 98th Cong. 2d Sess. 38 (1984) (expressing congressional intent that rather than nonacquiescing Secretary either should promptly appeal to Supreme Court or seek legislative resolution from Congress); Ferguson, *supra* note 1, at 220-23 (proposing alternative to NLRB nonacquiescence policy); Note, *supra* note 1, at 557 (proposing set of rules to supplant IRS nonacquiescence).