Recent Developments Under the Social Security Act

Kenneth J. Falk*

I. Introduction

The Social Security Act[1] has been described by the United States Supreme Court as "among the most intricate ever drafted by Congress,"[2] and the Court has stated that the Act is "almost unintelligible to the uninitiated."[3] To most persons, Social Security means only a government benefit program for retired or disabled persons. But the Social Security Act provides the legislative basis for such diverse programs as Aid to Families with Dependent Children (AFDC), Medicaid, and child welfare programs, as well as child support collection programs. The Code sections are further explained and detailed in numerous volumes of the Code of Federal Regulations. And each state has added further glosses to the Act with state administrative rules and regulations.

A survey of recent developments under the Social Security Act therefore necessarily encompasses a wide area. However, certain patterns quickly emerge in reviewing decisions under the Act. Litigation under the Act can take two directions. The first is to challenge the constitutionality of a portion of the Act itself, or of omissions in the Act.[4] The second approach is to assume that Congress acted properly in enacting a portion of the Act, but to argue that the federal or state agency erred in enacting regulations to implement the Act.[5]

The above approaches are highlighted in recent federal court cases in and around Indiana under the Social Security Act. A review of these decisions also establishes patterns that provide insight into potential future litigation in this area.

II. AFDC

A. Sibling Deeming

Prior to October 1, 1984, AFDC applicants had the option of excluding from the filing unit any child in the family.[6] Thus, if the

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*Assistant Director of Litigation, Legal Services Organization of Indiana, Inc. B.A., J.D., Columbia University, 1977.

[1]42 U.S.C. § 301 (1982).

[2]Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981).

[3]*Id.* (quoting Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977)).

[4]*See, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976).

[5]*See, e.g.*, Malloy v. Eichler, 628 F. Supp. 582 (D. Del. 1986).

[6]*See* Shonkwiler v. Heckler, 628 F. Supp. 1013, 1014 (S.D. Ind. 1985).

family unit was made up of a mother and half-siblings, if one of the half-siblings received a substantial amount of child support from the absent father or Social Security benefits from a deceased father, that half-sibling could be excluded from the family unit for purposes of AFDC eligibility. The family could therefore maximize its benefits by excluding from the family unit persons who had income, but who were under no legal obligation to share that income with other members of the family. Given the paltry sums received under AFDC,[7] even with this maximization, these families continued to be poor.

In 1984, in the Deficit Reduction Act, Congress enacted a change designed to reduce or eliminate AFDC benefits to those perceived by Congress to be less needy than persons with no resources whatsoever.[8] Specifically, Congress amended the Social Security Act to provide that all brothers and sisters living in the same home, including half-brothers and sisters, shall have their available income counted towards AFDC eligibility.[9] That is, the available income of all siblings is deemed to be shared by all other siblings and is therefore counted towards the family's income. The Secretary of Health and Human Services quickly promulgated regulations stating that all income of brothers and sisters, including half-siblings, was available to the family.[10]

This sibling deeming rule has spawned a great deal of litigation by low income persons.[11] The litigation has attacked both the constitution-

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[7]In Indiana, for example, the maximum combined amount of AFDC that one dependent child and one needy relative can receive is $196 per month. Not more than $60 per month may be awarded for each additional child. INDIANA DEP'T. OF PUB. WELFARE, INDIANA'S ASSISTANCE TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM (June, 1985) (available in the office of the Indiana Department of Public Welfare). *See also* IND. ADMIN. CODE tit. 470, r. 10.1-3-3 (Supp. 1986); *infra* notes 31-33 and accompanying text.

[8]*Shonkwiler*, 628 F. Supp. at 1017.

[9]*See* Deficit Reduction Act of 1984, § 2640(a), 42 U.S.C. § 602(a)(38)(B) (Supp. III 1985), which states in pertinent part:

> [I]n making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall . . . include—
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> . . . .
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> any brother or sister of such child . . . and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family . . . .

[10]45 C.F.R. § 206.10(a)(1)(vii)(B) (1985). It states: "For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance . . . [a]ny blood-related or adoptive brother or sister."

[11]*See, e.g.*, Ardister v. Mansour, 627 F. Supp. 641 (W.D. Mich. 1986) (ruling on preliminary injunction); Whitehorse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985); Gorrie v. Heckler, 624 F. Supp. 85 (D. Minn. 1985); Frazier v. Pingree, 612 F. Supp. 345 (M.D. Fla. 1985) (ruling on preliminary injuction); Shonkwiler v. Heckler, 628 F. Supp. 1013 (S.D. Ind. 1985) (ruling on preliminary injunction); *see also* Shonkwiler v. Bowen, No. IP84-1612-C (S.D. Ind. Aug. 11, 1986); Gilliard v. Kirk, 633 F. Supp. 1529 (W.D.N.C.

ality of the statute on its face as well as the propriety of the implementing regulations.[12] The constitutional arguments have been that the statute and/or regulations violate a right of privacy and family integrity because the statute forces families that are not one unit to merge into one;[13] that the statute effects an unconstitutional taking;[14] and that the statute creates an unconstitutional irrebuttable presumption.[15] These arguments have met with varying success. A number of courts have found the statute and/or regulations unconstitutional on their face.[16] However, other courts have found them constitutional.[17]

In Indiana, the issue was presented in the case of *Shonkwiler v. Heckler*.[18] The United States District Court for the Southern District of Indiana held that the statute and implementing regulations were proper.[19]

Brenda Shonkwiler was the head of the AFDC household in this case. Ms. Shonkwiler had three children living with her. One was the child of Mikel Shonkwiler and the other two were children from a former marriage. Mr. Shonkwiler paid $360 a month in court-ordered child support for his child's benefit. Prior to sibling deeming, the Shonkwiler child was not included in the family unit. Thus, he received $360 a month in support and the rest of the family, Brenda and the two half-siblings, received $256 a month in AFDC. However, the sibling deeming rule, as interpreted by the Department of Health and Human Services and the Indiana Department of Public Welfare, mandated that the Shonkwiler child and his support income be included in the family unit; as a consequence the family became ineligible for AFDC.[20] Thus, Mikel Shonkwiler's support for his son was deemed as being used to support his son's half-siblings and his ex-wife. Other plaintiffs in the litigation experienced similar harsh results because of sibling deeming.[21]

In finding against the plaintiffs, the district court relied on a theme often voiced by both courts and defendants in current litigation under

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1986); Oliver v. Ledbetter, 624 F. Supp. 325 (N.D. Ga. 1985); Creaton v. Heckler, 625 F. Supp. 26 (C.D. Cal. 1985).

[12]*See* cases cited *supra* note 11.

[13]*See, e.g.*, *Shonkwiler*, slip. op. at 10-11.

[14]*See, e.g.*, *Gorrie*, 624 F. Supp. at 90-91.

[15]*See, e.g.*, *Shonkwiler*, slip. op. at 11.

[16]*See, e.g.*, Gilliard v. Kirk, 633 F. Supp. 1529 (W.D.N.C. 1986); Whitehorse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985); Gorrie v. Heckler, 624 F. Supp. 85 (D. Minn. 1985); Frazier v. Pingree, 612 F. Supp. 345 (M.D. Fla. 1985).

[17]*See, e.g.*, Shonkwiler v. Bowen, No. IP84-1612-C (S.D. Ind. Aug. 11, 1986); Ardister v. Mansour, 627 F. Supp. 641 (W.D. Mich. 1986); Oliver v. Ledbetter, 624 F. Supp. 325 (N.D. Ga. 1985); Creaton v. Heckler, 625 F. Supp. 26 (C.D. Cal. 1985).

[18]628 F. Supp. 1013 (S.D. Ind. 1985).

[19]*Id.*

[20]*Id.* at 1016.

[21]*See id.* at 1016-17.

the Social Security Act: the need to reduce the costs of welfare programs.[22] The court stated:

> The primary purpose of Section 2640, the Secretary's regulation, and the State's AFDC Manual provision is to reduce or eliminate welfare benefits for those considered by Congress to be less needy than those completely without resources such as households that have available other income or resources with which to support themselves. . . . Given Congress' legitimate purpose of redistributing limited resources, the standard filing unit provision is rationally related to achieving that purpose. It is appropriate to assume the following proposition: that individuals who live in the same household share expenses. If the contributions of the siblings added to the AFDC unit are not direct payments to assist with household expenses, there will at least be indirect payments through the sharing of fixed expenses.[23]

Given the split in district court decisions around the country,[24] it is not unreasonable to expect that the United States Supreme Court will ultimately review this issue. The Supreme Court recently gave an indication of how it might rule on some of the issues presented in *Shonkwiler*. In *Lyng v. Castillo*,[25] the Court was faced with a challenge to sibling deeming under the Food Stamp Act,[26] a program not under the Social Security Act. There, Congress had amended the statute to provide that a food stamp household must include all siblings living together.[27] The Court upheld the law and found no impingement on a fundamental right and no equal protection violation.[28] According to the Court, the law was rationally based.[29] This decision continued a trend, recognizable in *Shonkwiler*, of extending great deference to Congress' determination of what eligibility guidelines are appropriate under the Social Security Act.[30]

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[22]*Id.* at 1018.

[23]*Shonkwiler*, slip. op. at 12 (citing Brown v. Heckler, 589 F. Supp. 985, 992-94 (E.D. Pa. 1984)).

[24]*See supra* notes 16-17.

[25]106 S. Ct. 2727 (1986).

[26]U.S.C. §§ 2011-29 (1982).

[27]*Lyng*, 106 S. Ct. at 2728 n.1.

[28]*Id.* at 2727-28.

[29]*Id.* at 2730-32.

[30]"Moreover, the Legislature's recognition of the potential for mistake and fraud and the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrants the use of general definitions in this area." *Id.* (footnotes omitted).

In discussing the power of Congress to require a disabled dependent child's Social Security benefits to terminate upon marriage to a disabled spouse, the Supreme Court

The *Lyng* decision did not address the AFDC program. Nor did it address all the constitutional arguments raised by opponents of sibling deeming in the AFDC programs. However, in upholding sibling deeming in the Food Stamp program, the Court did emphasize points presented in *Shonkwiler*: courts are reluctant to find legislation under the Social Security Act unconstitutional and, concomitantly, decisions by Congress in changing the Social Security Act are accorded great deference. *Lyng* will therefore undoubtedly have an impact on sibling deeming in the AFDC context.

B. Lump Sum Budgeting

The sibling deeming cases in the AFDC context exemplify one method of attack on programs under the Social Security Act, a constitutional attack on the legislation itself. A recent Indiana case regarding lump sum budgeting illustrates the other method, attacking agency interpretation of the legislation.

In order to be eligible for AFDC, an applicant must satisfy both an income and a resource test.[31] Eligibility will be found only if an applicant's income is below a needs standard established by each state,[32] and if his resources are not in excess of $1,000.[33]

The issue presented in the lump sum context is how to treat the receipt of a large sum of unearned income, whether through inheritance, Social Security award, or some other means. If it is treated as a resource, then once the individual has spent it down to less than $1,000, he would again be eligible for AFDC. If, however, the lump sum is treated as income, it must somehow be budgeted in the monthly AFDC budget.

Prior to 1981, lump sums were treated as resources, but in that year, Congress amended the Social Security Act to

> provide that if a child or relative applying for or receiving aid to families with dependent children, or any other person whose

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stated that "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." Califano v. Jobst, 434 U.S. 47, 53 (1977) (citing Weinberger v. Salfi, 422 U.S. 749, 776 (1975)).

[31]42 U.S.C. § 602 (1982).

[32]In Indiana, needs are computed according to a set formula, regardless of actual needs. IND. ADMIN. CODE tit. 470, r. 10.1-3-3(a)(2) (Supp. 1986). For example, an applicant is allotted no more than $100 a month for basic shelter costs, regardless of his actual shelter costs. A person's basic needs, comprising food, clothing, personal, household supplies, and utilities are budgeted at no more than $85.25 a month for the first person in the household and $73.50 for the second, regardless of actual costs. Then when a total needs figure is reached, it is automatically reduced ten percent to create an adjusted total needs figure. The maximum AFDC benefit that can be received is this adjusted total needs figure. IND. CODE § 12-1-7-3.1 (1982).

[33]43 U.S.C. § 602(a)(7)(B) (1982).

> need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—
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> (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and
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> (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A) . . . .[34]

In *Watkins v. Blinzinger*,[35] the Court of Appeals for the Seventh Circuit explained this provision by stating that under it,

> the state's welfare officials divide the lump sum by the monthly "standard of need" . . . . The quotient gives the number of months the person will be ineligible for aid. For example, if a person receives $20,000 and the monthly standard of need is $500, the state will divide $20,000 by $500, producing a quotient of 40. The recipient will be ineligible for AFDC for 40 months. This method treats the lump sum as if the amount of the "standard of need" had been received as monthly income during the months following receipt of the lump sum. A recipient who spends a lump sum classified as "income" and becomes destitute remains ineligible for the program nevertheless, while if the lump sum had been called a "resource" eligibility would have been restored.[36]

Neither the statute nor the federal regulations promulgated under it define the word "income." While it might be concluded that income is something easily determined, a specific problem arises in considering personal injury awards. In Indiana, as elsewhere, compensation for personal injury has always been treated as restoring the wronged individual to his preinjured state.[37] The individual is made whole but nothing more.

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[34]*Id.* § 602(a)(17).

[35]789 F.2d 474 (7th Cir. 1986).

[36]*Id.* at 475 (footnote omitted).

[37]*See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Mid-Century Ins. Co., 259 N.E.2d 424 (Ind. Ct. App. 1970).

Nevertheless, the Secretary of Health and Human Services and the Indiana Department of Public Welfare have both taken the position that a personal injury award is income. As a result, aggrieved AFDC recipients in *Watkins* brought suit in the United State District Court for the Southern District of Indiana. The district court rendered judgment in favor of the Secretary and the State.[38] The Seventh Circuit affirmed the district court's decision.[39]

The Seventh Circuit attempted to define income and to show why an award designed to compensate for injuries is income.[40] However, the key to the court's decision is the fact that Congress did not, in the Social Security Act, define the term income. Therefore, the Secretary was free to define income or else allow the states to define the term. The Seventh Circuit reasoned:

> Because AFDC is a program of cooperative federalism, and because states control most of the important variables, the Secretary's position . . . is entitled to considerable respect. If the Secretary (or a court) forced a state to exclude an item from income, it might respond by reducing the payments to all recipients of AFDC. A court should require such a revamping of the program only if the legislation at hand leaves no alternative.[41]

The Seventh Circuit acknowledged that the Secretary's position "may produce harsh results."[42] Nevertheless, it upheld that position.

Not all courts facing the lump sum budgeting question have sustained the Secretary's discretion in this manner, however. In *Reed v. Health and Human Services*,[43] the Court of Appeals for the Fourth Circuit determined that in the absence of a specific legislative definition of income, it should be given its plain and ordinary meaning, which had been consistently followed by Congress in such things as the Internal Revenue Code.[44] This plain and ordinary meaning dictated a conclusion that a lump sum personal injury award was not income.[45]

The Supreme Court has agreed to review the *Reed* case.[46] It is uncertain whether the Court will defer to agency discretion as in *Watkins*,

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[38]Watkins v. Blinzinger, 610 F. Supp. 1443 (S.D. Ind. 1985), *aff'd*, 789 F.2d 474 (7th Cir. 1986).

[39]*Watkins*, 789 F.2d 474.

[40]*Id.*

[41]*Id.* at 478.

[42]*Id.* at 482.

[43]774 F.2d 1270 (4th Cir. 1985), *cert. granted*, 106 S. Ct. 3271 (1986); *see also* Payne v. Toan, 626 F. Supp. 553 (W.D. Mo. 1985); LaMadrid v. Hegstrom, 599 F. Supp. 1450 (D. Or. 1984). *But see* Jackson v. Guissinger, 589 F. Supp. 1288 (W.D. La. 1984).

[44]*Reed*, 774 F.2d at 1274-75.

[45]*Id.*

[46]Lukhard v. Reed, 106 S. Ct. 3271 (1986).

or to common sense as in *Reed*. Nevertheless, *Watkins* stands as a reminder of the great deal of latitude that courts grant to agencies interpreting the statutes they are charged with administering.[47]

III. Medicaid

Watkins can be explained as the Seventh Circuit's way of bowing to agency discretion. However, another recent Indiana case shows that courts can be less deferential to an agency's interpretation of law.

Medicaid is a program designed to furnish "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[48] It is funded and administered through the cooperation of the federal and state governments pursuant to Title XIX of the Social Security Act.[49] A state participating in Medicaid must develop a state plan, which must comply with various income and eligibility requirements contained in the Social Security Act.[50]

Persons who receive AFDC also receive Medicaid.[51] However, in certain situations the income and resources eligibility requirements of AFDC and Medicaid differ. The Secretary has addressed this situation in regulations by stating that "[t]he [state] agency must provide Medicaid to individuals who would be eligible for AFDC except for an eligibility requirement used in that program that is specifically prohibited under Title XIX."[52] Thus, not only must states provide Medicaid to persons who receive AFDC assistance, but states must also provide Medicaid to persons who would receive AFDC but for an AFDC eligibility requirement that is specifically prohibited in the Medicaid statute.

In amending the AFDC statute to provide for sibling deeming, Congress did not make any comparable amendment to the Medicaid Act. Instead, for quite some time, the Medicaid Act has contained a strict prohibition against counting the income of a child as available to meet the needs of the child's siblings or parents.

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[47]*See, e.g.*, Young v. Community Nutrition Inst., 106 S. Ct. 2360, 2364 (1986), where the Supreme Court noted:

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court is whether the agency's answer is based on a permissible construction of the statute . . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

(quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).

[48]42 U.S.C. § 1396 (1982).

[49]*Id.*

[50]*Id.*

[51]*Id.* § 1396a(a)(10)(A)(i).

[52]42 C.F.R. § 435.113 (1985).

> A State plan for medical assistance [Medicaid] must. . . .
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> . . . .
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> . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 . . . .[53]

The effect of this statute is of great importance. If deeming of sibling income is prohibited by Medicaid, then even if a family loses AFDC benefits because one sibling's income is deemed to be available to the whole family, the family should still be eligible to receive Medicaid. Thus, the Social Security Act would at least assure that the family is able to receive necessary medical care.

Despite the clear text of the statute and regulation, the Secretary of Health and Human Services and the Indiana State Department of Public Welfare applied the sibling deeming rule to Medicaid recipients, thereby discontinuing the Medicaid benefits of thousands of indigent persons. In *Reed v. Blinzinger*,[54] low income persons challenged this extension of the sibling deeming rule, claiming that a conflict existed between the Secretary's AFDC regulations and the clear language of the Medicaid prohibition. The United States District Court for the Southern District of Indiana held for the plaintiffs, stating it could not see a distinction between merely requiring a sibling to be included in the filing unit and deeming the sibling's income available to the Medicaid applicant.[55] The court enjoined the Secretary and the State Welfare Department from utilizing sibling deeming in determining Medicaid eligibility.[56]

In its decision, the court simply found that the Secretary had gone too far in interpreting the statute and then claiming his interpretation was entitled to deference.

> An administrative interpretation is given controlling weight only if it is reasonable and reflects the policies underlying the leg-

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[53]42 U.S.C. § 1396a(a)(17)(D) (1982). The implementing regulations, 42 C.F.R. § 435.602 (1985), state:

> (a) Except for a spouse of an individual or a parent for a child who is under age 21 or blind or disabled, the agency must not—
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> (1) Consider income and resources of any relative available to an individual; nor
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> (2) Collect reimbursement from any relative for amounts paid by the agency for services provided to an individual.

[54]639 F. Supp. 130 (S.D. Ind. 1986), *appeal pending*.

[55]*Id.* at 134.

[56]*Id.*

> islation. Moreover, an agency is bound by its own regulations. The interpretation cannot be inconsistent with the plain meaning of a regulation or nullify the intent or wording of a regulation.
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> The Secretary's interpretation of § 602(a)(38) does not comport with the plain language of the Medicaid statute or with the Secretary's own regulations. The language of the statute and regulations is unambiguous. A court "must give effect to the unambiguously expressed intent of Congress." When the statute is analyzed as a whole, as defendants argue it should be, the statute provides that the Secretary may set standards for determining the availability of income actually received by an individual and of income assumed to be available. The latter is limited to income from a spouse or parent.[57]

The court's decision was in accord with holdings of other circuits and districts.[58] Agency discretion in statutory interpretation is therefore not limitless, but must be a rational and consistent interpretation of the statute.

IV. Social Security

Another area in which arguments about agency discretion in statutory interpretation have raged in the recent past is the area of disability determinations under the Social Security Act. Although there has been no seminal Indiana case on this issue, it has been addressed by the Court of Appeals for the Seventh Circuit, and because it will be addressed by the United States Supreme Court this term, the issue must be mentioned.

Depending on insured status, one is entitled to either Social Security or Supplemental Security Income if one is "under a disability."[59] The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months."[60] Disability exists only if the claimant's impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and

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[57] *Id.* at 132-33 (citations omitted). The Secretary and the state had argued that the Secretary's extension of the sibling deeming rule to Medicaid eligibility clearly reflected the intent of Congress and that this interpretation was entitled to great deference. *Id.* at 131-32.

[58] *See, e.g.*, Vance v. Hegstrom, 793 F.2d 1018 (9th Cir. 1986); Malloy v. Eichler, 628 F. Supp. 582 (D. Del. 1986); Sundberg v. Mansour, 627 F. Supp. 616 (W.D. Mich. 1986); Gibson v. Puett, 630 F. Supp. 542 (M.D. Tenn. 1985).

[59] 42 U.S.C. § 423(a)(1)(D)(1982); *see also id.* § 1381a.

[60] *Id.* § 423(d)(1)(A); *see also id.* § 1382c(a)(3)(A).

work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . .''[61] Thus, disability is a factor both of medical status and of various vocational considerations.

The Secretary of Health and Human Services promulgated a five-step sequential evaluation procedure for determining disability.[62] As noted in *Yuckert v. Heckler*,[63] in framing the issue relevant here,

> The first step requires the ALJ to determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b) (1985). If the

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[61]*Id.* § 423(d)(2)(A); *see also id.* § 1382c(a)(3)(B).

[62]*See* 20 C.F.R. § 404.1520 (1986), which provides:

(a) STEPS IN EVALUATING DISABILITY. We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) IF YOU ARE WORKING. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) YOU MUST HAVE A SEVERE IMPAIRMENT. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) WHEN YOUR IMPAIRMENT(S) MEETS OR EQUALS A LIMITED IMPAIRMENT IN APPENDIX 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) YOUR IMPAIRMENT(S) MUST PREVENT YOU FROM DOING PAST RELEVANT WORK. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) YOUR IMPAIRMENT(S) MUST PREVENT YOU FROM DOING ANY OTHER WORK. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

[63]774 F.2d 1365 (9th Cir. 1985), *cert. granted*, 106 S.Ct. 1967 (1986).

> claimant is working, the ALJ must find her not disabled. *Id.* If the claimant is not working, however, the second step requires the ALJ to determine whether the claimant suffers a severe impairment. 20 C.F.R. § 404.1520(c) (1985). The regulations define a severe impairment as one that significantly limits the claimant's "ability to do basic work activities." 20 C.F.R. § 404.1521(a) (1985). Basic work activities mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b) (1985). The ALJ must evaluate the severity of an impairment without reference to vocational factors. 20 C.F.R. § 404.1520(c) (1985). Only if the ALJ finds the claimant's impairment(s) severe does he proceed to the next three steps of the sequential analysis, under which he is required to consider the claimant's age, education, work experience, and ability to perform past work. *See* 20 C.F.R. § 404.1420(d)-(f) (1985).[64]

Step two of the regulation, therefore, allows an individual to be denied disability status without considering vocational factors. Moreover, step two requires an applicant who has shown inability to do past work nevertheless to carry a further burden. Thus, despite the fact that

> [t]he courts of all twelve circuits have unanimously held that, while the ultimate burden of proving disability lies with the claimant, the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work. The burden then shifts to the Secretary to show that the claimant remains capable of performing other work in view of the vocational factors of age, education, and work experience. . . . All the circuits agree that it is the language of the Act itself which requires "that disability determinations be made according to a two step process," with the first step placing the burden on the claimant to demonstrate an inability to perform past work.[65]

Step two appears to be an example of an administrative agency interpreting the Act in ways contrary to the statute. Therefore the Seventh Circuit, in *Johnson v. Heckler*,[66] along with a number of other courts,[67] has declared step two to be unlawful. The discretion of the Secretary does not stretch that far.

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[64]*Id.* at 1368 (footnotes omitted).

[65]Johnson v. Heckler, 769 F.2d 1202, 1210 (7th Cir. 1985), *appeal pending* (citing Valercia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985)).

[66]769 F.2d 1202 (7th Cir. 1985), *appeal pending*.

[67]*See* Baeder v. Heckler, 768 F.2d 547 (3rd Cir. 1985); *Yuckert*, 774 F.2d at 1365.

> The Secretary's argument that step two is a reasonable exercise of her broad rule-making authority necessary to the proper and efficient functioning of "an already overburdened agency" . . . is a fall-back argument merely, and a thoroughly unpersuasive one. The district court rejected the Secretary's reliance on her broad rule-making authority, reasoning that, to merit deference, the Secretary's regulations and rules must be consistent with the Act . . . . Because we have held the Secretary's regulations to be inconsistent with the statute, no deference to her rule-making authority is required.[68]

This has not been the holding of all courts facing this issue; a number have found that the severity regulations, as interpreted by the courts, can be utilized.[69] Illustrative of these is *Farris v. Secretary of Health and Human* Services,[70] where the Court of Appeals for the Sixth Circuit attempted to resolve agency discretion with an apparent violation of the Social Security Act. The court interpreted the step two inquiry as allowing rejection of a claim for a non-severe impairment only if the impairment is a "slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education and work experience."[71] Thus, these courts interpret step two as merely a "*de minimis*" requirement. This interpretation is problematic because there is no assurance that the agency interprets the severity regulation as a *de minimis* step.

This debate, like the debate over lump sum budgeting, should be resolved within the next year. The Supreme Court has agreed to review *Yuckert*, and the Court should resolve this debate between agency discretion and legislative pronouncements.

V. Paternity/Support Establishment

Title IV-D of the Social Security Act[72] appropriates money to the states to establish paternity and support for children born out of wedlock. To receive funding, each state must submit a state plan whose requirements are enumerated in the Act.[73] Among other things, the state plan must provide that each state will "undertake . . . in the case of a child

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[68]*Johnson*, 769 F.2d at 1212.

[69]*See* Estran v. Heckler, 745 F.2d 340 (5th Cir. 1984); Evans v. Heckler, 734 F.2d 1012 (4th Cir. 1984); Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984).

[70]773 F.2d 85 (6th Cir. 1985).

[71]*Id.* at 90 (quoting Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984)).

[72]42 U.S.C. § 651 (1982).

[73]*Id.* § 654.

born out of wedlock . . . to establish paternity."[74] The only prerequisite for receiving such services is that the applicant must either be on AFDC or have applied for paternity determination services as prescribed in the state plan.[75] These services are open to everyone.

In Indiana, the State Department of Public Welfare administers the Title IV-D plan. However, through cooperative agreements allowed by the Act,[76] the state has delegated the responsibility for prosecuting paternity cases to the various county prosecutors.

The Marion County Prosecutor enacted a policy, which became effective in September 1982, of refusing to file paternity cases whenever there was a possibility of there being more than one father.[77] Specifically, if the woman had sexual relations with more than one man before, during, or after the probable month of conception, no paternity case would be filed.[78] This policy was modified orally in 1983 to allow for a number of exceptions.[79]

In 1984, a mother of an infant born out of wedlock applied for paternity services from the Marion County Prosecutor's Office.[80] The office refused to assist because of the above policy, despite the fact that she had menstruated between the probable time of conception and the time she had relations with another man.[81]

The woman, labeled Ms. Doe, brought suit in *Doe v. Blinzinger*.[82] She claimed that the policy violated the Social Security Act in that the state and its designate, the prosecutor, were not undertaking to establish paternity.[83] The United States District Court for the Southern District of Indiana agreed and enjoined the use of the policy.[84]

Unlike the cases discussed previously, *Doe* did not involve a dispute between plaintiffs and the federal government. Moreover, *Doe* is the only known case of its kind in the country, in contrast with the above cases, which involve issues litigated in other districts and circuits. However, *Doe* does involve an agency, the State Department of Public Welfare, and the Marion County Prosecutor's Office, both of which attempted to interpret the Act broadly to deny assistance to low-income

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[74]*Id.* § 654(4)(A).
[75]*Id.* § 654(4)(A)(6).
[76]*Id.* § 654(7).
[77]Doe v. Blinzinger, No. IP84-1044-C, at 4 (S.D. Ind. July 9, 1986).
[78]*Id.* at 4.
[79]*Id.*
[80]*Id.* at 2-3.
[81]*Id.*
[82]No. IP84-1044-C (S.D. Ind. July 9, 1986).
[83]*Id.* at 7-10.
[84]*Id.* at 2-3 Judgment.

women in paternity cases.[85] In this case, the district court found that interpretation was too far-reaching.[86]

VI. Conclusion

The five cases and areas presented above are diverse. Indeed, they illustrate the expansiveness of the Social Security Act. Although it is difficult to draw conclusions from them, some general themes emerge.

First, poor persons and their advocates face an uphill battle in attacking the constitutionality of parts of the Social Security Act. Strong presumptions of validity attach to congressional pronouncements. Therefore, the focus must be on whether the agencies administering the Act have interpreted the Act in a manner contrary to the legislative language, intent, or purpose. While deference is given to the agencies' interpretation, their discretion is not boundless.

The third theme is not really a theme, but a hypothesis. Four of the five cases discussed above involved plaintiffs arguing that agencies had gone too far in interpreting Congress' intent as expressed in the Social Security Act. Of course, this is nothing new. Plaintiffs have always claimed that agencies have gone too far. What is disquieting is the reliance agencies have put on fiscal considerations in advancing narrow interpretations of the Act. In *Reed v. Blinzinger,*[87] for example, the Department of Health and Human Services, by extending the sibling deeming rule for determining eligibility for AFDC to determining eligibility for Medicaid, advanced an interpretation of the Act that has been rejected by every court considering the issue. Yet the Department continues to advocate a narrow interpretation of the Act, arguing that such an interpretation is fiscally sound and advances the intent of Congress. As a result, hundred of thousands of needy persons are denied Medicaid. Yet, given the current conservative sentiment generally, the argument that a specific interpretation will save money carries weight.

The 1960's saw the War on Poverty. In the 1980's, through restrictive amendments to the Social Security Act and through restrictive interpretations of the Act, we are seeing a war on the poor. As can be seen, much of the battle is being waged in Indiana. Undoubtedly, it will continue to be.

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[85] *Id.* at 3-6.

[86] *Id.* at 10-11.

[87] 639 F. Supp. 130 (S.D. Ind. 1986), *appeal pending.*